

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Question-One

In 1997, Al and Cate duly formed a limited partnership, Sleep Inn, L.P. ("Inn"), to own and operate a motel to be built in Albany County. The partnership agreement provided that Motels Inc ("Motels"), a New York corporation of which Al was the president and sole shareholder, would be the managing general partner, and that Al and Cate would be limited partners. The agreement contained no provision concerning transferability of partnership interests. Inn then entered into a contract with Dan to construct the motel, which was executed by Al "as president of Motels, managing general partner of Inn."

On completion of the construction of the motel a dispute arose concerning the balance owed Dan under his contract with Inn. Dan then commenced an action in Supreme Court, Albany County, against Inn, Motels, Al and Cate seeking damages for breach of contract. Motels, Al and Cate each duly moved to dismiss the complaint on the grounds that the complaint failed to state a cause of action against each of them and that Inn, the limited partnership, was the only proper party defendant in Dan's action. The court (1) denied the motion as to Motels and Al, and (2) granted the motion as to Cate.

In August 1998, after the death of her first husband, Cate married Fred. Cate had two children from her first marriage, Gert and Hank. Gert and her husband Ike had one child, Jane. Hank was unmarried with no issue.

On September 15, 1998, Cate duly executed a will, which included the following:

1. I give \$300,000 to Fred.
2. I give my limited partner interest in Inn to Hank.
3. I give the residue of my estate to Gert.

On the same day, Cate conveyed Greenacre, her home in Albany, to Cate and Fred, as tenants by the entirety.

On November 1, 1998, Gert died in a plane crash. On November 10, 1998, Cate died, survived by Fred, Hank, Ike and Jane.

Cate's net estate consisted of assets worth \$1,600,000, plus her limited partner interest in Inn, worth \$200,000, and Greenacre, worth \$300,000. Cate's will was duly admitted to probate in Surrogate's Court, Albany County.

- (A) Were the court's rulings (1) and (2) correct?
- (B) What are Hank's rights with respect to the limited partnership?
- (C) What are the rights of Fred, Hank, Ike and Jane with respect to Cate's estate?

Answer to Question One

A) The court's ruling in (1) was correct as to Motels, but incorrect as to Al. The issues are what the liability of a general partner is for the liabilities and obligations of a limited partnership and what the liability of a president and sole shareholder is for the liabilities and obligations of a corporation.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

In assessing a motion to dismiss for failure to state a claim, under CPLR 3211, a court determines whether, taking all of the pleadings in the light most favorable to the party against whom the motion is made, there is a sufficient factual basis for relief to be granted.

A general partner is liable for all of the liabilities and obligations of a limited partnership. Because Motels is the general partner, and because Dan has alleged a breach of contract by the limited partnership, there is a sufficient factual basis to grant relief to Dan with respect to the claim against Motels. Because of this, the court was correct to deny the motion with respect to Motels.

In general, a shareholder is not personally liable for the liabilities and obligations of a corporation. Under limited circumstances, a New York court will pierce the corporate veil when it determines that a shareholder has so unduly dominated a corporation that the corporation is a mere alter ego of that shareholder. While Al is the sole shareholder and president of Motels, indicating a large degree of influence, a New York court will not pierce a corporate veil for excessive domination by a shareholder without some indication of illegality or exploitation of the corporate entity for personal gain. Because there is no indication that Al exploited his relationship for personal benefit or engaged in illegality, the court was incorrect in denying the motion to dismiss the claim with respect to Al. As a shareholder, he should not be held personally liable for the liability of the corporation.

The court was correct in granting the motion (2) with respect to Cate. The issue is what the liability of a limited partner is with respect to the liabilities and obligations of a limited partnership.

A limited partner's liability for the liabilities and obligations of a partnership is limited to the extent of her interest in the partnership. She cannot be held personally liable for the limited partnership's liabilities. Because Cate is a limited partner, Dan cannot assert a claim against her personally. Thus, the court was correct.

B) Hank has a right to Cate's share of profits from the partnership as well as her share of the proceeds from dissolving and dividing up the limited partnership. The issue is what interests a limited partner may convey or devise in a limited partnership when the partnership agreement is silent in that respect.

Because Cate is a limited partner and the partnership agreement does not provide otherwise, she can devise to Hank only a share of the profits and proceeds of dissolution, but no partnership property or management rights.

Absent agreement, a partnership terminates at the death of a partner. Because the agreement does not provide otherwise, the partnership will terminate at Cate's death and Hank will receive her share of profits and proceeds of dissolution.

C) Fred will take \$650,000, which is 1/3 of the net estate. Hank will take Cate's rights to profit and proceeds of dissolution of Motels, approximately \$200,000, abated pro rata to accommodate Fred's election. Ike will take nothing. Jane will take \$750,000, the residue of the estate. The issue is what the respective rights of the survivors are to Cate's estate.

Fred is entitled to take a spousal election. The New York EPTL provides for a spousal election to take the greater of \$50,000 or 1/3 of the net estate if that exceeds the outright disposition to the spouse. The net estate includes testamentary substitutes, such as a survivorship estate (post 9/1/66). When the survivorship estate is held with the surviving spouse, the net estate is deemed to include 1/2 of the value of the estate. Cate's net estate therefore includes 1/2 the value of Blackacre, or \$150,000.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Cate's net estate, which includes the \$1,600,000 in assets, \$150,000 (1/2 Blackacre) and her \$200,000 interest in Motels, is \$1,950,000. One third of this is \$650,000. Because this is more than the \$300,000 given outright to Fred, that is what he takes. All of the other beneficiaries' gifts will be abated pro rata to accommodate this.

Hank will take the \$200,000 interest in Motels, to the extent that reflects rights in profits and proceeds from dissolution, as described above. His gift will be abated to accommodate Fred's spousal election.

Ike takes nothing under the will. The issue is what rights a surviving spouse has in the decedent's estate. Unless there is a specific provision for that spouse in the will, the spouse generally takes nothing. Therefore Ike, who is not mentioned in the will, takes nothing.

Jane takes \$750,000, the residue of the estate, abated pro rata to accommodate Fred's spousal election. The issue is what happens to a gift when a daughter of a testator pre-deceases the testator. In general, when a beneficiary pre-deceases the testator, the gift fails or adeems. There is an exception, under the New York Anti-Lapse Statute, where the beneficiary is the issue, brother or sister of the testator and she leaves issue that survive the testator, the gift does not adeem, but passes to that issue. In this case, Gert's residuary gift does not adeem, but passes to Jane.

Answer to Question One

A) The court was partially correct and partially incorrect in Ruling (1) denying the motion as to Motels and Al. The issue regarding Motels is whether or not a general partner in a limited partnership can be held personally liable for the contracts of the limited partnership. Under New York Partnership Law, a limited partnership can be created in order to limit the personal liability that all general partners face by creating a limited partnership with both a general partner and limited partners. The limited partners are protected in a manner similar to shareholders in a corporation, and are not to be held personally liable for the limited partnership's contracts. However, the general partner in a limited partnership is to be held personally liable for contracts of the limited partnership.

Motels Inc., while a corporation, is the general partner in Sleep Inn, L.P., and because it is the general partner, can be named "personally" in the breach of a contract suit along with Inn. Therefore, the court was correct in denying Motels' motion to dismiss.

The court was incorrect in denying the motion as to Al. The issue is whether or not Al can be held personally responsible for the debts of Inn, either in his capacity as a limited partner or as president and the sole shareholder of Motels.

Limited partners are not personally liable for the debts of the partnership under New York Partnership Law. Therefore, Al, as a limited partner, cannot be sued personally for the breach of contract.

Officers and shareholders in corporations are also protected from personal liability, unless circumstances exist that would justify piercing the corporate veil. If incorporators are deemed to have abused the privilege of incorporation, or use the corporate entity as a mere alter ego or to perpetuate fraud, a court may pierce the corporate veil and hold shareholders personally liable. In this case, there is no evidence suggesting that Motels Inc. is a mere alter ego of Al's, or that Al has abused the privilege of incorporating in any way. In addition, courts are more likely to pierce the corporate veil in cases involving tort rather than breach of contract cases like the case

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

presented by Dan. Therefore, the court should not have denied Al's motion to dismiss, as he should not be held personally liable in Dan's claim.

The court was correct in granting Cate's motion to dismiss Dan's claim. The issue is whether or not a limited partner may be held personally liable in a breach of contract claim against the limited partnership. New York law allows limited partners to be insulated from personal liability in claims against the partnership. In this case, Cate is merely a limited partner, with no interest in Motels or any further involvement in the claim by Dan. Therefore, the court was correct in dismissing Dan's claim against Cate personally.

B) Hank has a right to Cate's share of profits or surplus from the limited partnership, but has no right as to property of the partnership or management. The issue is what interests exactly may a limited partner transfer to a third party. Under New York Partnership Law, a limited partner may only transfer her interest or share of the profits or surplus of the partnership. All other incidents of partnership, such as partnership property and a share of the management of the partnership belong to the partnership, and cannot be transferred.

In this case, Cate, as a limited partner, can only transfer her share of the profits or surplus of the limited partnership and as a result, this is the extent of Hank's rights with respect to the limited partnership.

C) Fred has the right to elect to take his elective share from Cate's estate which will result in an additional \$100,000 along with the bequest of \$300,000 and ownership of Greenacre, with \$300,000. The issue is whether or not Fred should elect to take an elective share, and what his rights are under the elective share statute. In New York, the surviving spouse is entitled to take an elective share in the decedent spouse's estate in the amount of either \$50,000 or 1/3 of the augmented estate. The elective share is calculated as 1/3 of the augmented estate, less any direct bequests or interests given to the surviving spouse. The surviving spouse must elect to take the elective share within 6 months of the decedent spouse's death. In addition, to the elective share, a surviving spouse is also entitled to up to \$56,000 in property statutorily granted to the surviving spouse, such as an automobile, books, photographs and videos.

In this case, Fred should elect to take the elective share, and should receive a net elective share amount of \$100,000 in addition to Greenacre and the \$300,000 devise. The augmented estate of Cate should include the value of her interest in the limited partnership, plus the value of Greenacre, a survivorship estate. Therefore, the total augmented estate is valued at \$2,100,000. One third of the estate is \$700,000, the elective share amount.

However, Fred's direct bequests need to be deducted from this figure, and less the \$300,000 devise and the interest in Greenacre leaves Fred with \$100,000. This amount is to be deducted pro rata from the remainder of the estate (each bequest).

Hank will receive the \$200,000 limited partner interest in Sleep Inn, L.P. Under New York law, a limited partner can transfer her interest in the profits or surplus of a limited partnership. In this case, such interest of Cate's is valued at \$200,000, and Hank will take this amount less his share of the amount needed to make up Fred's elective share amount.

Ike takes nothing under Cate's will. The issue is whether or not the spouse of a will beneficiary can take in the event that the beneficiary predeceases the testator. New York's antilapse statute works to save bequests to specific individuals that may predecease a testator. Under the antilapse statute, a devise in favor of a brother, sister, or issue of the testator will not lapse, but will go to the issue of the beneficiary that survive the testator. However, there is no interest transformed to the spouse of the beneficiary.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

In this case, Ike, as Gert's spouse, takes nothing under the will, as he is not provided for under the antilapse statute.

Jane will take the residuary estate as Gert's issue under the New York antilapse statute. The issue is whether or not issue (surviving) may take if the beneficiary predeceases the testator of the will. The New York antilapse statute saves devises to the brother, sister, or issue of the testator, providing that the beneficiary's surviving issue (issue who survive the testator) take the gift in their place, per capita per generation.

In this case, Jane did survive Cate, and the original bequest falls within the antilapse statute, as Gert was Cate's daughter. Therefore, Jane takes under the antilapse statute, and has a right to the residuary estate, less any amount deducted to make up Fred's elective share amount.

In order to calculate the pro rata deduction for the elective share, one applies the formula of (value of bequest / value of estate x \$100,000).

Question-Two

Yesterday, I had a meeting with our client, Pat. In 1990, Pat, who was unemployed and had no assets, inherited a home from her aunt. When Pat married Dan in 1994, they were both 23, and they had each completed their first year of law school. Dan moved in with Pat, and shortly thereafter Pat conveyed title to her home to herself and Dan as tenants by the entirety. In the summer of 1994, Pat became pregnant. She gave birth to Tot in 1995, and she did not return for her second year at law school. Dan's wealthy parents paid for all of Dan's law school education and sent Dan periodic gifts, which Dan placed in a joint account with Pat. In 1996, Dan received his license to practice law. Since then, Dan has been an associate with a large law firm in New York City. His present annual salary is \$100,000, and he has been promised a \$10,000 bonus in three months for his outstanding work.

In February 1998, Dan moved to an apartment, where he now lives alone. Dan has admitted to Pat that he is having an adulterous relationship with Nan. While Dan's admission initially caused Pat frequent insomnia, she now accepts that her marriage will end, and she has decided that she now wants to complete her remaining two years at law school.

Pat is considering bringing an action for divorce against Dan and she would like to know (1) whether, based on the information in this memorandum, she has provable causes of action for divorce based on cruel and inhuman treatment, abandonment, and adultery. If she can succeed in an action for divorce on any of these grounds, she wants to know (2) whether she can anticipate receiving maintenance and, if so, for approximately how long. She would also like to know (3) which assets will be treated as marital property and how each will be valued for equitable distribution. Finally, assuming that Pat receives maintenance and custody of Tot, Pat would like to know (4) whether, if she receives maintenance, it will affect Dan's child support obligation.

Prepare a memorandum answering Pat's questions.

Answer to Question Two

1. Pat has valid grounds for a divorce.
2. Pat can receive maintenance.
3. See analysis for what assets will be considered for equitable distribution.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

4. Tot may receive child support regardless of maintenance payments.

1) There are five valid grounds that may be proved to seek a divorce: adultery, prison - other spouse in prison for three or more years, abandonment, cruel and inhuman treatment, no fault conversion. Here, Pat is alleging adultery, abandonment and cruel and inhuman treatment.

Adultery - This is where the spouse is engaging in sexual acts with another who is not the spouse. The only proof we have of adultery is Dan admitting that he is having an adulterous relationship with Nan. This will be hard to prove because Pat cannot testify as to this statement by Dan (She would be considered incompetent). However, if Dan testifies to a defense against such relationship with Nan, then Pat can now mention this statement by Dan. However, if Dan does not testify then there could be no proof of adultery.

Abandonment - This occurs where one spouse intentionally leaves with no intent to return (unjustified departure) for more than one year. Here we have Dan intentionally leaving Pat's home and getting an apartment. This could show no intent to return. We are not told of any justifiable reason for his departure. This has been for more than one year, since yesterday was July 26, 1999 and he left February 1998. Therefore, Pat would have a valid ground under abandonment.

Cruel and inhuman treatment - This occurs where the spouse is put in a position that is unbearable and may be dangerous to remain with the other spouse. Here, Dan's statements about his adulterous relationship may be used by Pat to show her state of mind. Dan's statements may be a valid ground for cruel and inhuman treatment. It did upset Pat since she had frequent insomnia after hearing of this relationship with Nan. This may be a valid ground for divorce.

Maintenance - In order to determine maintenance, the court takes into account factors such as the other spouses earning capacity, standard of living during the marriage, the financial position of the maintenance supplying spouse and other equitable considerations.

Here, Pat's earning capacity is very low. She dropped out of law school and she has been raising a child for four years. The standard of living for the past years has been nice. The parents paid for law school and Dan is now making \$100,000 a year since 1996 and receives bonuses. Therefore, Pat is used to a nice life.

Therefore, maintenance should be granted to Pat. However, the agreement can condition payment until Pat gets back on her feet after law school and when (or if) Pat gets remarried. Maintenance can terminate due to stated events, like Pat's increase in salary, remarriage, or maintenance can last until one of the party's deaths.

Equitable Distribution - This allows the courts to look at the marital assets and determine how they should be divided between the ex-spouses. The division is not necessarily "equal". Generally, the assets considered are: separate property, degrees, earning capacity, standard of living, alimony and child support to other prior family and anything else the court deems equitable.

Here, we had an inheritance to Pat. However, she conveyed the property to them as tenancy by the entirety. This caused the home to become a marital asset. The gifts made by Dan's parents were deposited in a joint bank account, therefore the court presumes that half is a gift to Pat. Dan's degree and earning capacity are considered marital property even if his parents paid for the education. Pat contributed to his earning the degree and succeeding in work by staying home and taking care of the child. Pat's standard of living has been high since Dan made a nice living.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Therefore, all these assets will be considered part of the marital property. The court may award Pat the family home or other distributions as it sees fit.

Child Support - This will be considered separate and apart from maintenance. The court looks to the salaries of the parents and takes a fraction thereof according to the number of children. Here, we have one child so 17% will be deducted and given as child support pro ratably divided according to salary amount.

The court used to have an \$80,000 cap on amount to be considered as salary. However, now the court will look to the total amount of both salaries. Here, we only have one salary, since Pat is unemployed. Therefore, the court will award 17% of \$100,000 as child support.

The court may allow a change upon a showing of changed financial circumstances of the child. Since Tot is only four, he may need more money as time goes on, especially for college. Child support is deemed to terminate when the child reaches 21 but may be agreed otherwise.

The court may also allow a change when Pat begins making a salary, in order to relieve Dan of the full burden.

Answer to Question Two

- 1) Pat would have a claim for divorce based on abandonment. She may have a claim based on cruel and inhuman treatment, but not based on adultery.
- 2) Pat can anticipate receiving maintenance until the court deems it equitable to discontinue it.
- 3) Marital assets will include, part of the law license, its value in Dan's hands, the home, the gifts from Dan's parents, Dan's salary, and the bonus if received.
- 4) The maintenance award will affect Dan's support obligations.

1) As to Pat's action for divorce, New York recognizes adultery, imprisonment, abandonment, cruel and inhuman treatment, and non-fault conversion of a separation agreement or separation judgment after a year. Here, Pat would have a valid claim for abandonment because Dan voluntarily left the marital residence, and has now been absent for more than one continuous year (from February 1998 to July 1999). There are no facts indicating that Dan requested to return to the marital residence which may, if unreasonably denied, negate a cause of action for abandonment.

Pat may also have a cause of action for cruel and inhuman treatment. Dan admitted his affair with Nan to Pat. Pat will be able to testify as to Dan's statement at trial, and to the effect it had on her and the marriage. The court will likely consider this sufficient to establish such cause.

Pat will not have a provable cause of action for adultery, absent other facts. In New York, in a cause of action for adultery, a spouse may only testify to prove the marriage, disprove the adultery, or disprove the defense to the adultery charge. That is, Pat will not be able to testify as to what Dan admitted to her regarding the adulterous affair, unless it was used to disprove Dan's defense.

2) Pat can anticipate receiving maintenance. The award of maintenance is an equitable action and the court will have discretion to consider the length of the marriage, the current financial situations of the parties, opportunities forgone because of the marriage, the homemaker spouses

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

contribution to the wage earners earning capacity, marital and separately held property and how equitable distribution is resolved.

Here, it is clear that Pat gave up career opportunities to have their child when she quit school. She is also currently not working, while Dan is receiving a good salary. While again the court has discretion as to the length of time maintenance should be paid, it is likely Dan will have to pay until Pat has finished school and established herself in the law profession. The court will also consider the standard of living of the former spouses while married, and may upon motion, reduce, but not eliminate, maintenance. In any event, maintenance will cease on the death of either spouse, or the remarriage of the receiving spouse.

3) In New York, the general rule is that assets acquired before the marriage are not considered marital property, and assets acquired during the marriage are considered marital property. There are exceptions. The house Pat originally acquired from her aunt was non-marital property acquired before the marriage, and even if acquired during the marriage, would nonetheless be considered non-marital property because it was received by bequest. But here, Pat conveyed the house to herself and Dan as tenants by the entirety, making a one-half interest gift of the property to Dan and it is now considered marital property.

The law degree will be considered to have been acquired partially during the marriage because Dan had only completed one year of law school when they were married. This despite the fact that Dan's parents paid for school.

The gifts to Dan from his parents would normally be considered separate property, because they were given specifically to Dan and not to Dan and Pat as husband and wife. But here again, Dan placed the money in a joint bank account, making a one-half gift of it to Pat, and thus converting it into marital property.

The value of Dan's license in his hands will also be considered a marital asset separate and apart from the license itself. Although this can be considered "double dipping", the Court of Appeals has not conclusively ruled against it.

Dan's salary will be considered marital property, and the \$10,000 bonus if he received it.

Note that the court will consider the whole picture in deciding equitable distribution, which includes considering what separate holding each spouse has as well as the marital property and the existence of minor children.

4) The maintenance award will not affect child support. New York subscribes to the uniform child support law. This allows for a determination to be made based on the number of children and the combined income of the parents up to \$80,000. New York generally adheres to the percentage above \$80,000. Here, with one child, Dan's obligation will be 17% of his income, since Pat has no income. If the court deviates from this percentage above \$80,000, it must in detail explain itself in the opinion.

Question-Three

James is the owner of a jewelry store located on the first floor of a building and lives in an apartment above the store. On Sunday afternoon, January 31, 1999, when the store was closed and James was in his apartment, he heard a noise coming from the store below. He went downstairs and entered the store, where he found Skip taking money out of the safe and putting it into a blue bowling bag. Upon seeing James, Skip ran out of the store, knocking James down but not injuring him.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

James immediately telephoned the police, and Detective Drake came to investigate. James gave Drake a description of Skip and of the bowling bag, and advised Drake that all of his cash and several watches were missing. Drake, who had previously arrested Skip for a burglary committed by a man carrying a blue bowling bag, immediately suspected that Skip had committed the burglary.

Later that day, Drake went to see Skip's girlfriend, Jan. Jan told Drake that Skip had visited her earlier that day, that he sometimes stayed at her apartment, and that he kept a footlocker there containing his belongings.

Drake asked if he could see Skip's footlocker. Jan agreed, but told Drake that the footlocker was locked, and that she did not have a key to it. Drake asked Jan if he could break the lock, and Jan gave him permission to do so. Drake then broke the lock, and opened the footlocker, in which he found a blue bowling bag containing cash and several watches.

Drake then went to Skip's house and asked Skip to come to the police station in connection with the investigation of a burglary. Skip and his father, Fred, went to the station where Drake informed them that Skip was a suspect in a burglary which had occurred that afternoon. Neither Skip nor Fred made any comment to Drake regarding Skip's whereabouts at the time of the burglary.

Skip agreed to appear in a lineup, and was identified by James as the burglar. Skip was immediately arrested and charged with the burglary.

Skip was indicted for the crime of burglary in the second degree. Art, Skip's attorney, gave the prosecution timely notice of an alibi defense, claiming that Skip was with Fred at home at the time of the burglary. Thereafter, Art moved to suppress the bowling bag and its contents on the ground that they were found in the course of an illegal search. The court (1) granted the motion.

At the trial, James testified to the events of January 31 and identified Skip as the person he encountered that day in his store. After the prosecution rested, Skip testified on his own behalf that he was home with Fred at the time of the burglary. Over Art's objection, on cross-examination, the court (2) permitted the prosecution to question Skip regarding his failure to disclose his alibi to Drake during the investigation.

Fred then testified, as an alibi witness, that Skip was home with him at the time of the burglary. On cross-examination, after Fred admitted that he was present at the police station with Skip when Drake informed them of the investigation and charged Skip with the burglary, the court (3) permitted the prosecution to impeach Fred's testimony, over Art's objection, by questioning Fred about his failure to advise Drake of this exculpatory information.

Before permitting the cross-examination, in each instance, the court determined in a bench conference that neither Skip nor Fred had relied on the advice of counsel in refraining from talking to the police, and, further, informed the jury that neither Skip nor Fred was obliged to disclose the exculpatory facts to the police.

In charging the jury, the court instructed the jury that Skip had the burden of proving his alibi defense and that they should acquit Skip if they believed his alibi.

(1) Were the numbered rulings of the court correct?

(2) Was the court's charge to the jury regarding the alibi defense correct?

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

(3) On the facts testified to by James, may Skip properly be convicted of burglary in the second degree?

Answer to Question Three

1) (1) The court's ruling was correct. The issue is whether the search of a locked trunk violates the 4th Amendment when the owner of the trunk did not consent.

The 4th Amendment to the U.S. Constitution protects individuals against unreasonable searches and seizures of the persons and possessions. An individual has a 4th Amendment right if they have a reasonable expectation of privacy in the item searched. Any evidence obtained in violation of the 4th Amendment must be suppressed and is not admissible at trial.

Drake conducted a valid search of Jan's apartment. Jan had authority to consent to a search because it was her dwelling. However, Jan did not have authority to consent to a search of the footlocker because it was locked and it did not belong to her, nor did she have access to the contents. A consent is not valid unless the officer reasonably believes that the person giving consent had authority to grant consent. Drake could not reasonably have believed Jan had that authority, because she told him that she did not own the locker and she did not have a key. To assert a 4th Amendment violation, the defendant must have standing. A defendant only has standing if he owned the thing or area searched, lived there, or was an overnight guest. Skip has standing to object because he owned the article searched. Therefore, the search violated the 4th Amendment rights of Skip and the evidence obtained must be suppressed.

(2) The court was incorrect in permitting the prosecution to question Skip about his failure to disclose his alibi. The issue is whether a defendant's exercise of his 5th Amendment rights is permissible grounds for impeaching his credibility.

The 5th Amendment to the U.S. Constitution grants individuals a privilege against self-incrimination. A defendant is entitled to exercise his 5th Amendment privilege and remain silent whenever there is a chance of making a damaging or incriminating statement. If a defendant does not exercise his 5th Amendment right, it is deemed waived forever as to any statements he makes.

Skip therefore had a right to remain silent and not engage in any colloquy with the police. It is irrelevant that he did not rely on advice of counsel in choosing not to speak. Advice of counsel has no bearing on 5th Amendment rights.

In a criminal case, a jury may not draw an adverse inference based on a defendant's exercise of his 5th Amendment privilege. Therefore, the jury was not allowed to draw any adverse inference regarding Skip's credibility based on his choosing to remain silent. This was therefore an improper line of impeachment inquiry.

(3) The court correctly permitted the prosecution to question Fred about his failure to advise Drake of the exculpatory information. The issue is whether a witness' prior silence can be used as impeachment evidence on cross-examination during a criminal trial. Fred had no 5th Amendment rights at stake in this case, because there was no danger that he would incriminate himself with regards to this crime. In addition, because he is not the criminal defendant, the jury is permitted to draw an adverse inference from the fact that he chose to remain silent. It should be noted that this is akin to the ability to impeach a witness with prior inconsistent statements. Silence can be interpreted as a statement if a reasonable person, under those circumstances, would have spoken. A reasonable person, under Fred's circumstances, probably would have spoken immediately to exculpate his son and spare him a criminal charge and trial.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

2) The court's charge to the jury was incorrect. The issue is whether an alibi is an affirmative defense.

Defendants have the burden of proving affirmative defenses only. Prosecutors in a criminal case must prove every element of the crime beyond a reasonable doubt. Defendants have this right under the Due Process Clause of the U.S. Constitution, as incorporated by the 14th Amendment to the Constitution. Skip's alibi goes to an essential element of the crime - his presence at the jewelry store. Therefore, the prosecution must prove, beyond a reasonable doubt, that Skip was present at the scene of the crime. Skip's alibi goes to create reasonable doubt as to this element. The jury charge therefore incorrectly placed the burden of proof on the defendant. This is a reversible error, giving Skip grounds for a mistrial.

3) Skip may not properly be convicted of burglary in the second degree. The issue is the elements of a burglary charge.

Under New York Penal Law, burglary requires: 1) entry or unlawfully remaining in, 2) a building, 3) with the intent to commit a crime therein. Note that under common law, the building had to be a dwelling, the entry had to be a break-in, after dark, and the entrant had to have intent to commit a felony. New York Statutory Law is therefore considerably broader than the common law definition. Under the facts testified to by James, Skip entered into a building (the jewelry store), with the intent of committing the crime of larceny (removing property with the intent to permanently deprive the owner of possession). It is clear that Skip did not have permission to enter the building, because the jewelry store was closed. His entry was therefore illegal. Skip can therefore be convicted of burglary under these facts.

Burglary in the second degree (under NYPL) requires one of the three following aggravating elements: 1) the building was a dwelling; 2) the burglar was armed; or 3) someone was injured. Although James was knocked down, the facts state he was not injured. In addition, there has been no proof presented that Skip was armed. Although the building entered contained a dwelling (an area where a person lives) on the second floor, Skip did not enter the dwelling. He only entered the commercial area on the first floor. Because they are totally separate areas, on different floors, Skip did not "enter" a dwelling in the meaning of NYPL. Therefore, the most Skip can be convicted of, based on James' testimony, is burglary in the third degree. The court should downgrade the charge by one degree.

Answer to Question Three

1) (1) The court correctly granted the motion to suppress the bowling bag. The issue is whether Skip's 4th Amendment rights were violated when the police searched Jane's house and seized his bag.

A person challenging a search must have standing - an expectation of privacy in the place searched or the item seized. Generally, a person has no expectation of privacy in another's home, and has no standing to challenge a search, even when his property was seized. However, a more than an occasional guest at someone's home does have an expectation of privacy, even though it is not their own home.

In this case, it was Jane's house that was searched, but since Skip was a frequent guest, he is entitled to assert a 4th Amendment violation.

The 4th Amendment prohibits all unreasonable searches and seizures. Pursuant to the exclusionary rule, all unlawfully obtained evidence is inadmissible at trial. All warrantless searches are unreasonable, unless the search is covered by an exception. Consent is the applicable

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

exception, and if it is given freely and voluntarily and intelligently, then no violation occurred. A third person with possessory rights in property may consent to a search, but that person must have authority. If the police have reason to know that the person consenting might not have authority, and they continue the search, that search is unlawful.

In this case, Drake did not have a search warrant to search Jane's house or any containers within. Jane gave Drake her consent to open Skip's footlocker, and even gave him permission to break the lock. It should have been obvious to Drake, given the lock and the fact that Jane had no key, that Jane did not have the authority to consent to the search. Therefore, the search was unlawful, and the evidence inadmissible.

(2) The court incorrectly permitted the prosecution to question Skip regarding his failure to disclose the alibi. The issue is whether an accused's silence may be used against him at trial.

In order for a statement or admission to be admissible under the 5th Amendment privilege against self-incrimination, a person in custody must receive Miranda warnings prior to interrogation. One Miranda right is the right to remain silent.

However, Miranda is only triggered when there is custodial interrogation. Custody occurs when a reasonable person believes he is not free to leave. Going to a police station, even voluntarily, is custody.

In this case, Skip accompanied Drake to the police station where he was told he was a burglary suspect. At that point, Skip was in "custody" since he was at the station and told he was a suspect. His Miranda right to remain silent attached, even though he had not been arrested yet. The court improperly allowed evidence of his silence to be admitted at trial to prove his guilt.

(3) The court ruled correctly in permitting testimony about Fred's failure to tell Drake about the alibi. The issue is whether a witness who is not the accused has a Miranda right to remain silent.

Silence can be used against a person who is not in custody and not formally charged, etc. If that person's silence is relevant evidence, then it can be used at trial.

In this case, Fred was not in custody. He was not entitled to Miranda protection, so he may be subject to cross examination on why he failed to bring up the alibi at that point. It is relevant to his credibility, since if the alibi were true, then a person would normally have brought it up at the time of arrest. Therefore, Fred's alibi testimony may be impeached.

2) Court's charge to the jury was incorrect. The issue is whether the defendant has the burden of proving an alibi defense.

The prosecution must prove every element of a crime beyond a reasonable doubt. They must also prove that defendant was, in deed, the one who committed the crime.

In this case, the charge incorrectly placed the burden of proof on Skip. It is the prosecution that must disprove the alibi beyond a reasonable doubt.

3) Skip may not properly be convicted of second degree burglary. The issue is whether Skip satisfied all the elements of burglary in the 2nd degree.

In New York, 2nd degree burglary is 1) knowingly entering or remaining 2) in a dwelling 3) with intent to commit a crime therein.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

The issue here is whether James' store could be considered a dwelling. If a store and a home are part of the same building, then entering the store is considered burglary since the whole unit could be considered a dwelling. The facts do not indicate enough about the physical location of the apartment, but it seems as if James' apartment was one of many in the building, so the store would not be considered a dwelling.

Second degree burglary also encompasses entering into a building, if there was also physical injury or the suspect was armed. In this case, neither applies. James was knocked down by Skip, but he was not injured, and the facts do not suggest that Skip was armed. Therefore, Skip cannot properly be convicted of 2nd degree burglary.

Question-Four

Sam, Sandy and Ben formed Star Inc, a New York corporation engaged in the dry cleaning business. The certificate of incorporation of Star Inc, which was filed on March 8, 1998, authorizes the issuance of 1000 shares of one class, without par value, and is silent concerning the right of existing shareholders to purchase additionally issued shares of the corporation. Three hundred shares each were issued to Sam, Sandy and Ben. Sam, Sandy, and Sandy's husband, Tom, who are all employed in the business, were then elected directors.

On July 15, 1998, the board of directors voted to issue the remaining authorized 100 shares to Link, Star Inc's attorney, in consideration for services performed in the incorporation of the business. Upon learning of the board's action, Ben immediately commenced an action against the corporation for an injunction, and moved for a preliminary injunction to bar the issuance of the shares during the pendency of the action. Ben claimed that (a) the shares could not properly be issued in exchange for services, and (b) in any event, the shares could not be issued to Link without the corporation first offering the newly issued shares to the existing shareholders. The court denied the motion for the preliminary injunction, holding that Ben was unlikely to succeed on either ground (a) or (b), and the action was thereafter dismissed.

The business of Star Inc grew rapidly, and its dry cleaning plant soon became inadequate to handle all of the work. The board decided to build a new dry cleaning plant. Sam, who owns a large lot which would be suitable for the new plant, proposed at a meeting of the board at which all directors were present, that Star Inc purchase his lot for \$200,000. Sam disclosed his ownership of the lot to the board, and truthfully advised the board that the property was listed for sale for its appraised value of \$215,000 and that he had already received an offer to purchase the lot for \$200,000. The board voted two to one to purchase Sam's lot, with Sam voting in favor of the proposal, and a contract for the purchase of Sam's lot was executed.

Before the closing took place, the owner of the lot adjacent to the existing plant offered to sell it to Star Inc. If Star Inc purchased the adjacent lot, it could expand its existing dry cleaning plant at much less cost than building a new plant. The board thus voted, two to one, with Sam opposed, to purchase the lot adjacent to the existing plant. Star Inc then refused to close on Sam's lot, and Sam is now threatening to sue Star Inc for breach of contract.

The board has approved plans for the plant expansion, which include extravagant quarters for the board and well-equipped athletic facilities for the employees. No dividends have been paid to the shareholders, but the employees, including Sam, Sandy and Tom, have received large salaries and substantial bonuses, in addition to receiving luxury cars for their personal use. At the annual shareholders' meeting, Ben protested to the board that it is spending too much money on the plant expansion and is otherwise squandering Star Inc's resources. The board ignored Ben's protests. Last week, frustrated by what he perceives to be waste and mismanagement by the board, Ben filed a petition seeking judicial dissolution of Star Inc.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

- (1) Was the courts ruling denying the preliminary injunction, on both of the grounds asserted by Ben, correct?
- (2) Can the corporation avoid the contract with Sam?
- (3) (a) Can Ben obtain judicial dissolution of Star Inc?
(b) Can the corporation prevent the proposed dissolution?

Answer to Question Four

1) The court was correct to deny the motion for the preliminary injunction on the basis of its holding that Ben was unlikely to succeed on the ground that the shares could not be properly issued in exchange for services and the ground that the corporation had to first offer the newly issued shares to the existing shareholders. The issues are: the requirements for obtaining a preliminary injunction, the proper consideration for the issuance of shares by a corporation and when pre-emptive rights exist.

To obtain a preliminary injunction, the plaintiff must show 1) inadequacy of legal remedies, 2) "clean hands", 3) the threat of immediate and irreparable injury and 4) probability of success on the merits. Thus, if the court here found that Ben was unlikely to succeed on the merits of either of his claims, it would have been required to deny the motion for preliminary judgment.

The court was correct that Ben was unlikely to succeed on either of his claims.

First, Ben's claim that the shares could not properly be issued in exchange for past services is incorrect. In fact, past services performed for the corporation do constitute proper consideration for the issuance of a corporation's shares.

Second, Ben's claim that the shares could not be issued to Link without first offering the shares to the existing shareholders is incorrect. In essence, Ben is claiming that he and the other existing shareholders should be permitted to exercise pre-emptive rights. Pre-emptive right is the right of an existing shareholder to maintain her percentage of ownership in the corporation by being offered the opportunity to purchase shares the corporation issues for cash before outsiders are permitted to purchase. However, pre-emptive rights do not exist when shares are issued for consideration other than cash nor when the shares issued are authorized shares included in the certificate and sold within two years of incorporation. Finally, for corporations incorporated after February 22, 1998, pre-emptive rights do not exist unless the certificate specifically grants them.

Applying these rules here, it is clear that Ben, as an existing shareholder, had no pre-emptive rights. The shares here are being offered for the value of past services and not for cash. In addition, the shares were authorized by the certificate and are being sold within two years of incorporation. Finally, the certificate is silent with respect to pre-emptive rights. Thus, Ben has no pre-emptive rights.

In sum, the court was correct that Ben was unlikely to succeed on the merits of either of his grounds for suit and, therefore, properly denied his motion for a preliminary injunction.

2) The corporation cannot avoid the contract with Sam. The issue is whether the transaction is voidable as an interested director transaction.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Directors owe a duty of loyalty to the corporation. The standard for judging their conduct is that directors should act in good faith and with the conscientiousness, honesty, fairness and morality that the law imposes on fiduciaries. As a result of the duty of loyalty, a corporate transaction in which a director is interested is voidable by the corporation unless 1) all the terms of the deal are fair and reasonable to the corporation or 2) all the material terms of the deal and the fact of the director's interest are disclosed to the corporation and the deal is ratified by the shareholders or the directors.

Here, the deal between the corporation and Sam is an interested director transaction since Sam owned the property involved and was a director of the corporation. However, the deal was not voidable by the corporation because the deal was fair and reasonable to the corporation as measured by the fact that the price paid is fairly commensurate with its fair market value and comparable offers.

It should be noted that had the deal not been fair and reasonable to the corporation, the board's vote would not have served as an effective ratification of the deal. Although the material terms of the deal plus the fact of Sam's interest were disclosed to the corporation, the board has to approve the deal by a sufficient vote of disinterested directors. Here, only one disinterested director out of two voted for the deal. Since such a vote constitutes less than a majority, it seems unlikely that it could be viewed as a "sufficient vote". However, in this situation, it doesn't matter how the board voted since it became a binding transaction by virtue of its fairness and reasonableness to the corporation.

In sum, the corporation cannot avoid the contract with Sam as there was a valid contract with no defenses.

3) a) Ben can obtain judicial dissolution of Star Inc. The issue is whether a shareholder holding one-third of the outstanding shares may bring an action for judicial dissolution on the grounds of the director's wasting of corporate resources.

A shareholder in a closely held corporation which is not publicly traded who holds 20% or more of the outstanding shares may bring an action for judicial dissolution on the grounds of fraudulent or illegal director conduct directed at the shareholder or on the grounds that the directors are wasting corporate assets.

Here, Ben holds one-third of the outstanding shares of the corporation which is more than the required 20% and it appears that the corporation is not publicly traded. Furthermore, Ben is claiming that the Board's allocation of money is wasteful. However, it should be noted that the Board's failure to pay dividends is not a very strong basis for such a claim. The decision to pay dividends is in a corporate board's sole discretion and will not be overturned absent bad faith or fraud. While Ben will point to the large salaries and expensive sports cars, the burden will be on him to convince the court that these expenditures coupled with the non-payment of dividends are a deliberate act of bad faith and fraud on the part of the directors and that such misconduct is directed purposely at Ben as a shareholder.

In sum, Ben can bring an action for judicial dissolution of the corporation on the grounds that the board is wasting corporate resources.

b) The corporation may prevent the proposed dissolution by purchasing Ben's shares at a fair and reasonable price as authorized and supervised by the court in which the action for judicial dissolution is brought.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Answer to Question Four

1) Denial of Preliminary Injunction

The court was correct to deny the motion for preliminary injunction on both grounds. At issue is whether the requirements for obtaining a preliminary injunction have been met.

To obtain a preliminary injunction, the plaintiff must show: a) likelihood of success on the merits; b) imminent and irreparable injury; c) no remedy at law is available; and d) that the balance of hardships favor the plaintiff. The plaintiff will also be required to post a bond if the preliminary injunction is granted.

In this case, Ben can show imminent and irreparable harm because his ownership and voting power will be diluted by the sale. However, he may have a remedy of law because he can sue for damages later - although this may not fully compensate him for his loss of corporate control.

Most importantly, however, Ben is likely to lose on the merits of both arguments.

The first issue is whether services performed in the past is adequate consideration for a corporation to issue stock. Under the BCL, services previously performed are valid consideration for stock. Moreover, the corporation may issue stock in exchange for services to be performed in the future under an executed contract. In this case, the services were adequate consideration because they were performed in the past for the benefit of the corporation. The fact that they were performed prior to incorporation is irrelevant. Thus, the court's ruling was correct.

The second issue is whether Ben has pre-emptive rights to purchase shares in proportion to his current ownership interest in Star Inc. This argument fails for three reasons.

First, under the BCL, for corporations formed after February 22, 1998, shareholders do not enjoy pre-emptive rights unless such rights are explicitly granted in the corporation's certificate. In this case, Star Inc. was incorporated in March 1998, after the February 1998 statutory dividing point. In addition, the certificate was silent concerning the issue of pre-emptive rights. Because the certificate did not expressly grant such rights, Ben cannot invoke them.

However, even if Ben did have pre-emptive rights, he could not exercise them in this case. First, pre-emptive rights only apply when shares are sold by the corporation for cash. In this case, Star Inc. issued the shares to Link not for cash, but for services previously rendered.

Moreover, statutory pre-emptive rights do not apply to shares authorized for sale within two years of the formation of the corporation. In this case, the shares were issued in July 1998 - just four months after incorporation. Hence, even if Ben held pre-emptive rights under the BCL, he could not exercise them in this situation.

2) Contract with Sam

The corporation has the right to rescind the contract with Sam. The issue is whether the statutory duty of loyalty has been violated and whether the directors validly ratified the transaction.

Under the BCL, a director owes a duty of loyalty to the corporation. A director must exercise his duties in good faith and with the conscientiousness, fairness, morality, and honesty that the law requires of fiduciaries. In this case, because Sam was a director, he owed Star Inc. a duty of loyalty. A transaction between a corporation and its director violates the duty of loyalty unless it is proved to be fair and reasonable to the corporation or is ratified in one of three ways.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Under the BCL, a transaction with an interested director does not violate the duty of loyalty if the terms of the transaction are fair and reasonable to the corporation. The burden of making such a showing is on the director. In this case, the property was listed at \$215,000 and another party had offered \$200,000. However, there is not enough evidence in the facts to conclude that all terms were fair and reasonable. Unless Sam can prove they were, and unless the transaction is approved as described below, Star Inc. will be able to have its obligations rescinded.

A transaction may be approved by the corporation, notwithstanding the director's interest, in one of three ways. First, the transaction can be approved by a majority vote of the shareholders. In this case, the board voted 2-1 to purchase the lot; however, the shareholders (including Ben and Link) were never afforded a vote. In addition, in such a vote, Sam would be unable to vote his shares.

Alternatively, the transaction may be approved by either: 1) a majority vote of the disinterested directors; or 2) if the interested directors are necessary for a quorum, by the unanimous vote of the disinterested directors. In this case, Sam was an interested director because he was the counterparty to the contract with Star Inc. However, neither Sandy nor Tom had any interest in the deal. The board's vote was invalid because the disinterested directors (i.e., the directors other than Sam) deadlocked at 1-1. Although the quorum requirement was satisfied, because two of the three directors (more than a majority) could vote, the BCL requires a majority vote to authorize the transaction. In this case, two votes from disinterested directors would have been required to approve the deal.

The appropriate remedy for the corporation is rescission. The corporation can either seek a judicial order of rescission, or wait until Sam sues for specific performance and assert in its defense that the transaction was not validly authorized. If it suffers damages, it can recover from Sam at law.

3) Judicial Dissolution

a) Ben can obtain judicial dissolution of Star Inc. The issue is whether a minority shareholder may petition the court for dissolution and the grounds for obtaining such an order.

Under the BCL, a 20% shareholder may petition the Court for dissolution of a corporation traded and either a) the majority shareholders are using their corporate power to oppress the minority shareholders; or b) the majority shareholders are wasting or looting corporate assets. In this case, Ben will be able to petition for dissolution because he owns 300 of the corporation's 1000 issued shares, or 30%. Moreover, the petition is appropriate because assets are being diverted to the majority shareholders in the form of employment compensation, extravagant quarters, athletic facilities, bonuses, and luxury cars. Although the minority shareholders have no right to dividends, corporate assets are being squandered on the majority shareholders, who happen to be directors and/or employees. Because these assets are not being used for corporate purposes, this constitutes both waste and oppression of the minority shareholders. Here, both grounds for dissolution are satisfied.

b) The corporation can prevent the dissolution by buying out Ben's shares. The issue is whether the Court will order dissolution if the shareholder can be protected by other means. Under New York law, dissolution is a last resort. If there is some other way to protect the interests of the minority shareholders - such as buying out their shares at a fair price - dissolution will not be necessary.

In this case, the Court could order Star Inc. to repurchase or redeem Ben's shares at a fair price. However, the price will be determined by considering the value of the corporation's shares before the complained-of behavior. In other words, the price will incorporate the resources the

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

corporation has devoted to bonuses, luxuries, shareholder compensation, and the like. This will ensure that Ben receives fair value and the majority shareholders do not succeed at looting all the corporate assets for themselves.

Question-Five

Owen, a resident of State X, owned Blackacre, a warehouse located in New York County. On January 1, 1998, Tom, also a resident of State X, entered into a lease with Owen for Blackacre. The lease provided in pertinent part that Tom was required to maintain Blackacre at his sole cost and expense. The lease also provided that Owen reserved the right to enter and inspect the premises at any time, and to make needed repairs at Tom's expense. Owen, however, made no such inspections in 1998.

Pete, a New York resident, is an independent trucker whose truck is registered in New York. On November 9, 1998, Pete made a delivery of goods to Blackacre. Pete parked his truck next to the Blackacre loading dock and climbed onto the dock. After Pete opened the truck's cargo door, one of Tom's employees lowered a metal ramp attached to Blackacre's dock to create a bridge between the truck and the dock. As Pete was unloading the truck, the ramp collapsed, causing Pete to fall between the loading dock and the truck. Pete sustained a fractured arm and leg and thereafter, timely submitted a claim for his medical expenses under the no-fault provisions of his truck insurance policy.

In January 1999, Pete commenced an action against Tom and Owen in Supreme Court, New York County, seeking to recover \$1 million in damages for personal injuries. His complaint alleged that the defendants had negligently failed to maintain the loading dock and ramp, owned by Owen and leased to Tom. Tom and Owen answered Pete's complaint. Each denied the allegations of negligence, and asserted a cross-claim against the other.

Owen then moved for summary judgment dismissing Pete's complaint and Tom's cross-claim, on the ground that as an out of possession owner, he could not be held liable for injuries caused by defects in the premises. (1) The court denied the motion.

After a bench trial, the court found both Owen and Tom negligent. The law of State X limits liability for personal injuries to \$150,000. In determining damages, Tom and Owen requested that the court apply the law of State X, and Pete requested that the court apply the law of New York.

- (A) Is Pete entitled to benefits under the no-fault provisions of his insurance policy?
- (B) Was the court's ruling denying Owen's motion for summary judgment correct?
- (C) Which state's law should the court apply to the issue of damages?

Answer to Question Five

A) No-Fault Insurance

Pete is not entitled to benefits under his no-fault policy. The issue is whether New York's no-fault insurance covers injuries not incurred while driving.

New York has a no-fault insurance system that requires all car owners to purchase insurance so that upon an accident each owner turns to his own policy instead of that of the other party

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

involved - if there is one. The insurance covers owners and drivers as well as passengers and pedestrians who may be involved. The insurance covers injuries if incurred in auto accidents.

Here, Pete was injured while unloading his truck. As an independent trucker, he would have his own no-fault insurance. However, his no-fault insurance would not cover his injuries because they are not the result of a car accident or collision.

B) Summary Judgment

The court was incorrect in denying Owen's motion for summary judgment. The issue is whether Owen is liable as a landowner or landlord for injuries caused by defects of the premises. Per the CPLR, a motion for summary judgment will be granted if there is no triable issue of fact and the issue can be resolved as a matter of law. New York has abolished the different categories of landowner's duties to people who come on to their land. Per New York law, landowners owe a duty of reasonable care under the circumstances to anyone who comes on to their land.

Here, Pete came on the land as an invitee because he was doing business with Tom. The lease between Tom and Owen required Tom to maintain the premises and Owen simply reserved the right to inspect and repair at his discretion. Thus, Owen is not liable as a landowner because under the circumstances of a lease giving Tom the responsibility to maintain the property, a reasonable landowner is allowed to believe that the equipment will be maintained to be safe.

As a landlord, Owen also escapes liability. Under New York Landlord-Tenant Law, a tenant has a duty to repair and a duty to third parties. A tenant's duty to repair obligates him to maintain the premises in as good a condition as when he leased it. A tenant's duty to third parties covers injuries incurred on the premises even if due to lack of repair. This is true even if the landlord has contracted to make repairs. An exception to this rule exists if the injury occurs in a "public space" which a landlord has a duty to maintain.

Here, Tom has expressly contracted to maintain the premises. Owen has contracted to inspect at will and make needed repairs. Tom is not relieved of liability by Owen's promise to repair nor is Owen liable for injuries to third parties due to lack of repair because New York law does not impose liability for third party injuries on a landlord even if he has contracted to repair. One exception to this lack of landlord liability is the public space exception which states that the landlord is responsible for keeping all areas open to the public safe and clear. This exception would not apply however, because a loading dock is not open to the public. It is used by people doing business with the warehouse.

Thus, Owen is not liable for Pete's injuries via his role of landowner because he has not breached a duty of reasonable care under the circumstances. He is also not liable as a landlord because tenants have a duty to third parties even when the landlord has expressly contracted to repair.

Thus, the summary judgment should have been granted, because there is no triable issue of fact and Pete should be released as a matter of law.

C) Conflict of Laws

New York law should be applied. The issue is whether, under governmental interest analysis, which state law should apply in the area of limiting liability.

New York has rejected the vested interest theory of conflict of law. New York has adopted the governmental interest analysis as put forth in the five-part list of Babcock. The five steps to look at are: 1) factual contacts to the state, 2) each state's law, 3) the policy behind each law, 4) to interrelate each policy with the facts of the case and 5) use the state law which has the greater

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

policy interest. In tort actions, New York refined this analysis under *Neumeier* to determine risk distribution. Per *Neumeier*, the court, in a situation where all the parties are not from the same state, will look to the law of the state where the injury arose and apply it if it helps its own citizen.

Here, there is a tort action so the New York court will use the *Neumeier* analysis. The court will look to New York law because the injury occurred in New York (thus, interest "vested" here) and New York's policy behind not limiting personal injury damages is rooted in the state's policy of deterring reckless and negligent behavior. Thus, because the injury occurred in a warehouse in New York and New York has a firm belief in plaintiff's rights, and since state X's interest were not interfered with since the plaintiff receiving the damages is a New Yorker, the court will apply New York law.

Answer to Question Five

A) No-fault insurance does not apply in this accident to cover Pete. No-fault insurance is required coverage for every car owner in New York. No-fault insurance is the place of first relief for those injured as a result of negligent driving. The no-fault insurance scheme takes the car accident outside of the court's hands in a negligence action. One may sue on negligence only if the expenses from the accident total over \$50,000 in one year. No-fault does not include pain and suffering costs. It only covers medical expenses and up to two-thirds of income, but no greater than \$2,000 per month.

In this case, though the accident occurred near Pete's truck. Pete's truck, the operation of the truck was not the cause of the accident that injured Pete. Pete was injured due to negligent maintenance of the unloading ramp. Therefore, Pete must sue for negligence to gain a remedy.

B) The court's ruling was incorrect. The first issue is whether an absent landlord has the duty to maintain premises in good repair. Generally, the landlord does not have a duty to repair or make safe, unless the landlord expressly undertakes such a duty. In this case, Owen, the landlord, expressly reserved the right to enter and inspect Blackacre while Tom rented it and to make repairs at Tom's expense.

This express reservation, of a right of entry and repair, will not operate to hold Owen liable in this case. This reservation is not an expressed obligation or undertaking by Owen to make the premises safe.

The tenant has the duty to make safe the premises he rents. A tenant has a duty to all invitees to exercise reasonable care. In doing so, the tenant has a duty to warn or make safe known artificial hazards on the premises. Knowing includes actual knowledge as well as something the tenant should have found upon reasonable inspection. As a matter of law, Owen had no duty to Pete. Without such a duty under the law, the motion for summary judgment should have been granted.

The lease Owen and Tom entered into required Tom to maintain Blackacre. This duty to maintain includes the duties Tom has to invitees (persons who came on to the property of the person with a possessory interest for their mutual commercial benefit) generally.

Therefore, Owen owed no duty to Tom to fix, repair or make safe, and Owen owed no duty to Pete to inspect and make safe. The premises' safety was Tom's duty, therefore the court's ruling was incorrect.

The second issue is that the CPLR provides that summary judgment motions may be granted only where there is no triable issue of fact in dispute. In such cases, the court should render a directed

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

verdict as a matter of law. If the summary judgment motion is accompanied by the appropriate affidavits, as a matter of law, for the reasons discussed above, Owen cannot be held liable for Pete's injuries.

C) New York law should be applied to the issue of damages. The issue is whether a New York court should apply its own substantive law, or the substantive law of the domicile of the defendants to determine damages.

Conflicts of law are decided in New York by using a governmental interest analysis. First, the court looks to the factual contacts of the parties to each of the domiciles represented. The court then looks to the laws in conflict. The court then looks to the policies behind the conflicting laws. The court then compares all of this and chooses the law of the state with the most contacts.

Further, the court will temper this analysis by looking to the domicile of the parties. If the parties are from the same domicile, New York will apply that law. If the parties are from differing states, and New York law will benefit its domiciliary, New York courts will apply New York law. If the parties are from different domiciliaries and application of New York law will not benefit its domiciliary, New York will apply the law of the place of the wrong and the place of the accident unless one state has a stronger governmental interest analysis.

In this case, the plaintiff (Pete) and the defendants (Owen and Tom) are from different domiciles. Owen and Tom have factual contacts of their interest in Blackacre. Owen, a domiciliary of state X, owns Blackacre and rents it to Tom, domiciliary of state X. Blackacre is located in New York. Pete is a New York domiciliary who drives a New York truck to Blackacre in New York. Pete is injured in New York.

New York will not limit the amount of recovery for personal injury. The policy behind this is to protect injured plaintiffs and promote careful action. State X limits liability to \$150,000 on personal injuries. The policy of this is to protect defendants from extremely high court damages awards.

New York has many more factual contacts with the accident and the parties. The only contact state X has with this cause of action is the fact that Owen and Tom are state X domiciliaries.

Where both plaintiff and defendant are from differing jurisdictions, New York will apply New York law if it benefits the New York domiciliary.

In this case, not only does New York have a greater governmental interest in seeing its law applied, its law benefits its domiciliary.

Therefore, New York law should be applied to the issue of damages.

Question-Six

Vent is a manufacturer's representative for industrial ventilation equipment. In 1993, Vent sold and delivered a dust hood to Sharp, the owner of a grinding shop, for one of Sharp's grinding wheels. The contract for the sale of the dust hood provided that any disputes arising out of the contract would be submitted to arbitration. After July 1994, the dust hood never operated properly. Sharp complained to Vent many times, but the dust hood was not replaced or satisfactorily repaired.

In December 1998, Sharp served Vent with a demand for arbitration, claiming that Vent breached the warranty of merchantability implied in the sale of the dust hood. At the arbitration hearing,

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Vent raised the defense of the statute of limitations. The arbitrator refused to dismiss the claim as time-barred, and rendered an award in Sharp's favor, including an award of punitive damages. Sharp has now moved to confirm the arbitration award, and Vent has cross-moved to vacate the award on the grounds that (a) the claim was time-barred, and (b) the award of punitive damages exceeded the arbitrator's authority.

In May 1999, Vent visited Zeo, the owner of a chemical plant. Zeo told Vent that he wanted to purchase an air purifier for the plant control room. Vent showed Zeo technical bulletins from several manufacturers Vent represented, and Zeo selected an air purifier manufactured by Erth. Vent told Zeo that the air purifier would have to be manufactured to his particular specifications, given the characteristics of the control room, and thus he could not give Zeo a price. Zeo told Vent to get the air purifier for him as quickly as possible, due to an upcoming OSHA inspection of the plant. There was no writing regarding the proposed sale.

Vent ordered the air purifier, and Erth promptly built it to Zeo's specifications and delivered it to Vent. When Vent telephoned Zeo to arrange installation, Zeo advised Vent that he had purchased an air purifier from another supplier and no longer needed Erth's air purifier.

Vent has now received and paid a bill from Erth for \$7,800, the fair market value of the air purifier. Zeo has refused Vent's demand that he pay Vent for the air purifier. Vent is unable to sell the air purifier to anyone else, and he has commenced an action against Zeo for breach of contract to recover the \$7,800. In his answer, Zeo has raised the defenses that the alleged contract was unenforceable because it was (a) not in writing, and (b) too indefinite, because there was no agreement as to price.

Last year, Vent decided to offer service contracts to his customers and hired Bart as a salesman in his new service department. In a written employment contract, which was silent as to duration and termination, Vent agreed to pay Bart a fixed salary and commissions of 20 percent on new service contracts. Bart was extremely successful in obtaining new business for Vent in 1998. Now that Vent's service department is established, Vent believes that he can act as salesman himself and, thus Vent fired Bart. Vent has an employee manual which states that it is the policy of the company not to discharge employees except for cause. Bart was not aware of the policy when he left his former job to work for Vent. Bart has now commenced an action against Vent for (a) wrongful discharge, and (b) breach of contract in connection with his termination by Vent.

- (1) Did the arbitrator rule correctly with respect to Vent's statute of limitations defense?
- (2) May the arbitrator's decision regarding (a) the statute of limitations and (b) punitive damages, be reviewed by the court on Vent's cross-motion to vacate the arbitration award?
- (3) Discuss the merits of the defenses raised by Zeo in his answer to Vent's complaint.
- (4) Is Bart likely to succeed in his action against Vent for (a) wrongful discharge and (b) breach of contract?

Answer to Question Six

1) The arbitrator did not rule correctly with respect to Vent's statute of limitations defense. The issue is whether the statute of limitations for Sharp's breach of warranty of merchantability claim had run by the time Sharp served Vent with a demand for arbitration. The rule is that the statute of limitations for breach of warranty claims is four years. Vent sold the dust hood to Sharp in 1993. Sharp served the demand for arbitration in 1998, more than four years later. The statute of limitations for breach of warranty of merchantability had thus run and the arbitrator's refusal to

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

dismiss the claim as time-barred was incorrect. It should, however, be noted that while the arbitrator was incorrect, arbitrators are not bound by the law in rendering decisions.

2) a) The court may not review the arbitrator's decision regarding the statute of limitations. The issue here is whether a court may review an arbitration award on a substantive ground such as the running of the statute of limitations. In New York, there is a strong policy favoring arbitration and courts are limited in their ability to review arbitration awards. In particular, courts may only review an arbitration decision on three grounds: misconduct during the arbitration proceeding, bias or interest of the arbitrator, and the arbitrator's exceeding of his/her powers. In this case, the arbitrator's decision regarding the statute of limitations does not fall into any of the three preceding grounds. As mentioned earlier, while the arbitrator's decision with respect to the statute of limitations might be wrong, it is not an example of an arbitrator exceeding his/her powers because arbitrators are not bound by the law. Therefore, the court did not have authority to review the arbitrator's decision on the statute of limitations issue in Vent's cross-motion to vacate the arbitration award.

b) The court may review the arbitrator's award of punitive damages. At issue is whether an arbitrator's award of punitive damages is reviewable by a court. As stated above, New York has a strong public policy favoring arbitration and courts may only review an arbitration award for misconduct, bias, or exceeding of powers. By statute, New York has prohibited the award of punitive damages by an arbitrator. An award of punitive damages exceeds an arbitrator's powers. Here, the arbitrator exceeded his/her powers because the arbitrator awarded punitive damages to Sharp. Therefore, the court may review the arbitration award on this ground.

3) a) Zeo's defense that the alleged contract failed because it is not in writing is unpersuasive. The issue is whether the statute of frauds is satisfied here. The rule is that where there is a contract for a sale of goods of \$500 or more, the statute of frauds must be satisfied by a writing or by performance in order for the contract to be enforceable. There was no writing here. With respect to performance as a means of satisfying the statute of frauds in a sale of goods contract, the rule under the Uniform Commercial Code (UCC) is that part performance of the contract only satisfies the contract as to the part performance and not as to the entire contract. There is an exception for specially manufactured goods however. With specially manufactured goods, part performance by a party is sufficient to satisfy the statute of frauds. The air purifier in this case was a specially manufactured good because it was built to Zeo's particular specifications. Thus, Vent's order of the air purifier and the subsequent construction of the air purifier to Zeo's specifications was part performance of the contract that satisfied the statute of frauds and caused the contract to be enforceable despite the lack of a writing. Zeo's defense that the contract is unenforceable because it was not in writing thus fails.

b) Zeo's defense that the alleged contract was indefinite for lack of a price term fails. The issue is whether a contract for a sale of goods must include a price term. Under the UCC, a sale of goods contract must include a quantity term, but not a price term. Therefore, there is no requirement for an agreement as to price before a contract for the sale of goods can be enforceable. Zeo's assertion that the contract lacks a price term thus does not result in the unenforceability of the contract in question.

4) a) Bart is not likely to succeed in his action against Vent for wrongful discharge. The issue is whether a discharge without cause is wrongful if the employee was not aware of the for-cause limitation on an employer's ability to discharge. The rule with respect to offers and acceptances of contracts is applicable here. An offer can only be accepted by one to whom the offer is made and by one who knows of the offer. Here, Vent made an offer of employment to Bart. The terms of Vent's offer included only those terms communicated to Bart and known by Bart. Bart did not know of the company's policy not to discharge employees except for cause. Thus, it does not

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

appear that the offer of employment extended to Bart included a promise of no discharge except for cause. It could be argued that the statement, in the employee manual that the company had a policy of not discharging employees except for cause, indicated Vent's agreement to be bound by that policy with respect to all employees. However, there was also a written employment contract between Vent and Bart and it could be argued that the terms of Bart's employment are exclusively contained within that document, unless otherwise stated. Assuming that the written employment contract between Vent and Bart did not refer to Vent's agreement to be bound by any other documents, and there was no statement as to discharging employees only for cause in Vent's offer of employment to Bart (The written employment contract in question was silent as to termination) , there was no agreement not to discharge except for cause between Vent and Bart. Therefore, Bart is unlikely to succeed in his action against Vent for wrongful discharge.

b) Bart is unlikely to succeed in his action against Vent for breach of contract. At issue here is whether there was a valid employment contract between Vent and Bart. The rule for employment contracts is that a duration term must be included. The fact pattern states that the written employment agreement in question was silent as to duration. The lack of a duration term results in an invalid, unenforceable contract. Bart's breach of contract cause of action is unlikely to succeed.

Even if the lack of a duration term is deemed to be not fatal to the contract and an at-will employment contract is implied, Bart is still unlikely to succeed because, as discussed earlier, there was no agreement that he could be discharged only for cause. Therefore, Bart is not likely to succeed in his claim against Vent for breach of contract.

Answer to Question Six

1) The arbitrator did not rule correctly with respect to Vent's Statute of Limitations Defense.

The issue is whether a party is barred from bringing suit against a manufacturer for breach of implied warranty when the cause of action occurred over four years ago.

Under the UCC (and adopted by New York), the statute of limitations for violations of all types of warranties is four years. The statute begins to run upon the manufacturers delivery of the goods to the buyer. Here, Vent sold the goods and delivered them to Sharp in 1993. Thus, any cause of action in implied warranty that Sharp would bring would have to have been brought by 1997. Thus, by bringing claim in 1998 for breach of warranty, Sharp should have been time-barred. Thus, the arbitrator's ruling was legally incorrect. Although, since New York as a matter of public policy has a strong interest in promoting arbitration, generally arbitrator's are not bound by the law.

2) The court may review the arbitrator's award with respect to the punitive damages award, but not the statute of limitations.

The issue is to what extent an arbitration award is reviewable. As a general rule, New York courts have a strong public policy in favor of arbitration. Under New York law, arbitrators are not bound by the substantive law and unless parties contract otherwise (expressly state arbitration claims will be bound by substantive law). Further, since New York courts strongly favor arbitration, they are reluctant to overturn/vacate arbitration decisions and do not do so based on erroneous applications of law. New York law has provided that arbitration awards may not be reviewed/ vacated unless the moving party can prove that the arbitrator was biased, there was fraud on the part of the arbitrator, or if the decision violates public policy. Erroneous decisions of law are not a grounds for review.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Here, since the statute of limitations assertion is essentially a claim-based or erroneous application of law by the arbitrator, it would not be considered reviewable because of New York's strong policy in favor of arbitration.

However, the award of punitive damages would certainly be vacated and considered in violation of public policy. Under New York law, the award of punitive damages by arbitrators is violative of public policy and is therefore improper. Thus, since in this case the arbitrator awarded punitive damages, his award violated public policy and should be vacated.

3) Both of Zeo's defenses (statute of frauds and illusory) must fail under the UCC.

Zeo's Statute of Frauds defense must fail.

The issue is whether a contract for unique goods is required to be in writing when the goods are over \$500 and the seller begins performance on customizing such goods.

Since the contract involves the sale of goods the UCC applies. Under the UCC, as a general rule, contracts for over \$500 must be in writing in order to satisfy the Statute of Frauds. Here, the contract was not in writing and so based on the general rule it would appear that Zeo's defense was valid.

However, the UCC has provided that the Statute of Frauds is satisfied whenever a buyer requests unique goods and the seller begins producing the unique goods. Here, the air filter had to be manufactured to particular specifications only suited to Zeo's company. Further, Vent actually began performing (customizing) and actually finished creating this unique good. Further, it is obviously a unique good because Vent can sell it to no one else. Therefore, the UCC exception to the Statute of Frauds is applicable and the contract need not be in writing. Thus, Zeo's defense must fail.

Zeo should lose on his defense that the contract was illusory as well.

The issue is whether price is a necessary requirement under the UCC in order to constitute a valid contract.

Under the UCC, the general rule is that price is not a necessary requirement to a valid contract. So long as the quantity and item are specifically stated, the court will find that a binding, valid contract exists. The court will then determine a reasonable price if there is a dispute. Note that at common law, a lack of price would probably be deemed illusory and a binding contract not found because there was no meeting of the minds.

Here, there was an agreed upon quantity (one air filter) and item type selected by Zeo. Thus, Zeo may be held liable under the UCC. A valid contract existed and hence his defense must fail. The court will then determine a reasonable price.

4) Bart is not likely to succeed in a wrongful discharge or breach of contract claim. The issue is whether an at-will employee may be fired for any reason.

Under New York law, if a contract is indefinite to duration, it is presumed at-will. Under *Murphy v. American Home Products*, the Court of Appeals stated that an at-will employee can be fired "for any reason, or for no reason at all". New York has refused to extend much protection for at-will employees (unlike most states) and save for extreme situations (*Wieder v. Skala* - Attorney terminated for revealing a fellow attorney's violation of ethical obligations) has refused to grant at-will employees protection.

NEW YORK STATE BAR EXAMINATION
JULY 1999 QUESTIONS AND ANSWERS

Here, Bart's contract was indefinite as to duration, thus, he is presumed to be an at-will employee and is terminable at-will.

While it is true that the employee handbook states that employees may only be dismissed for cause, the Court of Appeals has expressly stated that the existence of a handbook alone is an insufficient basis for either wrongful termination or breach of contract.

Thus, based on established Court of Appeals precedent, Bart would not have a claim under either wrongful discharge or breach of contract (the Court of Appeals has applied these standards to both types of action).