

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Question-One

Plaintiff, a resident of State X, was employed by Fast Corp., a State X corporation whose principal place of business is in State X. Fast Corp. owned an office building in New York City where Plaintiff was gravely injured when the employee-only elevator in which he was riding suddenly dropped two floors. The elevator was manufactured, installed, and serviced exclusively by Del Corp., a New York corporation, having its principal place of business in New York.

Plaintiff duly commenced a diversity action in the United States District Court for the Southern District of New York against Del Corp., alleging negligence and seeking to recover damages for his injuries. Del Corp. duly commenced a third party action against Fast Corp. for contribution, claiming that Plaintiff's injuries were aggravated by the negligence of Fast Corp.'s employees in removing Plaintiff from the elevator. State X law does not allow a contribution claim against a plaintiff's employer, but New York law allows such a claim when the plaintiff suffers a grave injury. There is no dispute that Plaintiff suffered a grave injury as defined by New York law.

Prior to trial, Fast Corp. moved to dismiss Del Corp.'s third party action on the ground that State X law applies and does not allow a contribution claim against a plaintiff's employer. In opposing the motion, Del Corp. asserted that the court should apply New York's choice of law rules, as a result of which New York substantive law would apply and allow the claim. The court agreed with Del Corp. and denied Fast Corp.'s motion.

At trial, Plaintiff proved the foregoing pertinent facts regarding the circumstances of the accident, but did not offer any direct evidence of Del Corp.'s specific acts of negligence with respect to the elevator. At the close of Plaintiff's case, Del Corp. argued that Plaintiff failed to prove a prima facie case of negligence against Del Corp. and, therefore, the case could not properly be submitted to the jury.

(1) Was the court correct in (a) applying New York's choice of law rules and (b) applying New York substantive law to determine Fast Corp.'s motion?

(2) In the absence of direct evidence of specific acts of negligence by Del Corp., may the court properly submit Plaintiff's action to the jury?

(3) What are the essential elements that Del Corp. must establish to recover against Fast Corp. on its third party claim for contribution?

(4) What are the essential elements that Del Corp. must establish to recover against Fast Corp. on its third party claim for contribution?

ANSWER TO QUESTION 1

1. (a) The issue here is which choice of law rules a Federal Court applies when sitting in diversity. A federal court must have personal jurisdiction and subject matter jurisdiction in order to properly adjudicate a dispute. Subject matter jurisdiction is based on either a federal question arising under federal law or diversity of citizenship when the parties are from different states and the claim exceeds \$75,000 exclusive of attorneys' fees and court costs. When the federal court is sitting in diversity, the Erie doctrine applies. The Erie doctrine states that the federal court will apply federal procedural laws and the state's substantive law of the forum in which it sits. Choice of law rules are considered substantive law, so a federal court sitting in diversity applies the forum state's laws.

Here, there is a diversity case brought in the United States District Court in New York. Therefore,

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

according to the Erie doctrine, the federal court will apply New York's choice of law rules. The court therefore was correct in applying New York's choice of law rules.

(b) The issue here is whether the court, in determining New York's choice of law rules, properly applied New York law in a tort action based on distribution of loss. In order for a state's law to constitutionally be applied, the state must have some significant relationship with the parties and the transaction. New York used to apply the vested rights approach, which would apply the law of the situs of the tort whenever there was a choice of law question. A choice of law question arises whenever more than one law applies. Since the New York courts found that the vested rights approach was rigid and would sometimes create unfair results, it now applies the government interest analysis. The government interest analysis, when there is a tort dispute, would apply the place of the injury when there are rules regulating conduct, and when there is a loss distribution question applies the Babcock analysis plus considering the Neumer rules. Under Babcock, first identify the contacts that the state has with the parties and the injury; then state the different law and how it differs; then the court would look at the different underlying policy each state would have in applying its law; then the court would apply the different contacts with the policy and determine which state has a greater governmental interest and that state law would apply.

Here, the plaintiff is a resident of State X and was injured at his place of employment in New York. The employer, Fast Corp., is incorporated in State X and has its principal place of business in State X. The defendant Del Corp. is a New York corporation with its principal place of business in New York. Based on the Neumer rules, when the plaintiff and defendant are residents of different states, the law of the place of injury should apply unless another state's law has a greater interest. The place of injury is New York and the court was correct in applying New York's law in determining that Del Corp. could maintain a cause of action for contribution against Fast Corp.

2. The issue here is whether a defendant's motion for judgment as a matter of law (also called Directed Verdict) should be granted when a plaintiff has proved *res ipsa loquitur*. A plaintiff recovers in an action based on negligence when he sets forth a *prima facie* case. A *prima facie* case for negligence consists of: (1) a duty; (2) a breach of that duty; (3) causation (factual causation and legal causation which is proximate cause); and (4) damages. *Res ipsa loquitur* is a doctrine based on allowing an inference of negligence. For it to apply, the plaintiff must prove that he was not at fault in creating his injury, that the injury he suffered was not the kind of injury that happens absent negligence, and that the defendant was in sole control of the instrumentality that caused Plaintiff's injury. If the plaintiff establishes *res ipsa loquitur*, it establishes that there was a duty of care, and that the defendant breached that duty. The plaintiff still must establish causation and damages. A directed Verdict will be entered if there is sufficient reasonable evidence for the jury to only conclude one way and is governed in the light most favorable to the non-moving party.

In this case, the plaintiff has offered enough direct evidence so that the court can submit the case to the jury. The plaintiff has shown that the elevator suddenly dropped, which shows that it is not the type of accident which happens without the negligence of a party. Also, that the elevator was solely manufactured, installed and serviced exclusively by the defendant Del Corp. which shows that Del Corp. had exclusive possession over the elevator. However, Del Corp. might argue that since employees of Fast Corp. used the elevator, that there could have been another source that has caused the plaintiff's injury. However, there is enough evidence to establish an inference of negligence. Additionally, the plaintiff can recover based on circumstantial evidence. The verdict does not have to be based solely on direct evidence. Therefore, the court can submit Plaintiff's action to the jury.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

3. The issue is what essential elements must be proved for a party to recover based on contribution. Contribution is a theory of recovery when there are joint tortfeasors. A joint tortfeasor will be liable to the plaintiff for 100% of the plaintiff's injuries, but a joint tortfeasor can seek contribution from another joint tortfeasor. Under New York law, the amount that can be recovered in contribution is based on pure comparative fault and a defendant cannot recover from another joint tortfeasor more than that tortfeasor's share of fault. It is important to note that normally under New York's Workers Compensation Law, an employee can not recover from an employer for injury caused on the job, and a third party can recover from the employer only when the employee has suffered grave injury.

Del Corp. must show that Fast Corp. would be partly or wholly liable to Plaintiff on the plaintiff's claim against Del Corp. In order to recover in contribution, Del Corp. must establish that Fast Corp. was negligent. A prima facie case for negligence consists of: (1) a duty; (2) a breach of that duty; (3) causation (factual causation and legal causation which is proximate cause); and (4) damages. Fast Corp. did owe a duty of reasonable care to its employees and others while on Fast Corp.'s property. In New York, the duty of care is not based on the plaintiff's status on the property, but rather on whether it was reasonable and foreseeable for the plaintiff to be injured. Del Corp. also must prove that Fast Corp. breached that duty to the plaintiff by not exercising its duty as a reasonable prudent person would under similar circumstances. Also, Del Corp. must prove that Fast Corp. was the factual cause of Plaintiff's injuries, that but for Fast Corp.'s negligence, the plaintiff would not have been injured. Fast Corp. was the proximate cause of Plaintiff's injuries because it was foreseeable that Plaintiff would have suffered the type of injury associated with the negligence. Also, that Plaintiff has suffered damages which Plaintiff has, since he has suffered a grave injury.

ANSWER TO QUESTION 1

1. (a) The Court was correct in applying New York's choice of law rules under the Erie doctrine because this is a diversity case in Federal court and the court should apply New York's choice of law rules.

This is a diversity action in New York federal court. The issue is which choice of law rules should be applied. We have three choices here; federal law, State X law, or New York law. The general rule in diversity cases is that the court applies federal procedural law and state substantive law. Choice of law is a substantive issue, and therefore federal law would not apply.

In order to choose between State X and New York, the federal courts use the Erie doctrine to determine which state choice of law rule would apply. Although the question of New York vs. State X is outcome determinative with respect to substantive law, here we have no information about the difference between State X and New York choice of law rules. Neither state would seem to have a strong interest here, and this is not the type of question that could lead to forum shopping. Moreover, the accident took place in New York and the court is sitting in New York. Accordingly, the district court will apply New York choice of law rules.

(b) The Court was correct in applying New York's substantive law rules because there is a true conflict; and because Del and Fast Corp. are domiciliaries of different states, the accident happened in New York, and this is a loss allocating rule.

The issue is basically a choice of law issue under New York substantive law. The first question is whether or not there is actually a conflict between the laws of New York and State X and whether the conflict matters. Here this is clear; State X does not allow contribution claims against a plaintiff's employer, but New York law does allow such a claim where the plaintiff suffers a grave injury, and there is no dispute that Plaintiff suffered a grave injury under New York law. The conflict matters because the claim will be barred if State X law is applied but not if New

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

York law is applied. Given that there is a conflict and that it matters, courts will engage in a government interest analysis to determine which state's law should apply. Courts will look at the state interests involved, look at the domicile of the relevant parties, make sure that the state interests are implicated, and if there is a conflict, proceed as will be discussed more fully below.

Both New York and State X have an interest here. State X does not allow contribution claims against employers, presumably to protect employers from lawsuits. Since this issue is a third party contribution claim, the relevant parties to look at are Del Corp. and Fast Corp. Here, Fast Corp. is a State X corporation and their principal place of business is in State X (making them a State X domiciliary), so their interests are implicated. New York does allow contribution claims, presumably to protect employees but also to ensure that workplaces are sufficiently safe. Here Del Corp. is a New York corporation and its principal place of business is in New York (making it a NY domiciliary), and the accident occurred in New York. State X's interests are very clearly implicated here, as their interest is in protecting employers' assets from tort claims. It is less clear that New York's interests are implicated. On the one hand, one could argue they are not because the rule about contribution for grave injuries would seem to be about protecting plaintiffs. However, New York has an interest here in ensuring that its workplaces are safe and if contribution is not allowed, then employers might take less care in preventing negligence if no contribution is allowed. Because both state's interests are implicated, we have a true conflict.

In assessing which state law should apply in the event of a conflict, New York courts ask whether the rule at issue is a conduct governing or loss allocating rule. If it were a conduct governing rule, then in this case New York substantive law would apply because the accident took place in New York. There is only a moderate argument that this is a conduct governing rule, because the true issue is not whether elevators are kept safe, but who should pay in the event of a negligence claim. On the other hand, one could argue that the rule will affect conduct because it would incentive employers to keep their workplaces safe.

The better argument is that we are looking at a loss allocating rule. The question is not whether elevators should be maintained safely. Rather, the question is who should pay for the injury when it is not, Del or Fast Corp. In loss allocating situations, New York will apply the law of the state of both domiciliaries if they are domiciled in the same place. Here, they are not. If domiciles are separate, the law of the place of the accident will apply meaning New York law since the accident occurred here.

Thus, regardless of whether we call this conduct governing or loss allocating, New York substantive law applies, and therefore the court was correct in applying substantive New York law.

2. The court may properly submit Plaintiff's action to the jury because of the doctrine of *res ipsa loquitor*.

Generally speaking in a negligence action, in order to get to the jury, the plaintiff must establish a *prima facie* case of negligence; duty, breach, causation and damages. Here, Del Corp. clearly had a duty to act as a reasonable person in similar circumstances, and this means that they had to manufacture, install, and service the elevator correctly. We also have clear causation and damages. The question here is breach; did Plaintiff establish a breach?

The doctrine of *res ipso loquitor* protects plaintiffs in cases where proof of a breach may be difficult. In order for the doctrine to apply, Plaintiff must show (1) these types of accidents do not typically happen absent negligence; (2) the instrument at issue was in the exclusive control of the defendant; and (3) the plaintiff is free from contributory negligence. Here, the doctrine applies. Elevators typically do not drop two floors absent some kind of negligence in the manufacturing, installation, or service of the elevator. Very importantly, it is stated that Plaintiff proved that the

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

elevator was manufactured, installed and serviced exclusively by Del Corp. This satisfies the exclusive control aspect. Also, while there is no indication of Plaintiff's contributory negligence, elevators are not designed in a way where a rider could cause it to fall two floors. (If they are, that would probably be a tort too). Bottom line, *res ipsa loquitur* applies and given that the other elements of negligence apply as well, the case should go to the jury.

3. In order to establish a claim for contribution, Del Corp. must establish that Fast Corp.'s negligence was a proximate cause of Plaintiff's injuries, and that Fast Corp.'s employees are responsible for Fast Corp.'s torts. If both Del Corp. and Fast Corp. are negligent and liable for Plaintiff's injuries, then as joint tortfeasors they are joint and severally to Plaintiff, and more importantly Del Corp. can recover from Fast Corp. for Fast Corp.'s share of the damages.

New York is a pure comparative negligence state. Even if Fast Corp. is only liable in a small percentage, they would still owe contribution to Del Corp. Again, in a negligence claim we look at duty, breach, causation and damages. Here, the question is whether Fast Corp. is negligent. Fast Corp. will be liable for the acts of its employees if there is a principal agent relationship and the tort is committed within the scope of that relationship. Here we are talking about actual employees, and thus the agency relationship is established. Fast Corp. attested to their actions, benefited from them, and had the ability to control the means by which the employees operated.

Fast Corp. clearly had a duty not to move an injured party. Del Corp. would need to show that moving Plaintiff was a breach of this duty, that moving the Plaintiff exacerbated the damages. (Damages are already shown by the fact that Plaintiff suffered a grave injury.)

Question-Two

Husband and Wife purchased Home as tenants by the entirety. Wife gave birth to Junior in 1997. In 1998, Husband duly executed a will, the dispositive provisions of which provided:

"I give all my estate to my spouse, Wife, if she survives me. If she fails to survive me, I give one-half of my estate to my son, Junior, and the other one-half to my sister, Sis."

In 2000, Husband and Wife adopted Daughter. Husband never executed a new will or codicil. In 2002, Husband deposited \$100,000 in a bank account in the name of "Husband, in trust for Daughter."

In 2005, Husband borrowed \$50,000 from Creditor. Husband signed a promissory note stating "this note is secured by a pledge of my shares of Company, Inc." Husband was the sole shareholder of Company, Inc., which operated a small business. Creditor did not file a financing statement with the Secretary of State.

In 2006, during a marital dispute, Wife stabbed Husband to death. Wife was thereafter convicted of manslaughter.

At the time of Husband's death, Husband and Wife still owned Home, and the bank account established by Husband was intact and unchanged. Husband's will was duly admitted to probate, and Sis was appointed executor.

Sis found the certificates for Husband's shares of Company, Inc. with his business records. Sis, as executor, sold Company, Inc. to Buyer for \$60,000. At the closing, she endorsed and delivered the certificates to Buyer. The note to Creditor has a significant unpaid balance.

Husband's distributable probate estate is \$900,000. Wife, Sis, Junior and Daughter are all living.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

- (a) What portion, if any, of Husband' s probate estate should be distributed to (i) Wife and (ii) Daughter?
- (b) What interest, if any, does Wife have in Home?
- (c) What rights, if any, does Creditor have in the shares of Company, Inc.?

ANSWER TO QUESTION 2

A. (i) The issue is whether a spouse who has killed the other spouse is entitled to inherit under a will.

New York does not permit murderers to profit from their crimes. Thus, a person who has killed the testator cannot inherit under the will.

Here, Wife killed Husband and was convicted for the killing. That it was during a dispute and that she was convicted only of manslaughter do not constitute excuses to exempt her from the general rule. Thus, Wife cannot inherit under the will, and she is treated as having pre-deceased husband.

(ii) The issue is whether a pretermitted child should share in the estate when there is a non-will disposition in the child' s favor.

Under the Estate Powers and Trusts Law, when the testator becomes the parent of a child after the execution of the will, what share the pretermitted child has in the estate depends on the following. If the testator has children at time of execution and the will made a substantial gift to the existing children, then the pretermitted child takes an equal share as the existing children. If the testator did not provide for the existing children, then the later child acquires nothing. If the testator did not have children at the execution, then the later child gets an intestate share. In any case, however, if the testator has otherwise provided for the later child, then the child has no claim on the probate estate.

Here, the testator has left a Totten trust of \$100,000 in favor of Daughter. That is a disposition for the daughter, and thus the daughter takes nothing from the probate estate. It does not matter that the will provided for Junior, the child of the testator at the time of execution.

B. The issue is whether the spouse who has killed the other spouse retains the right of survivorship in property owned by the couple as tenants by the entirety.

If the same rule applies to right of survivorship as right of inheritance, then the killing spouse should not take. There is good public policy for such a rule, because it would be undesirable to award one tenant by the entirety who killed the other tenant with the joint property.

Here, Wife and Husband acquired the property as tenants by the entirety. Because Wife killed Husband and was convicted of the crime, she should be treated as having predeceased Husband, and the home should pass into the estate of the husband as his sole property by right of survivorship.

C. The issue is whether the interest of a secured unperfected creditor prevails over the interest of a purchaser for value.

This issue is governed by the UCC. A creditor who has a security in stocks must perfect his interest by filing. If the interest is properly perfected, then the creditor has precedence over all other creditors except for a buyer in the normal course of commerce (e.g., a customer who buys

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

something from a store). If an interest was not perfected, then the creditor has precedence only over an unsecured creditor.

Here, the creditor received a promissory note giving him interest in the shares of Company, Inc. However, he did not file a financing statement with the Secretary of State. Thus, he has not perfected his interest. Buyer purchased the shares for value. Because Creditor did not perfect his interest, and therefore Buyer had no "record" notice of Creditor's interest, Buyer should prevail over the Creditor's claim over the shares. It is not known whether Buyer had actual knowledge of Creditor's interest in the shares. If Buyer did, then he would no longer qualify as a bona fide purchaser, and Creditor would then be able to assert a right in the shares.

ANSWER TO QUESTION 2

A. (i) The first issue is the effect of a spouse's murder of his or her spouse on gifts to the murdering spouse in the murdered spouse's will.

A constructive trust is imposed to prevent a property from passing to a wrongdoer. Where a one spouse murders the other, a constructive trust will be imposed on all property that would have passed to the murdering spouse under the will of the murdered spouse. This is an equitable remedy intended to prevent a will beneficiary (in this case, a spouse) from profiting by such his or her wrongful conduct. Whereas a resulting trust returns property to the grantor, a constructive trust transfers property from a wrongdoer to the person who should rightfully receive the property.

In this case, Husband's will bequeaths his entire estate to Wife, if she survives him. Although Wife did survive Husband, Wife has been convicted of manslaughter in connection with Husband's death. A constructive trust will therefore be imposed on Husband's estate to prevent Wife from benefiting from her actions. Husband's estate will not pass to Wife. Rather, Wife will be treated as if she predeceased Husband, and Husband's estate will go to Junior and Sis in equal shares, since this was the intent that Husband evidenced in his will. Wife therefore has no interest in Husband's probate estate.

(ii) The issue is whether Daughter, as a pretermitted child, has a claim under her father's will.

Under the pretermitted child statute, a child born after the execution of a will who is not provided for in the will or by lifetime settlement may be entitled to a portion of the deceased parent's estate. If the testator had children when the will was executed, the afterborn child will (1) take nothing if her siblings were not provided for in the will, (2) share in her sibling's gifts pro rata if significant dispositions were made to her siblings in the will, or (3) receive her intestate share of her deceased parent's estate if only nominal gifts were made to her siblings in the will. However, if an afterborn child is provided for by a lifetime settlement by the deceased parent, the afterborn child is not entitled to a share of the deceased parent's estate, regardless of bequests to any siblings.

Daughter is a pretermitted child, since she was adopted after Husband executed his will and adopted children are considered afterborn children for this purpose. Husband had a child, Junior, at the time the will was executed, and left Junior a significant bequest (a contingent remainder in one-half his estate). Daughter, however, is not entitled to share in Junior's bequest because Daughter was provided for by a lifetime settlement by her father. A Totten trust constitutes a lifetime settlement that precludes an afterborn child from benefiting from the pretermitted child statute. When Husband created the bank account, "Husband, in trust for Daughter," he established a Totten trust. Whether the \$100,000 Totten trust is considered to be small in comparison to the entire estate or to Junior's bequest (a contingent remainder in one-half of a \$900,000 probate

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

estate) is irrelevant. Daughter has no interest in Husband' s probate estate because she was provided for in a lifetime settlement.

B. The issue is whether the murder of one co-tenant by the other severs a tenancy by the entirety.

A tenancy by the entirety is a specially protected marital estate with a right of survivorship. The right of survivorship means that if one co-tenant dies, his or her interest in the property is not part of his probate estate, but passes automatically by operation of law to the other co-tenant. The right of survivorship in a tenancy by the entirety can only be severed by the death of one co-tenant (in which case the other co-tenant takes the entire interest), voluntary partition, or divorce. If, however, one co-tenant murders the other, the murdering co-tenant is not permitted to benefit from the right of survivorship.

In this case, Wife and Husband owned Home as tenants by the entirety. Although under normal circumstances, the death of Husband would mean that Husband' s interest in Home would pass by operation of law to Wife pursuant to her right of survivorship. In this case, Wife will be precluded from receiving Husband' s interest in Home because she has been convicted of manslaughter in connection with Husband' s death. Wife therefore has no interest in Home.

Because Wife has no interest in Home as a result of her wrongful conduct, Husband died in partial intestacy. This is because the disposition of Home was not provided for in his will. As a result, the laws of intestate succession will apply. Because she murdered Husband, Wife will also be barred from taking under intestacy. Home will pass by intestacy to Junior and Daughter in equal shares, who will become tenants in common.

C. The issue is whether Creditor has a claim against Buyer, when Creditor did not file the security agreement.

Attachment of a security interest secures the creditor' s rights against the debtor. In order for a security interest to attach to property, there must be a written security agreement, which sufficiently describes the property. In this case, Husband signed a promissory note stating that "my shares of Company, Inc." were pledged to repay the loan from Creditor. This note will satisfy the security agreement requirement, since it was in writing and signed by Husband. The description of the shares as "my shares in Company, Inc." is sufficient to identify the property pledged; all of Husband' s shares in Company, Inc. Creditor' s rights therefore attached against Husband.

Perfection determines a creditor' s rights in the security property vis-a-vis third parties. Perfection happens when the creditor files the security agreement with the Secretary of State or takes possession of the property. In this case, Creditor did not file the security agreement. Nor did Creditor take possession of the stock certificates, since the facts state that Sis found the certificates with Husband' s business records. As a result, Creditor is an attached but unperfected creditor.

An attached, unperfected creditor will not prevail against a buyer in the ordinary course, i.e., a bona fide purchaser for value who buys from a dealer in the type of property at issue. An attached, unperfected creditor will, however, prevail against a buyer who buys from an individual who is not a dealer (i.e., not in the ordinary course or stream of commerce).

In this case, there was no public market for the shares in Company, Inc. since it was a close corporation (Husband was the sole shareholder) and Sis was not, on these facts, a securities broker. Therefore, when Buyer bought the stock from Sis, Buyer did not become a buyer in the ordinary course. As an attached, unperfected creditor, Creditor will therefore prevail against Buyer, even if Buyer had no notice of Creditor' s rights in the stock.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Question-Three

Acorn Corp. is engaged in the sale of medical diagnostic services to hospitals located in Buffalo and the surrounding area in western New York State. In 2000, Kelly was hired by Acorn Corp. as vice-president of sales. In her employment contract with Acorn Corp., Kelly agreed that, in the event of the termination of her employment with Acorn Corp., she would not engage in any similar business for a period of five years anywhere in New York State. Kelly became the top sales person for Acorn Corp. and was elected a director of the corporation.

In 2005, Kelly was making a sales call on a customer of Acorn Corp. when she was introduced to Brady, the president of Brady Corp. Brady advised Kelly that Brady Corp., a manufacturer of medical imaging systems, had developed a new hand-held x-ray machine. He asked Kelly to serve as a manufacturer's representative to sell the product. Kelly agreed and, in her own name, entered into a contract with Brady Corp. to sell the x-ray machine for a stated commission.

Without Acorn Corp.'s knowledge, Kelly then began to sell the machine to customers of Acorn Corp., earning significant commissions. Although Acorn Corp. sold diagnostic services, it had never sold diagnostic equipment, such as x-ray machines. However, Acorn Corp. had the know-how to market diagnostic equipment, the customer base to sell it to, and the sales force to make the sales. It had directed Kelly, as vice-president of sales, to seek opportunities for Acorn Corp. to expand into sales of diagnostic equipment.

Acorn Corp. learned of Kelly's contract with Brady Corp. in 2006. Acorn Corp. immediately fired her, and the board of directors voted to remove Kelly as a director. The certificate of incorporation and shareholder by-laws of Acorn Corp. are silent as to the removal of directors. Acorn Corp. thereafter commenced an action against Kelly, claiming to be entitled to recover damages and lost profits as a result of Kelly's contract with Brady Corp.

Acorn Corp. hired a new vice president of sales, and its sales of diagnostic services in the western New York State area have continued unabated.

Kelly has now moved from Buffalo to New York City, where she continues to sell the x-ray machine for Brady Corp. She has also accepted a job as a sales representative for Lab, Inc., a medical laboratory in New York City, to begin on March 1, 2007. Her sales territory will be limited to New York City, and the services she will be selling to hospitals in her new employment include the same types of diagnostic services she sold as a sales representative for Acorn Corp. Her new office will be approximately 400 miles from the offices of Acorn Corp.

Upon learning of Kelly's planned new employment, Acorn Corp. immediately amended the complaint in its action against Kelly to include a cause of action for breach of contract, seeking a permanent injunction to enforce the restrictive covenant. Acorn Corp. simultaneously moved for a preliminary injunction, barring Kelly from beginning her new job with Lab, Inc.

- (1) Was Kelly properly removed as a director of Acorn Corp.?
- (2) Is Acorn Corp. likely to succeed in its cause of action against Kelly to recover damages and lost profits as a result of the Brady Corp. contract?
- (3) What must Acorn Corp. establish in order to be granted a preliminary injunction, and is it likely to succeed?

ANSWER TO QUESTION 3

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

1. The issue is whether the board of directors may remove a director absent a provision in the bylaws or certificate of incorporation.

Directors may only remove a director if the certificate or a shareholder by-law so provides. In any event, a director may never remove a director without cause. If the certificate and bylaws are silent, only the shareholders may remove a director. Furthermore, shareholders may not remove a director without cause absent a provision in the certificate or shareholder by-laws that allows it. There is cause to remove a director when that director violates any fiduciary duty, including, for example, engaging in self-dealing, usurping a corporate opportunity, or committing waste.

Here, there was cause to remove Kelly because she usurped a corporate opportunity for herself by selling the x-ray machines and earning commissions for herself, which constituted a breach of the duty of loyalty. However, she was not properly removed because the certificate or shareholder by-laws did not allow the directors to remove a director for cause.

Therefore, Kelly was not properly removed as a director.

2. The issue is whether a director who profits from her own contracts in an area of interest to the corporation, breached her fiduciary duty of loyalty.

Officers and directors owe fiduciary duties to the corporation. The fiduciary duty of loyalty requires that a director act with the same degree of honesty, loyalty, conscientiousness, and fairness that the law requires of fiduciaries. Usurpation of a corporate opportunity is a breach of the duty of loyalty. A corporate opportunity is usurped when a director or officer profits from any transaction that a reasonable director would anticipate is of interest to the corporation, provided the corporation has not had the opportunity to turn it down.

Here, the sales of the handheld x-ray machine for a commission was a corporate opportunity. Although Acorn had not sold diagnostic equipment before, it was interested in expanding into the area of selling diagnostic equipment. Furthermore, Kelly as vice-president was aware of this interest. Indeed, she had been directed to seek out such opportunities for the corporation. Kelly had actual knowledge that the corporation would be interested in this opportunity, and yet took it for herself and profited from it. Therefore, Kelly has usurped a corporate opportunity and breached her fiduciary duty of loyalty.

The remedy for breach of a corporate opportunity is to turn over the opportunity to the corporation or to impose a constructive trust on the profits. Therefore, Acorn Corp. is likely to succeed in its cause of action and may likely recover damages and lost profits.

3. The issue is whether there is a likelihood of success on the merits that a non-compete agreement will be specifically enforced.

Under the CPLR, a party may make a motion on notice for the provisional remedy of a preliminary injunction whenever the ultimate remedy sought is the equitable remedy of a permanent injunction. In addition to a showing that the party is seeking equitable relief, the party must show a likelihood of success on the merits, that damages are not adequate, that irreparable injury will otherwise result, and that there are no equitable defenses such as laches, unclean hands, or estoppel.

Generally, New York courts will not restrict a person's ability to seek the lawful employment of her choice for public policy reasons. However, a limited exception exists for a valid non-compete agreement. A non-compete agreement is enforceable if the person's services are unique such that damages would be inadequate, the agreement is reasonable in geographic scope and time, and is reasonably necessary to the employer.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Here, Acorn Corp. is entitled to make a motion for preliminary injunction because it is ultimately seeking a permanent injunction. It will likely prevail on the preliminary injunction motion if it can show a likelihood of success on the merits, which in the case of a non-compete agreement will also establish that damages are not adequate (by showing the employee's services are unique) and that irreparable injury would result (the non-compete was necessary to the employer).

Here, the non-compete agreement was validly formed in exchange for Kelly's employment. Kelly's services are likely unique, and the non-compete may reasonably be necessary to Acorn Corp. because Kelly was vice president of sales, and had extensive knowledge of the workings of the company in her capacity as an officer and director.

However, the agreement is probably not reasonable in scope because New York State is too broad of an area, and five years is too long of a time. As applied to Kelly's new job, the agreement is likewise not reasonable because her office is 400 miles away and her new job's business is limited to New York City while Acorn Corp. sold its services in Buffalo and western New York.

Therefore, the motion for preliminary injunction will probably not be granted because Acorn Corp. will probably not be able to show a likelihood of success on the merits.

ANSWER TO QUESTION 3

1. Kelly's Removal as a Director

The issue is whether directors may remove a director from the board for cause when the certificate and by-laws are silent on the subject.

Under the BCL, when the certificate and by-laws are silent with respect to removal of directors for cause, such removal is the responsibility of the shareholders and not the directors. In this case, there was cause for removing Kelly as a director because she breached her fiduciary duty of loyalty to Acorn (as will be detailed below) by usurping a corporate opportunity. But removal of a director for cause is a responsibility of the shareholders and not the directors.

Therefore, Kelly was improperly removed as a director because the directors and not the shareholders removed her. It should be noted that the directors had full ability to remove Kelly in her capacity as an officer. Removal of officers is a prerogative of the Board unless properly changed by bylaw or certificate.

2. Cause of Action Against Kelly for Damages and Lost Profits

The issue is whether, on these facts, Acorn can sustain a claim for breach of the fiduciary duty of loyalty against Kelly

A director or officer of a corporation must act with the conscientiousness, morality, honesty, and fairness that the law requires of fiduciaries. As such, a fiduciary of a corporation may not engage in transactions injurious to the corporation's interests, including competing with the corporation or usurping a corporate opportunity. If a director is found to have breached her duty, she is liable to the corporation for its damages and lost profits caused by the director's breach.

In this case, Kelly usurped a corporate opportunity which she should have presented to the board, and given the board an opportunity to reject, before accepting. Because Acorn had not yet entered the field of selling medical equipment, it is arguable as to whether Brady Corp. and Acorn Corp. were in direct competition with one another when Kelly met Brady (although the fact that she met

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

him at a sales call suggests that they had the same customers). But Acorn did appear to be ready to enter the market, Acorn had the know-how, customer base, and sales force to enter the market. Moreover, Acorn had directed Kelly to seek such opportunities. Without Acorn's direction to Kelly, their preparation to enter the market may not have made them a competitor of Brady, but the direction to Kelly indicated that they wanted to enter the market, and they wanted Kelly to figure out how to do so.

As such, when Kelly was presented with the opportunity to sell the X-ray machine, she should have presented that opportunity to the Acorn board and given it an opportunity to reject it before accepting the opportunity for herself. To not do so was the usurp a possible corporate opportunity to market and sell the product for Acorn even though Acorn had not officially entered the market, and Kelly breached the duty of loyalty.

The normal remedy for a breach of duty of loyalty is for the corporation to recover its damages and lost profits, and Acorn may do so from Kelly through use of a constructive trust.

3. Requirements for Acorn to Obtain a Preliminary Injunction

The issue is whether Acorn will succeed in obtaining a preliminary injunction against Kelly against her violation of her non-competition agreement. In particular, Acorn will have to show probability of success on the merits of the issue as to whether the agreement is enforceable.

To obtain a preliminary injunction in an equity action, the proponent must make a motion on notice, submit an undertaking to indemnify the defendant if the case is ultimately lost, and demonstrate likelihood of success on the merits, irreparable and imminent harm if the injunction is not granted, that no remedy at law would be adequate, and that the balance of the hardships tips in its favor.

Assuming that the motion in this case is duly filed and an appropriate undertaking is offered, Acorn must, first and foremost, demonstrate probability of success on the merits of the action. In this case, that success will depend on the validity of the non-competition agreement. Non-competition agreements are disfavored as a restraint on trade, but they are generally enforceable in New York if they are reasonable in terms of geographic scope and time limitations.

In this case, the agreement is unlikely to be enforced because it is unreasonable, at least in terms of geography. Acorn sells equipment to hospitals located in Buffalo and western New York. There is little likelihood that it competes with companies engaged in the same business in New York City, which is far away and likely has a separate market for such equipment. It will be difficult for Acorn to explain why it needs to be protected from Kelly selling products in New York City, as Kelly will not be competing with Acorn for the same customers because her territory is limited and 400 miles away. Also, the time limitation seems to be quite long under the circumstances. As such, Acorn will probably not be able to establish a probability that it will succeed on the merits, and it should not receive a preliminary injunction.

Moreover, Acorn will probably have difficulty with the other requirements for preliminary injunctive relief as well. First, Acorn is probably not suffering imminent or irreparable harm from Kelly's work in New York City due to her limited territory and the distance from Buffalo. Second, to the extent that Kelly's work does cause Acorn harm, such harm is probably remediable by damages rather than an injunction. Third, the balance of hardships probably tips in Kelly's favor. While Acorn would be allowed to continue in its business with little interference, Kelly will be prevented from earning a living in her chosen profession. The hardship to her will be much greater, at least in the short term while the case is pending.

For the foregoing reasons, Acorn's motion for a preliminary injunction should be denied.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Question-Four

The police received a tip from an anonymous source that Bernard had been murdered. A day later, Bernard's dead body was found behind the steering wheel of his own parked car. In the back seat of the car, the police found a jacket that had Archie's full name sewn in the collar. Inside one of the jacket pockets was a sealed blank envelope. The police opened the envelope and found a note from Archie to Bernard in which Archie demanded that Bernard tell him the location of some money that the two had stolen together, "or else".

The police took a statement from Carol, who said she knew Archie and Bernard. She saw them leave a neighborhood tavern together and ride off in Bernard's car on the night Bernard was reported to have been murdered. Carol also reported to the police that Archie called her the next day and said that he was getting out of the country.

The police went to Archie's home without an arrest warrant and found the front door slightly ajar. They entered and searched the house. Archie was found inside a closet and was arrested for the murder of Bernard. At that time, he was given his Miranda warnings.

Over his objection and without counsel, Archie was then placed in a line-up, where he was identified by Darlene. Darlene lives near where Bernard's car was found. She said she saw Archie running from Bernard's car just after she heard a shot fired.

After his arraignment, and outside the presence of his assigned counsel, Archie, after signing a waiver of his right to counsel, was questioned by the police. He gave a statement to them admitting that he shot Bernard.

Archie's attorney moved to suppress (1) the note found in Archie's jacket; (2) the line-up results; and (3) Archie's statement. The court denied the motion in all respects.

(A) Assuming the police had probable cause, was the arrest of Archie lawful?

(B) Assuming the arrest was lawful, were the court's rulings on (1), (2) and (3) correct?

ANSWER TO QUESTION 4

A. The issue is whether the police violated the Fourth Amendment when they arrested the defendant at his home without first procuring a warrant.

The Fourth Amendment to the Constitution, made applicable to the state through the Fourteenth Amendment, protects against "unreasonable searches and seizures." In interpreting this command, the Supreme Court has held that when the police seek to arrest a suspect at his home (thereby constituting a seizure), they must first procure a search warrant. There are a number of limited exceptions to this requirement. Among these exceptions are exigency - when an emergency exists at such a level as to justify not procuring a warrant. Another exception allows the police to occasionally act without a warrant in order to preserve "evanescent" evidence - evidence that might be destroyed if the police were to wait to obtain a warrant.

Here, it appears the police did have probable cause to arrest the defendant. Even under the more stringent Aguilar-Spinelli test that New York continues to apply, Carol's tip was reliable and would probably have justified the issuance of a warrant by a detached and neutral magistrate, on a finding of probable cause - as would be required by the Constitution.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

This probable cause does not mean, however, that the arrest was lawful without a warrant. Because they arrested Archie in his home without a warrant, the police conduct would have to fall within one of the limited exceptions to the warrant requirement.

One of those exceptions is for evanescent evidence. Where the police fear that evidence may be destroyed, they may sometimes act outside the boundaries of the warrant requirement. Here, it is true that Carol indicated to the police that Archie told her he was leaving the country (hearsay requirements, of course, do not apply to this type of inquiry). The police might attempt to argue that the evanescence exception is triggered. However, a court would be unlikely to agree. The police could have lawfully monitored Archie's home from outside in order to monitor his comings and goings. Indeed, once he left his home, they would have been able to arrest him without a warrant merely because probable cause existed. Moreover, even with the possibility of Archie's fleeing the country, the police ostensibly had time to obtain a warrant. New York allows officers to apply for a warrant via electronic or telephonic means, and this was an option available to the officers.

The police might also try to justify the arrest on the grounds that there existed some exigency - some urgent emergency - that would take the arrest outside of the Constitution's warrant requirement. However, the facts do not seem to justify this conclusion. It is true that the police wanted urgently to arrest Archie, whom they suspected of being a murderer. But this alone cannot justify the warrantless arrest. The Supreme Court and New York courts have justified exigency exceptions to the warrant requirement in cases where public health was imminently threatened, where children's lives were imminently threatened, and similar life-threatening emergencies. There do not appear to be facts to make this case fall within that line of cases.

Finally, the fact that the door was slightly ajar does not materially alter this analysis. Once they entered the suspect's home in order to make an arrest without a warrant, the police violated the Constitution's prohibition on unreasonable searches and seizures. It is important to note however, that an illegal arrest will not of itself necessarily give the defendant a meaningful remedy. It is true that evidence obtained as a result of the warrantless arrest may be excluded under the "fruit of the poisonous tree" doctrine. Yet as the Supreme Court announced in the 1950's case of *Frisbee v. Collins* and reenunciated in the 1990's in the *Alvarez-Machain* case, the mere fact that the defendant's presence was obtained unlawfully does not act to deprive the court of the ability to try him.

B. (1) The issue is whether Archie has standing to challenge the search of Bernard's vehicle.

The Fourth Amendment protects against "unreasonable searches," but this right extends only to the extent that the person challenging the search has standing to do so. Standing means that the person had a reasonable expectation of privacy in the thing searched, such that he is a proper party to challenge the search in court.

As a general rule, people have an expectation of privacy in property that own or possess. The Supreme Court and the New York courts have extended this doctrine somewhat, and permit for instance, an overnight guest to challenge the results of a warrantless search in the home in which he or she was staying.

Here, it was not Archie's car that was searched, but rather Bernard. It does not appear that the warrantless search was unreasonable (given that the thing searched was a car parked in view of the public with a dead body in plain view). Even if it were, however, Archie would not be able to assert the constitutional rights of another in order to exclude the evidence under the exclusionary rule, which calls for the exclusion of evidence where it is illegally obtained. Consequently, Archie did not have a reasonable expectation of privacy in the car generally.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

The issue then becomes whether the police unlawfully searched the jacket itself or the envelope. A court would likely reason that because Archie had no expectation of privacy in the car itself, he had no reasonable expectation of privacy in the things within the car. Even if a court were to entertain the idea that things within the car were illegally searched even without an expectation of privacy in the car as a whole, it appears the police acted reasonably. The jacket itself may have read "Archie" but the police had no way of knowing that "Archie" was not in fact the owner of the car or the dead individual within it. Archie might argue that this exception cannot extend to the envelope itself and that the police should have obtained a warrant to open it. Yet again, however, the issue probably would go back to whether Archie has standing to challenge the search in the first place.

Thus, because he almost certainly lacks standing to challenge the search, the court's ruling with respect to suppression of the note was correct.

(2) The issue is whether a suspect is entitled to counsel at a pre-charge lineup.

The general rule, and the federal constitutional requirement, is that the Sixth Amendment right to counsel does not ordinarily attach before the imposition of formal charges against the defendant. The New York approach is somewhat broader than the federal requirement. New York protects the "indelible" right to counsel whenever: 1) the police engage in activity overwhelming to the layperson and the defendant requests counsel; 2) after the imposition of formal judicial process; 3) at arraignment; and 4) anytime there is significant judicial activity in the case. Accordingly, even in New York, the general rule is that before the defendant is formally charged with a crime (thereby bringing with it the protections of the Sixth Amendment right to counsel), he has no right to counsel at a pre-charge lineup. There is an additional narrow exception in New York to this rule: where the police are aware that the defendant is represented by counsel and he makes a request for counsel, the police must provide it.

Here, the defendant had not yet been charged with a crime. The police were unaware that he was represented by counsel (nor does it appear that he was), and in any event, the defendant made no request for counsel prior to the lineup. Thus, it does not appear that his Sixth Amendment right to counsel.

Nor does the lineup invoke the defendant's right to counsel under the Fifth Amendment. While there is a right to counsel protected under that constitutional provision, it applies only where the suspect is subject to custodial interrogation. While appearing in a line-up may be incriminating, it is not testimonial. Thus, there was no violation of the right to counsel, nor any other apparent constitutional infirmity. The court was correct to deny the motion to suppress the line-up results, and the witness should be entitled to make an in-court identification (and consistent with the hearsay exception, testify to the original identification, as well).

(3) The issue is whether the police may obtain a valid waiver from a suspect post-charge and without the presence counsel.

As noted above, both federally and in New York, the right to counsel attaches once formal judicial proceedings are begun against the defendant. Moreover, in New York, a valid waiver of one known to be represented by counsel may not, post-arraignment, be obtained outside the presence of that counsel.

Archie was known to be represented by counsel (for counsel was assigned). The questioning occurred outside the presence of counsel. Though a waiver was obtained (which will generally cure constitutional defects if it was knowing and voluntary), it was not obtained in the presence of counsel.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Thus, Archie's right to counsel, as protected here by both the Fifth and Sixth Amendments was violated, and the court was incorrect to deny the motion to suppress. The court should have granted that motion, for under the exclusionary rule, an illegally obtained confession may not be used by the state.

ANSWER TO QUESTION 4

A. Assuming the police had probable cause, Archie's arrest may be lawful if the court finds exigent circumstances present. The issue is when the need for an arrest warrant is required. Under the Fourth Amendment, a person cannot be lawfully arrested unless the police first obtain an arrest warrant. An arrest warrant must issue from a detached, neutral magistrate on a finding of probable cause. There are certain exceptions to the requirement of an arrest warrant. For example, if there are exigent circumstances, or if the arrest is in a public place, then police can make the arrest without first obtaining a warrant. In this case, if the police can prove that there were exigent circumstances present such that taking the time to obtain an arrest warrant would result in Archie having the time to flee, then they may be able to overcome the warrant requirement. However, the facts suggest that the circumstances were not of an immediate nature. To begin with, the police received the anonymous tip the night before they actually found the body. Then, when they found the body and came across evidence suggesting Archie's involvement in the crime, they did not go straight to a magistrate but continued to investigate. Once they received corroboration from Carol, the police proceeded to Archie's house. That being said, based on Carol's testimony of Archie "getting out of the country," the police may be able to demonstrate that that fact gave them the emergency situation that would allow an officer to forego the warrant requirement for the sake of making an actual arrest of Archie. In other words, the police will argue that any minute spared to obtain a warrant would have been time wasted in arresting Archie. If the court finds this argument persuasive, then Archie's arrest will be lawful. Notably, the fact that Archie's door was open is likely not enough to allow the police to overcome the requirement for a warrant. Whereas in a fully public place, police can generally proceed to arrest on just probable cause (not a warrant), Archie's house was not a public place nor were the police invited in. The fact that the door was open will not affect the lawfulness of the warrant-less arrest.

B. (1) The court's ruling on the note found in Archie's jacket is correct. The issue is whether Archie has standing to object to the note found in his jacket pocket. Under the Fourth Amendment, a person is granted protection from government searches and seizures of things where there is a reasonable expectation of privacy. Whereas someone's personal property might be inherently private in nature, the fact that Archie's jacket here was found in Bernard's car takes it out of the realm of privacy that is expected. In other words, because the jacket was in Bernard's car, which Archie did not own, and more importantly, because Archie was not in the car with the jacket, he cannot reasonably expect to have the jacket itself be free of any government search. Because Archie has no expectation of privacy, he has no standing to object to the jacket, and therefore it comes in as evidence.

(2) The court's ruling on the line-up is correct. The issue is whether the Fifth Amendment attaches to line-ups. Under the Fifth Amendment, a person is free from giving testimonial evidence that may tend to incriminate them. The rights under the Fifth Amendment attach after a person is in police custody - meaning when a reasonable person would not feel free to leave. Here, Archie's Fifth Amendment privileges had clearly attached as he had been arrested, and was therefore in police custody. That being said, a line-up will not violate a person's Fifth Amendment right to be free of self-incrimination because it is not testimonial in nature. Also, Archie has no claim to keep the line-up out under his Sixth Amendment right to counsel because he had not yet been formally charged. He may be able to assert an argument under New York's right to counsel (see *supra* Section 4(b)(3)). However, he would first have to prove that there was substantial governmental interference such that a right to counsel was necessary. In this case, the

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

court' s ruling was likely correct as line-ups are non-testimonial in nature and therefore the Fifth Amendment does not apply.

(3) The court' s ruling in regards to Archie' s statement was likely incorrect. The issue is whether Archie' s waiver was valid. Under the Sixth Amendment, a person' s right to counsel attaches once a formal charge has been brought against the defendant. In this case, Archie' s right to counsel likely attached after his arraignment. Under the federal rules, a waiver is valid if it is knowing and intelligent and voluntary. This means that the defendant knew the right he was giving up and did so voluntarily – without any coercion by the police. Under the federal rules, Archie' s confession here would likely be admissible as he gave a knowing and intelligent and voluntary waiver of his right to counsel. Therefore, the police were allowed to question him in regards to the alleged crime. However, New York has a much more defendant-protective right to counsel. By statute, New York provides for an indelible right to counsel which attaches not just when there is a formal charge, but whenever there is substantial government interference such that a defendant may benefit from the presence of counsel. Clearly, an arraignment qualifies as such an instance and therefore New York' s right to counsel attached in Archie' s case. One protection under New York' s right to counsel is that a voluntary and knowing and intelligent waiver must be made in the presence of counsel. Thus, in order for Archie' s confession to be valid, it would have to have been made while his counsel was still present. Here, it was not; therefore it is invalid. Indeed, Archie' s waiver, the police questioning, and his subsequent confession were all made outside the presence of counsel. As such, his confession can be said to be a fruit of the poisonous tree and should therefore be excluded under the exclusionary rule. The court was therefore incorrect in denying Archie' s motion to suppress.

Question-Five

In June 2000, Frank and his sister, Sue, took title to Greenacre, an undeveloped parcel of land located in Village, as joint tenants. Sue died in April 2006, without a will, survived by her daughter, Deb, her sole distributee. On July 27, 2006, Frank executed and delivered a deed conveying Greenacre to his children which stated "to Ann, Beth, and Carl, in equal shares."

On November 1, 2006, Deb wrote to Ann, Beth and Carl claiming that she owns a one-half interest in Greenacre as Sue's only heir.

On December 1, 2006, Ann and Beth, without Carl' s knowledge, entered into a contract to sell Greenacre to Paul for \$600,000. The contract provided for a down payment of \$60,000 and set a closing date of March 1, 2007. The contract was silent as to risk of loss or condemnation.

On December 15, 2006, Village condemned a 10 foot strip of Greenacre, to widen a public road leading to a shopping mall owned by Ed, a local businessman. Village' s condemnation decision was based upon a public study that found that increasing traffic congestion in the vicinity of the shopping mall posed a serious safety problem. The study recommended that the road leading to the mall be widened. Ed agreed to contribute \$100,000 to Village toward the construction costs, as his shopping mall would benefit from the widening of the road. Several residents of Village objected to the condemnation on the ground that the expenditure of public money would confer a private benefit on Ed.

On February 15, 2007, as compensation for the condemnation, Village paid Ann, Beth and Carl the sum of \$75,000, the fair market value of the strip. Ann and Beth immediately notified Paul of the condemnation and the \$75,000 payment from Village. Paul advised Ann and Beth that he would not close title under the contract, because of the condemnation. Ann and Beth told him that they intended to enforce the contract.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

1. After Sue died and Frank conveyed Greenacre to Ann, Beth and Carl, what respective right, title and interests, if any, did Ann, Beth, Carl and Deb have?
2. Was it lawful for Village to condemn the 10 foot strip of Greenacre?
3. How does the condemnation of the 10 foot strip affect the rights of Ann, Beth and Paul under the December 1, 2006 contract?
4. Assuming that Ann, Beth and Paul close title under the December 1, 2006 contract, what respective right, title and interests, if any, will Paul and Carl have in Greenacre?

ANSWER TO QUESTION 5

1. The issue is whether a joint tenant's ownership interest passes by intestacy to her heirs upon her death.

A joint tenancy is always accompanied by a right of survivorship. Each joint tenant has an undivided interest in the whole, but that ownership interest is not descendible, meaning that it does not pass by intestacy to the heirs of a deceased joint tenant. Instead, when one joint tenant dies, the survivor takes a full undivided ownership interest in the whole.

Accordingly, when Sue died, Frank took Greenacre as sole owner by right of survivorship. Deb, Sue's intestate distributee, took no interest in Greenacre. Frank therefore had the right to convey Greenacre to his children. When Frank conveyed Greenacre to his children "in equal shares," the conveyance created a tenancy in common. A conveyance is presumed to create a tenancy in common, rather than a joint tenancy, which must be created by clear language indicating that it is a joint tenancy with right of survivorship. Ann, Beth and Carl therefore each have a 1/3 interest in Greenacre as tenants in common, and each may freely transfer or devise his or her interest.

2. The issue is whether the condemnation of the 10 foot strip by Village was an unconstitutional taking.

The Takings Clause of the Fifth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, prohibits the government from taking private land for public use without just compensation.

Here, Village condemned a 10 foot strip of Greenacre in order to widen a public road, having found that the narrowness of the road leading to Ed's shopping mall created a "serious safety problem." This is a classic example of a taking "for public use." States and municipalities regularly take private property in order to create or widen public roads through the exercise of eminent domain. The fact that the widening of the road will benefit Ed, a private landowner, in his use of his property as a shopping mall, does not mean that the taking was for private use nor does the fact that Ed contributed to the construction costs of widening of the road. "Public use" is interpreted broadly, and an incidental benefit to a private party will not render a taking unconstitutional.

Furthermore, Village paid Ann, Beth and Carl "just compensation" for the land. Village paid fair market value, which is all that the government is required to pay in compensation for a taking. Accordingly, the condemnation of the 10 foot strip of Greenacre was lawful.

3. The issue is which party bore the risk of loss once the land sale contract for Greenacre had been signed.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Condemnation of a portion of property constitutes "destruction" of that portion of the property, since that portion of the property no longer belongs to the former owner but to the state. At common law, under the doctrine of equitable conversion, once the land sale contract was signed the buyer was the equitable owner of the property and the seller was the equitable owner only of the sale price. Accordingly, the buyer bore the risk of loss when property was destroyed after the land sale contract was signed and before closing, unless the destruction was attributable to the seller's fault or the parties agreed otherwise. In New York, however, under the Uniform Vendors and Purchasers Risk Act (UVPRA), in the absence of an agreement to the contrary, the seller bears the risk of loss unless the buyer has taken either possession or legal title.

Here, there was no provision in the contract regarding the risk of loss or condemnation. Paul does not have legal title because the closing will not occur until March 2007, and he does not have possession of the property. Therefore, Ann and Beth, as the sellers, bear the risk of loss of the portion of the land that was condemned. If the entire property had been condemned, a court would find that Ann and Beth could not enforce the contract, because they bore the risk of loss under the UVPRA. However, because the amount of land condemned was small (only a 10 foot strip) and the sale price (\$600,000 for an undeveloped parcel) indicates that the property was likely a sizable one, a court might find that Paul was nonetheless obligated to perform under the contract, with a reduction in the sale price to account for the loss of the 10 foot strip.

4. The issue is whether Ann and Beth had the right to convey Greenacre to Paul without Carl's consent.

As noted above, Ann, Beth and Carl took Greenacre from Frank as tenants in common. A tenant in common may freely transfer his or her ownership interest without the permission of the other tenants in common, but cannot convey the ownership interest of another. Therefore, while Ann and Beth had the power to convey (together) a $2/3$ ownership interest in Greenacre, they did not have the power to convey Carl's share to Paul. Accordingly, Paul and Carl are tenants in common. Carl has a $1/3$ interest in the property, and Paul has a $2/3$ interest in the property.

ANSWER TO QUESTION 5

1. The issue is what respective rights, title and interests, if any, Ann, Beth, Carl and Deb had after Sue died and Frank conveyed Greenacre to Ann, Beth and Carl.

(a) Deb Frank and Sue owned Greenacre as joint tenants. This means that each had a right of survivorship. A right of survivorship means that the estate passes to the surviving joint tenant by operation of law when the other joint tenant dies. Here, Sue died so Greenacre passed to Frank by operation of law. Greenacre did not pass through Sue's intestate estate. As a result, Deb, Sue's sole distributee, received no interest in Greenacre upon Sue's death. A spouse has the right of an elective share, and a joint tenancy is a testamentary substitute, but Deb was Sue's daughter, not her spouse. Therefore, Sue had no right to an elective share. After Sue and Frank died, Sue had no right, title or interests in Greenacre.

(b) Ann, Beth and Carl Frank conveyed Greenacre to Ann, Beth and Carl as tenants in common. Tenancy in common is the default estate created by a conveyance such as the one by Frank, which conveys to parties "in equal shares." This conveyance did not create a joint tenancy because there was no explicit right of survivorship created by the grant to Ann, Beth and Carl. Joint tenancy is disfavored by the law and courts require explicit survivorship language to create a joint tenancy. To create a tenancy in common, the grantor need not use the explicit language "as tenants in common." The language used by Frank was sufficient.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Each tenant in common has the right to use and enjoy the entire property. As tenants in common, Ann, Beth and Carl enjoyed the right to use the entire property of Greenacre. Tenants in common each own an undivided interest in the property. Tenants in common can own equal undivided interests or different undivided interests. Ann, Beth and Carl each owned an undivided 1/3 interest in the property because Frank's conveyance was to each an "equal share".

Tenants in common hold title to the property together as tenants in common. Because the deed validly conveyed the property to Ann, Beth and Carl, they held title to Greenacre as tenants in common.

2. The issue is whether it was lawful for Village to condemn the 10 foot strip of Greenacre for the purpose of expanding a roadway that would be made dangerous by a private developer's building of a shopping mall in the area.

A condemnation of property is a physical, actual taking that must comply with the constitutional requirements contained in the Fifth Amendment of the U.S. Constitution. A municipality may condemn property if it does so for the public good and if it pays just compensation. Here, Village condemned the strip because it was necessary to avoid a serious safety problem. The Village condemned the property for the public good. The fact that Ed also benefited from this condemnation does not make Village's actions unconstitutional. The taking was still for the public good even though it happened to benefit Ed as well.

The Village also paid just compensation. In order to qualify as just compensation, the municipality must pay the owner of the property an amount that corresponds to what the owner is giving up. This is measured by the value of the property to the land owner, not its value to the government. The market value of the strip is \$75,000. This is the amount the Village was required to pay because it corresponds to the value of the land to the land owners. The fact that, to the municipality and Ed, the strip was worth much more than \$75,000 is irrelevant.

The Village's taking was constitutional.

3. The issue is how the condemnation of the 10 foot strip affects the rights of Ann, Beth and Paul under their land sale contract.

Ann, Beth and Paul entered into a land sale contract. Every land sale contract contains an implied warranty of marketable title. A land seller warrants that they will deliver marketable title at closing. In this case, Ann and Beth were unable to deliver marketable title at closing because of the condemnation of the land. Land sale contracts also contain a second warranty that no material misrepresentations have been made by the seller. This second warranty does not apply in this case because Ann and Beth did not misrepresent the existence or lack of existence of the condemnation. Because neither warranty was violated in this case, Ann, Beth and Paul breached the contract. Equity traditionally considers that which ought to be done. Therefore, because the contract was silent about who bore the risk of loss or condemnation, traditional equity principles would put that risk on Paul, the buyer. Under New York law, a buyer does not assume risk of loss to property until the buyer actually takes title. Thus, under New York law, Paul does not bear the risk of loss due to condemnation. Paul will be entitled to reduce the purchase price at closing by the value of the strip of land. Under contracts law, a party is excused from performance where there is a substantial or material breach. The condemnation of this strip of land is not a material breach so Paul would not be excused from performance.

4. The issue is what right, title and interests Paul and Carl will have in Greenacre, assuming Ann, Beth and Paul close title under the land contract.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

Ann, Beth and Carl were tenants in common. Tenants in common can freely transfer their own interests in the property. If some, but not all, tenants in common transfer their interests in the property, this does not affect the remaining tenants' interests. The purchaser takes only as much as the sellers have to convey. On the basis of these rules, Paul and Carl are tenants in common because Paul acquired the interests of Ann and Beth and steps into their shoes, and because Paul's purchase of their interests does not terminate the tenancy in common.

Each tenant in common has the right to use and enjoy the entire property. Paul and Carl each have the right to use and enjoy the entire property.

Tenants in common each own an undivided interest in the property equal to their share of ownership. Tenants in common can own equal undivided interests or different undivided interests. Paul acquired Ann and Beth's 1/3 shares. As a result, Paul has an undivided 2/3 interest in Greenacre.

Tenants in common hold title to the property together as tenants in common. Paul and Carl, as tenants in common, hold title to Greenacre together.

MPT

Glickman v. Phoenix Cycles, Inc.

The client, George Glickman, was demoted from his vice president position at Phoenix Cycles, Inc. shortly after returning to work after taking nine weeks' leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., to recover from a stroke and to care for his newly adopted baby. Glickman seeks legal advice regarding whether his employer's actions violate the rights accorded under the FMLA, specifically, the right to be restored to a pre-leave employment or an equivalent position. The supervising partner has already spoken to Phoenix's in-house counsel in an attempt to resolve Glickman's claims without resorting to litigation. Applicants' task is to draft a follow-up letter persuasively setting forth the basis for Glickman's claims under the FMLA, discussing the specific FMLA provisions that Phoenix has violated, explaining why the exceptions in the Act for key employees do not apply, and setting forth the forms of relief to which Glickman would be entitled should the matter proceed to litigation. The File consists of the instructional memorandum, a transcript of an interview with Glickman, a Phoenix Cycles' press release, a letter to Glickman from the company regarding his FMLA leave, and a management consulting firm's report on Phoenix Cycles. The Library contains excerpts from the FMLA and two federal cases.

You may order copies of the February 2007 MPTs and their corresponding point sheets from NCBE, in June 2007 on the NCBE website, <http://www.ncbex.org>, or telephone, (608) 280-8550.

ANSWER TO ANSWER MPT

Dear Ms. Snow

I am writing this letter on behalf of our client George Glickman in regard to his potential claim against Phoenix Cycles, Inc. under the Federal Family and Medical Leave Act (FMLA).

Phoenix Cycles, Inc. has violated Mr. Glickman's FMLA rights subsequent to his return to work on January 15, 2007. Mr. Glickman took nine weeks leave for his stroke and the adoption of his child pursuant to FMLA Section 2612(a)(1)(B) and (D). As acknowledged by the letter from John Pearsall, CEO dated December 19, 2006, Mr. Glickman was eligible for such leave under FMLA.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

When Mr. Glickman returned from said leave, Phoenix Cycles violated his rights under Section 2614(a)(1)(A) and (B) of FMLA when they demoted him from Vice President of Bicycle Marketing to Coordinator of Bicycle Marketing. Such change was a demotion because it "affected the essential functions of pre-leave employment" (Ridley). Mr. Glickman's position before his leave was not equivalent to his position after his leave and thus violated the act. To be equivalent, an "employee's new position must be virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must involve same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." (Ridley)

While Mr. Glickman's salary is the same as before his leave, his responsibilities have significantly decreased. The position of Vice President has been taken away resulting in a decrease in status, he has lost support staff decreasing his privileges, and he now reports to his former peer, Sue Cowen, resulting in a decrease in responsibility. All these changes were identified by the court in Ridley as proving a demotion in violation of FMLA. Further, Mr. Glickman was not given the right to even interview for the new Vice President position and such a denial would certainly not have happened had he been on the job. Mr. Pearsall acknowledged in the Franklin Business News what a great job Mr. Glickman does with marketing. Failure to even interview him for the new Vice President position looks suspiciously like taking away a right that Mr. Glickman would have had before his leave which would also violate the FMLA. By demoting Mr. Glickman due to his FMLA leave, Phoenix Cycles violated his rights under that act.

While Phoenix Cycles, Inc. may argue that such a demotion was either necessitated by legitimate business reasons or that such demotion is acceptable under the "Highly Compensated Employees" section of FMLA, neither theory is supported by the facts in this matter.

Phoenix may try to claim that the demotion was motivated by legitimate business reasons but such a claim is unsubstantiated by facts. FMLA only confers the job "which the employee would have been entitled had the employee not taken the leave." (FMLA) However, the timing of the restructuring and the availability of the job of Mr. Glickman's raises serious questions about such a legitimate purpose. As Ridley noted, a relatively brief time between return from leave and the adverse employment action is problematic. (Ridley) Here, only shortly after Mr. Glickman returned from his leave, he was told that he would be merged into Ms. Cowen's group. The Company cited a June 15, 2005 Consulting Report as the reason for the restructuring, but the delay in discussion or enforcement of such restructuring coupled with the seeming lack of incorporation of any other suggestion from Hutchinson Consulting seems to hint to the fact that such restructuring was not based on a legitimate business decision and violated FMLA.

Additionally, as stated in your December 19, 2006 letter to Mr. Glickman, you believe you can eliminate his position simply because he is a "highly compensated employee" under FMLA. This is not an accurate portrayal of the law. FMLA allows highly compensated employees to not be reinstated if a substantial and grievous economic injury will result from RESTORING such employee, not their absence. (FMLA, Jones). The court in Jones, while ruling for the School District, ruled that in assessing the economic impact, "the employer may consider the cost of reinstating the employee to an equivalent position if hiring a permanent replacement for the employee on leave was unavoidable. In that case the district had to hire a permanent replacement, had no equivalent position for Jones, and was a public entity which could not raise prices to cover such injury.

Phoenix Cycles is completely different. There is almost no cost in reinstating Mr. Glickman as Mr. Pearsall did his work while he was gone and no additional labor was hired. Further, Phoenix did not have to eliminate Mr. Glickman's position, and could raise prices to make up any small amount of injury they may have had. Due to these factors, there is substantial or grievous

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

economic injury that would result from reinstating Mr. Glickman and thus, failure to do so was a violation of his rights under the FMLA.

Mr. Glickman would like to be restored to his former position with all the benefits and bonus opportunities that he had before his demotion. While litigation is not Mr. Glickman's preference, he will be forced to litigate if he is not restored. If this matter is litigated Mr. Glickman will be entitled to any compensation he has been denied due to the demotion, liquidated damages equally the denied compensation, and reinstatement.

Through such demotion Mr. Glickman is being denied his right to \$25,000 in bonuses that are being given out to the new Vice President pursuant to the line which Mr. Glickman came up with and designed. Had Mr. Glickman not been demoted, the bonus would have been paid to the person in his position, especially considering the new line was his brainchild. As the court said in *Ridley*, there is a strong presumption toward liquidated damages. Should this matter go to trial, Phoenix will be liable for \$25,000 in lost compensation, \$25,000 in liquidated damages, and reinstatement of Mr. Glickman to his prior position.

I look forward to speaking in the near future.

ANSWER TO QUESTION MPT

Dear Ms. Snow:

I am writing in regards to the matter concerning our client George Glickman, who believes he has been wrongfully demoted by his employer, Phoenix Cycles, Inc., after he took leave from work under the federal Family and Medical Leave Act (FMLA). Mr. Glickman has a strong case under the FMLA for a wrongful demotion by Phoenix Cycles following his leave for medical and child-care reasons.

In order to show a prima facie claim for a violation of FMLA rights, the 15th Circuit Court of Appeals has held in *Ridley v. Santacrocce General Hospital* that a plaintiff must establish the following:

- (1) he was entitled to FMLA leave;
- (2) he suffered an adverse employment decision; and
- (3) there was a causal connection between the employee's FMLA leave and the adverse employment action

The Family and Medical Leave Act states that "eligible employees are entitled to a total of 12 work-weeks of leave during any 12-month period for" the placement of son or daughter for adoption and for a serious health condition that makes the employee unable to perform his employment functions (FMLA 29 U.S.C. § 2601). Under the FMLA, Mr. Glickman was entitled to leave due to the stroke he suffered on November 15, 2006 and the subsequent adoption of his daughter. Mr. Glickman took a total leave of nine weeks with five weeks for the serious health condition of the stroke and then four weeks for the preparation of his adoptive daughter. These nine weeks fall under the 12 weeks allocated by the FMLA.

The second prong of a prima facie FMLA claim requires that the employee suffer an adverse employment decision. An adverse employment decision occurs if an employee is not restored to their pre-leave employment or an equivalent position. In *Ridley*, an equivalent position is one that is equal or substantially similar in the conditions of employment. Fact finders consider the duties

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

and essential functions of the new position and whether they are materially different from the pre-leave position. The employee's new position must be virtually identical to the former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It also must involve the same or substantially similar duties and responsibilities requiring the same skill, effort, responsibility and authority. It must also have similar opportunities for promotion and salary increase.

Mr. Glickman can also set forth a showing that he suffered an adverse employment decision upon his return to Phoenix Cycles. Prior to his leave, Mr. Glickman was employed as one of the six division vice presidents in the area of bicycle marketing. This position entailed him to be part of a number of marketing projects, supervise market research, monitor retailers, coordinate product reviews, and industry trade shows. Upon his return to Phoenix Cycles, Mr. Glickman was then placed as a Coordinator of Bicycle Marketing in the new combined division of bicycle and accessories marketing.

Although the salary is the same, Mr. Glickman is no longer a vice president, has lost his support staff, and has to report to Sue Cowen. The taking away of managerial duties and supervisory powers was also regarded as changing an employee's position in Ridely. Therefore, Glickman's loss of supervising market research and reporting to Ms. Cowen supports the conclusion that his new position at Phoenix was not equivalent to his former position. Mr. Glickman has lost out on the status of being a vice president and is now a coordinator. Therefore, Mr. Glickman has suffered an adverse employment decision because his new employment position is not equivalent to his former one. Mr. Glickman might have also lost out on the \$25,000 bonus for the retro bike line which he was given the real credit for by John Pearsall in a Franklin Business News article.

Mr. Glickman can also show that the adverse employment action was causally connected to his taking of FMLA leave. Mr. Glickman noticed the change in attitude from John Pearsall following his request to take leave. Phoenix Cycles has argued there was a legitimate business reason for the change in employment position. A legitimate business reason would not violate the FMLA. However, Mr. Glickman can show that no legitimate business reason exists for the change in position. In this case, the management consulting report by Hutchison Consulting, LLC does recommend a possible merger for the two marketing divisions of bicycle and accessories. However, this was the only change from the consulting report that was implemented. The report was also issued more than 18 months ago and this change was implemented after Mr. Glickman had requested his leave for his adopted daughter's arrival. Although the report recommends these changes, it also recommends identifying a manager with the experience and creativity to lead the new division. Mr. Glickman has been at Phoenix Cycles longer than Ms. Cowen and was credited by Mr. Pearsall himself as having "a talent for knowing what will appeal to our customers..." ("Phoenix Cycles Gearing Up New Product Line, Franklin Business News, November 24, 2006). Therefore, Mr. Glickman's knowledge of the industry, his length of the time with the company, and his creative success should have allowed him to interview for a position in leading the combined division. Even without the interview, there was no legitimate business reason for Phoenix to merge these two divisions from a report filed more than 18 months ago and from which no other recommendations had been implemented. It is also interesting to note that Mr. Glickman's position was the only one eliminated in all of the departments and that Ms. Cowen herself has admitted to the stress underlying the creation of one position for these two divisions.

Although Mr. Glickman is a "salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer" and therefore not entitled to immediately be restored by the employer to his previous position of employment (FMLA 29 U.S.C. § 2601), the test for a "substantial and grievous economic injury" from *Jones v. Oakton School District* is not met. The Court of Appeals stated that a showing by an employer that reinstatement of an

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2007 QUESTIONS AND ANSWERS

employee would result in "substantial and grievous economic injury" would permit the employer to elect not to reinstate that employee under the FMLA exception for highly compensated employees.

The court noted that the requisite economic injury must result from restoring the employee to his prior position or its equivalent and not be caused by his absence. The court defined a "substantial and grievous economic injury" to threaten the economic viability of the employer. A lesser injury of minor inconvenience of costs would not be sufficient but a substantial, long-term economic injury would be sufficient.

Mr. Glickman's reinstatement to his former position would not impose a substantial and grievous economic injury to the corporation. Mr. Glickman has retained the same salary level as his old position. Therefore, there would be no real economic injury to Phoenix Cycles that would be so egregious as to allow for him to not be given his former position or an equivalent one.

As shown, Mr. Glickman will be able to prove a prima facie case for a violation of his FMLA rights and Phoenix Cycles will then be liable for damages equal to any wages, employment benefits, or other compensation denied and an additional amount as liquidated damages and equitable relief such as reinstatement or promotion. In *Ridley*, the court also held that the amount of lost wages can be doubled (as liquidated damages) unless the employer can show the violation was in good faith and that it reasonably believed that the act or omission did not violate the FMLA. In this case, Phoenix will be liable to Mr. Glickman for any benefits he lost, including the potential bonus for the Retro-line, and this award will be doubled since there is no reasonable belief that Phoenix's actions were in good faith. Mr. Glickman will also be entitled to a reinstatement of his former position at Phoenix Cycles.

From the legal precedent and the facts set forth, it is clearly shown that Phoenix Cycles violated Mr. Glickman's rights under the FMLA and wrongfully demoted him upon his return. Even as a highly paid employee not guaranteed reinstatement, Mr. Glickman can show that his new position was not equivalent to his former one, that no legitimate business reason existed for his new position, and that no substantial and grievous injury would be suffered by Phoenix in possibly reinstating him. If Mr. Glickman is not restored to his former position or an equivalent one, Phoenix will be responsible for any benefit losses to him, possible liquidated damages, and a reinstatement of his position.