NEW YORK STATE BAR EXAMINATION
JULY 2009 QUESTIONS AND ANSWERS

Question-One

ChemCorp is a manufacturer of industrial chemicals. On January 2, 2008, Al contracted with ChemCorp to act as the exclusive sales agent in New York State for ChemCorp's products. The contract stated that Al was authorized to make sales of chemicals in ChemCorp's name in accordance with current price lists, and that Al would be paid a commission of 20% on all sales.

Al was immediately successful in expanding sales of ChemCorp's products. Pleased with the increase in its business, on December 31, 2008, ChemCorp sent Al a letter, signed by ChemCorp's president, stating that, in recognition of Al's past outstanding performance as ChemCorp's sales agent, ChemCorp would pay Al a bonus of $10,000 on July 1,2009.

TubeCo is a manufacturer of industrial tubing with a plant located in upstate New York. The manager of TubeCo's plant visited ChemCorp's website to obtain information about purchasing ChemCorp's products. On the website, Al was identified as the exclusive sales agent for ChemCorp in New York State. The website listed Al's name and contact information, and directed potential customers to contact Al to purchase ChemCorp's products. The TubeCo plant manager contacted Al, who thereafter visited TubeCo's plant and quoted prices on several chemicals for TubeCo.

On January 22, 2009, in a contract signed by the TubeCo plant manager and "ChemCorp, by Al," TubeCo agreed to purchase two different chemicals, latex and chlorine, from ChemCorp.

The contract provided that TubeCo would purchase 25,000 gallons of latex at a price of $10 per gallon for delivery on April 1, 2009. At the time the contract was signed, the price list ChemCorp provided to Al listed the price for latex as $13 per gallon. Although Al was aware that the contract provided for a lower price than that indicated on the price list, he hoped to persuade ChemCorp to honor the lower price in order to make the sale to TubeCo, a new customer. ChemCorp had previously declined to approve any sale at a price lower than that specified on its price list.

The contract further provided that TubeCo would buy 3000 pounds of chlorine per month from ChemCorp for 24 months, at a price of $2 per pound. The contract specified that the chlorine would be 93% pure, and would be delivered on or before the 30th of each month, commencing March 30, 2009.

ChemCorp refused to deliver the latex to TubeCo for the specified contract price, informing TubeCo that Al was not authorized to enter a contract at that price. TubeCo thereafter contracted with another supplier to purchase latex for $12 per gallon. TubeCo now claims that ChemCorp and Al are jointly liable to it for the difference between the contract price and the price it paid to obtain latex from an alternative supplier.

After the first shipment of chlorine was made, TubeCo tested the chlorine and found that it was only 90% pure. TubeCo nonetheless accepted the chlorine without objection and used it in the plant, without any negative consequences. Chlorine that is 5% below the contract specification for purity is generally regarded in the industry as within acceptable tolerances. After accepting

three shipments of chlorine that were 90% pure without complaint that they did not meet the contract specification, on June 1 TubeCo's plant manager sent a letter demanding assurances from Al and from ChemCorp that future deliveries of chlorine would be 93% pure. Al and ChemCorp both ignored TubeCo's letter. TubeCo refused to accept the June 30 shipment after testing the chlorine and finding it to be only 90% pure. On July 15, TubeCo sent a letter canceling the contract for chlorine. ChemCorp now wishes to enforce the contract for the purchase of chlorine, claiming the contract was improperly cancelled by TubeCo.

ChemCorp now refuses to pay the bonus to Al, claiming that it received no present or future benefit for the payment, and thus the promise contained in its letter is unenforceable.

1. Are (a) ChemCorp and (b) Al liable to TubeCo on the contract for the sale of latex?

2. Did TubeCo properly cancel the contract for the purchase of chlorine?

3. Is ChemCorp's promise to pay a bonus to Al enforceable?

ANSWER TO QUESTION 1

1. a.) The issue is whether the contract was validly entered into between ChemCorp and TubeCo.

As a general rule, an agent creates rights and obligations for the principal if the agent has actual authority from the principal to do so. However, in certain circumstances, the agent's actions can bind the principal even in the absence of actual authority. This can happen if a person is held out by the principal as the principal's agent in a position of authority that would usually be associated with the power to bind the principal through relevant actions. This kind of authority is called apparent authority. The principal is bound by the agent's conduct if a third party reasonably relied on the agent's apparent authority. Apparent authority may also exist when the agent exceeds the limits of the agent's actual authority, provided the principal's counterparty was not aware of the limits on the agent's authority.

Here, Al was identified at ChemCorp's website as its exclusive sales agent in New York State. In addition, potential purchasers of ChemCorp's products were directed to contact Al to purchase ChemCorp's products. Hence, it was reasonable for ChemCorp to expect that its potential customers, including TubeCo, will consider Al to be ChemCorp's agent with authority to enter into sales agreements on behalf of ChemCorp. Furthermore, the website did not contain any information on the limits of Al's authority. Therefore, it was reasonable for TubeCo to rely on Al's apparent authority to enter into sales contracts on behalf of ChemCorp, including to establish price terms in such contracts.

Therefore, ChemCorp is bound by the contract executed by Al. ChemCorp is liable for TubeCo's cover damages since the substitute purchase does not appear to have been made in bad faith (it is noteworthy that the price for the substitute products was lower than ChemCorp's own list price).

b.) The issue is whether Al is liable under the contract with TubeCo despite purporting to execute it on behalf of ChemCorp.

As a general rule, the agent is not liable on the contracts entered into on behalf of the principal to the principal's counterparty. Such contracts create rights and obligations for the principal but not for the agent. As an exception, the agent becomes liable under a contract where the principal was not properly identified.

Here, the exception is not applicable. The contract properly identified ChemCorp as a party to the contract. In addition, Al was contacted by TubeCo as ChemCorp's agent for purposes of transacting business with ChemCorp. There was nothing in the contract or in the negotiations between Al and TubeCo that could have given TubeCo the impression that it was dealing with Al directly rather than with ChemCorp via Al as its agent. Hence, there are no grounds for imposing on Al personal liability under the contract.

2. The issue is whether the chlorine contract was properly cancelled by TubeCo.

As a general rule of Uniform Commercial Code ("UCC") Article 2, in an installment contract such as the one between ChemCorp and TubeCo, the buyer can cancel the contract with respect to an installment if such installment is substantially impaired, or with respect to the entire contract if the defects in the installment amount to a substantial impairment vis-a-vis the entire contract. The buyer may return the goods within a reasonable time after inspection. If the return is not made, the goods are deemed accepted. Demanding assurances is one of the remedies available to a party to a sales contract if such party has reasonable grounds to suspect that the other party may not perform according to the contract. If the request to provide assurances is not honored, the requesting party may treat such failure to provide assurances as anticipatory repudiation and cancel the contract. However, a party may effectively waive its right to demand assurances and cancel the contract based on the failure to provide them if that would be inconsistent with the prior dealing between the parties.

Here, the defects in the chlorine supplied by ChemCorp do not amount to substantial impairment, because, in particular, they are within the standard set by the usage of trade existing in the industry. In addition, TubeCo previously accepted the deficient chlorine without objection. The demand for assurances might be justified since ChemCorp has continuously breached its obligations under the contract by supplying deficient chlorine. However, in the present case TubeCo accepted the deficient chlorine without objection. The quality of chlorine did not deteriorate with each subsequent installment, and there was nothing in the parties' relationship that suggested that ChemCorp might commit any other breaches of contract. Therefore, demand for assurances was not justified under the circumstances, ChemCorp was not under obligation to respond, and TubeCo was not justified in canceling the contract.

3. The issue is whether ChemCorp's promise to pay a bonus to Al is enforceable.

As a general rule, to be enforceable a promise must have consideration. Past performance, or performance of a preexisting duty to the same party, is not treated as acceptable consideration.

However, in New York a promise made in a signed writing that lists past consideration (which can be verified) is enforceable.

Here, ChemCorp's letter meets the above requirements. The increase in ChemCorp's can be verified by looking at its financial statements. Hence, the promise is enforceable.

ANSWER TO QUESTION 1

1. a.) The issue is whether an employer is liable on a contract entered into by its employee. In New York, the rule is that employees are agents of their employers because the employer-employee relationship meets the test for agency. That is, employers and employees assent to the principal-agent relationship, the employee acts for the benefit of the employer, and the employer is entitled to control the manner and methods of the employee's work. An agent is liable for contracts entered into by its principal if the agent was authorized to contract on behalf of the principal. Authorization can be either express, implied or apparent. Express authority means that the principal has explicitly told the agent that he is entitled to act. Implied authority means that the agent believes he is entitled to act because action is necessary to carry out his agency, the agent has acted similarly in prior dealings between the principal and agent, or it is customary for agents in that position to act in that way. Apparent authority occurs when the principal cloaks the agent with the appearance of authority and a third party reasonably relies on the agent's appearance of authority in dealing with the agent. If an agent acts with express, implied or apparent authority in contracting on behalf of the principal, the principal is bound by the terms of the contract.

Here, Al was the exclusive sales agent of ChemCorp in New York State. Because the contract between ChemCorp and Al specifically designated Al as an agent, agency principals apply to the relationship. Al had ChemCorp's authority to contract for the sale of chemicals in New York State, as specifically authorized by his employment contract. However, the contract limited Al's contracting authority to sales in accordance with current price lists. Because of this explicit limit in Al's contract, he did not have express authority to contract with TubeCo for less than the prices listed on the price lists. Al contracted to sell TubeCo latex at $10 per gallon, which was below the listed price of $13 per gallon. Therefore, Al did not have express authority to enter into the contract with TubeCo on those terms. Similarly, Al did not have implied authority to enter into the contract on those terms because entering into a contract to sell chemicals for less than ChemCorp's listed price was not necessary to perform his duties of selling chemicals, it is probably not customary for sales agents to sell products for less than the company's list prices, and Al could not have thought he had authority to do so because of prior dealings with ChemCorp. In fact, the facts explicitly state that ChemCorp had previously refused to accept contracts purporting to sell chemicals at less than the list price. However, Al did have apparent authority because ChemCorp cloaked him with the appearance of authority and a third party, TubeCo, specifically relied on that appearance of authority. Specifically, ChemCorp listed Al as the exclusive sales agent for ChemCorp in New York on its website and directed potential customers, including TubeCo, to contact Al regarding product sales. It was reasonable for TubeCo to believe that Al had authority to enter into the contract based on this appearance of authority. The provision in Al's contract prohibiting him from contracting to sell chemicals for less than the list price takes the form of a secret limiting instruction that TubeCo could not

reasonably have known of. Therefore, TubeCo reasonably relied on Al's appearance of authority in entering into the contract. Because ChemCorp cloaked Al with the appearance of authority and TubeCo reasonably relied on that appearance, Al had apparent authority to enter into the contract on behalf of ChemCorp and ChemCorp is bound by the contract. ChemCorp will be liable to TubeCo for TubeCo's expectation damages, the difference between the contract price and the amount TubeCo had to pay to get the latex elsewhere.

b.) The issue is whether an agent acting with the principal's authority in entering a contract is personally liable on the contract. In New York, the rule is that agents acting with authority on behalf of their principals are not personally liable on contracts entered into. There is an exception where the agent does not disclose the principal to the other party to the contract or only partially discloses the principal. In this case, the third party would be entitled to sue either the agent or the principal on the contract.

Here, Al was ChemCorp's agent and was acting with ChemCorp's apparent authority in contracting with TubeCo, as discussed above. Al is therefore not personally liable on the contract, only ChemCorp is liable. Further, Al did not fail to disclose the principal or only partially disclose the principal. Rather, TubeCo knew it was contracting with ChemCorp because they got Al's contact information from ChemCorp's website, and Al signed the contract as "ChemCorp, by Al." The principal was therefore fully disclosed and therefore the exception does not apply. Al, as agent, is not personally liable on the contract with TubeCo.

2. The issue is whether a buyer of commercial goods may cancel an installment contract where prior installments have been accepted although not perfect tenders and the seller has failed to supply assurances that future installments will meet the perfect tender standard. In New York, contracts for the sale of goods are governed by Article 2 of the UCC. Installment contracts are those contracts that, by their terms, are delivered and paid for in installments instead of by means of a single shipment. Although the general rule is that the buyer of goods under Article 2 of the UCC is entitled to perfect tender, installment contracts may only be cancelled where an installment is so defective that it substantially impairs the value of the entire contract. Similarly, individual installments may only be rejected if the installment is substantially impaired. Where a buyer requests assurances that future goods will satisfy the perfect tender requirement (based on the buyer's reliable information indicating that the seller may fail to comply) and the seller fails to provide such assurances within 10 days of the buyer's demand, the buyer is generally entitled to treat the failure as an anticipatory repudiation, cancel the remainder of the contract and immediately sue for damages. However, this remedy will not be available where the contract is an installment contract, the buyer has accepted several installments despite their failure to meet the perfect tender requirement, and the defects in the goods do not rise to the level of substantial impairment.

Here, the contract is for the sale of goods because chemicals constitute goods. The contract is therefore governed by Article 2 of the UCC. The contract is an installment contract because it provides for one installment to be shipped every month, each installment consisting of 3000 pounds of Chlorine. The contract is therefore governed by the principals of substantial impairment and TubeCo is not entitled to reject an installment unless it is substantially impaired, and may not cancel the entire contract unless the defect in an installment substantially impairs

the entire contract. Here, the defect did not substantially impair either an individual installment or the contract as a whole. The goods were non-conforming because the chlorine was only 90% pure where the contract specified that it would be 93% pure. The purity of the product delivered was only 3% below the contract specification and a 5% variance is considered acceptable in the industry. Also, TubeCorp accepted several shipments without objection and the chlorine was used without any negative consequences. Therefore, there was no substantial impairment and TubeCo was not entitled to reject an installment or cancel the entire contract. It is irrelevant that TubeCo asked for assurances because TubeCo had previously accepted the product without objection and the defect in the product did not constitute a substantial impairment. ChemCorp was performing substantially pursuant to the terms of the contract, and TubeCo was therefore not entitled to treat the lack of assurances as an anticipatory repudiation and improperly cancelled the contract.

Although TubeCo was not entitled to cancel the contract or reject any installments, TubeCo would be entitled to sue to recover any damages it suffered as a result of accepting the non-conforming goods. If the chlorine delivered was worth less than the chlorine contracted for, for example, TubeCo could sue for the difference in price and would be entitled to recover that difference as its expectation damages.

3. The issue is whether a written and signed promise to pay a bonus is enforceable where there is no consideration other than past performance. In New York, the general rule is that a contract is not enforceable without consideration. Consideration must be something that is bargained for, and past services and prior performances generally do not constitute consideration based on the common law, which governs all contracts other than contracts for the sale of goods or contracts for the lease of goods. However, in New York, where a promise to pay is in a writing signed by the promisor, the writing takes the place of consideration and the promise will be enforceable against the promisor despite the existence of any further consideration.

Here, the promise to pay Al a $10,000 bonus was supported only by the consideration of his past performance. This would generally be insufficient to constitute consideration and create a binding contract. However, the promise was in writing, signed by the president of ChemCorp. The writing specifically references Al's past services as the consideration for the bonus. The writing therefore takes the place of consideration and the contract is enforceable against ChemCorp.

Question-Two

Ann borrowed $900 from Dan in April of this year so she could build a gazebo in her backyard. She said she would pay him back as soon as possible. In June, frustrated by Ann's non-payment of the loan he made to her, Dan went to Ann's home. He told Ann that if she did not pay him immediately, he would come back the next day, hurt her and tear down the gazebo which she had built. Fearful of his threat, Ann wrote a check for $900 to Dan, aware that she had only $300 in her checking account at Bank. The next day, Dan deposited Ann's check into his checking account at Credit Union. Credit Union told Dan that it normally takes three days for the funds to become available.

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Dan owed $500 in rent to his landlord. Dan asked his neighbor, Ernie, if he could borrow $500 until Ann's check cleared. Ernie agreed, as long as Dan signed a note promising to repay Ernie. Dan wrote on a piece of paper "IOU $500", signed it, and gave it to Ernie.

Three days later, Dan was notified that Ann's check bounced due to insufficient funds. Dan immediately called Ann, accused her of writing a bad check, and demanded that she make good on the check. Ann thereafter deposited sufficient funds into her account at Bank to cover the check. Dan re-deposited the check and later Dan was advised by Credit Union that the check had cleared and the funds were available for his use.

Ernie heard that Ann's check to Dan had cleared so he asked Dan to pay off the $500 debt. Dan refused and denied ever borrowing money from Ernie.

1. Did Dan commit the crime of larceny against Ann?

2. Did Ann commit the crime of issuing a bad check? Assuming that she committed the crime does she have any defenses?

3. Is the paper Dan signed and gave to Ernie a negotiable instrument under the Uniform Commercial Code?

ANSWER TO QUESTION 2

1. Dan's "larceny" against Ann:

The issue is whether the crime of larceny is committed when a person threatens to physically injure another or damage another's property in order to obtain the payment of money.

At common law, larceny is defined as the trespassory taking and carrying away of the property of another with the intent to steal. A complete defense to larceny is that the taking is under the claim of right (i.e., the property actually belongs to the person taking it). Extortion is a form of larceny that consists of the taking of property of another through the use of a threat, with the intent to steal. Robbery is another form of larceny, which includes the use of force or threat of force in the commission of a larceny that is from a person's body or in the person's physical presence.

In this case, Dan went to Ann's home, but there is no indication that he did so as a trespasser. He had a preexisting relationship with Ann (as evidenced by his willingness to lend her money), and therefore he was likely to be invited to her residence. He also did not covertly take property from her residence, so he did not commit a trespass to chattel while he was at her residence. Therefore, he is not guilty of traditional common law larceny. However, he may still be guilty of Extortion, a form of larceny, if he threatened Ann in order to take her property with an intent to steal. Dan did make threats to harm Ann and her property in the future if he was not paid. However, when Dan took the check for $900, he did so under a claim of right, since he believed that it was rightfully his property which he was entitled to have returned under the terms of their agreement. His threats of force and the taking of the money directly from Ann's person may also lead to a

conclusion of robbery, but the threats were of future (not imminent) harm, and, once again, the intent to steal element is missing.

Since Dan's taking of the check from Ann was under a claim of right, and not with the intent to steal, he is not guilty of larceny.

2. Ann's Bad Check:

The issue is whether writing a check with the knowledge that there is not enough money to cover the amount of the check is sufficient for the commission of the crime of issuing a bad check.

The crime of issuing a bad check consists of writing a check, and placing it into commerce, conveying it as consideration for an obligation, with the knowledge that there are insufficient funds to cover the check. There are defenses if the issuer reasonably believed that there were sufficient funds available. In addition, the statutory affirmative defenses to all crimes are available - i.e., 1) insanity, 2) extreme emotional disturbance, 3) entrapment, and 4) duress. Duress is a defense if a person committed a crime due to the threat of imminent harm, which they would not have otherwise committed. An affirmative defense such as duress must be raised by the Defendant and proven by a preponderance of the evidence.

In this case, Ann could be guilty of issuing a bad check because she wrote a check for $900, gave it to Dan in satisfaction of a debt she owed to him, and she had knowledge that she only had $300 in her account. However, she may be able to plead the affirmative defense of duress, since Dan threatened to use force against her and her property. Ann would have to raise the defense of duress and prove its elements by a preponderance of the evidence to succeed. In this case, Dan's threat was to come back tomorrow, so she is likely to fail to prove a threat of "imminent" harm. Ann may also claim to have a defense because, upon demand to "make good" on the check, Ann deposited sufficient funds into her account to cover the check. Therefore, Dan received payment on the check, albeit with a slight delay and possible fees from the bank.

Therefore, Ann committed the crime of issuing a bad check because she passed a bad check with the requisite intent, but she may have a defense since she made good on the check promptly thereafter.

3. Dan's IOU to Ernie:

The issue is whether an "IOU" which is signed and delivered is sufficient to qualify as a negotiable instrument under the Uniform Commercial Code (U.C.C.).

Under U.C.C. Article 3, negotiable instruments consist of drafts and promissory notes which satisfy six qualifications: The instrument must be 1) in writing, 2) payable "to the order of or to the bearer of the instrument, 3) for the payment of a sum certain, 4) signed by the party to be bound, 5) an unconditional promise to pay, and 6) payable at a definite time or on demand.

In this case, there is a writing, it is signed by the party to be bound, and it is for a sum certain. However, there is no affirmative unconditional promise to pay (a simple "IOU" is not enough to

satisfy, it must be a promise to actually pay), there is no definite time stated that it must be paid (although some silent documents will infer payment on demand), and the instrument is not made payable "to the order of or to the bearer of the instrument.

Therefore, the IOU signed by Dan and given to Ernie is not a negotiable instrument under the U.C.C. Although, Ernie may still be able to enforce it as a contract for payment if he proves there was an offer, acceptance and consideration.

ANSWER TO QUESTION 2

1. The issue is whether the elements of larceny have been established as against Dan.

Larceny is the intentional trespassory taking of the property of another with the intent to permanently deprive them of possession, without consent, or with consent obtained fraudulently. Larceny in New York encompasses all forms of common law larceny, including larceny by trick and false pretenses. Taking property subject to a valid claim of right, i.e. with the belief that it is actually yours, does not constitute larceny. For example, taking back your lawnmower from your neighbor, to whom you loaned it, is not larceny. Extortion is the taking of another's property by the threat of future harm or force.

Dan took property from Ann in the amount of a $900 check. He intended to permanently deprive her of the property, and he obtained her consent by extortion. He threatened to hurt her physically and to destroy her gazebo unless she paid him, and that threat is what caused Ann to consent to turn over the check to Dan. While it is true that Dan was owed money by Ann, this is not a defense to larceny because he did not have the right to take her money two months later (where the loan was not required to be paid within a specific time) and certainly did not have the right to do so by threatening to harm her property or her person.

2. The issue is whether Ann can be guilty of the crime of issuing a bad check; e.g. whether the elements of the crime of issuing a bad check have been established, and whether she can assert the defenses of duress and depositing funds.

Issuing a bad check is a crime in which 1) a person puts a bad check into circulation, 2) knowing at the time that the account contains insufficient funds to cover the payment of the check, 3) expecting that payment will be denied by the bank, and 4) such payment is in fact denied.

Ann is guilty of all these elements. She wrote Dan a check for $900 and gave it to him as payment, thus putting it into circulation. She knew that she only had $300 in her account at the time and that the check would bounce because of that fact (she could reasonably expect that Dan would cash the check soon afterwards), and the bank did in fact refuse payment because the check bounced due to insufficient funds. Therefore, the elements of the crime of issuing a bad check have been met.

However, Ann may be able to assert two successful defenses. First, she can claim duress. Duress is a valid defense to any crime in NY; the defendant must establish that they only committed the crime because they were being threatened by the immediate use of physical force. Dan was

threatening to return the next day and hurt her and destroy her property. This type of threat would ordinarily constitute duress because it is a threat of physical force, and likely a credible threat. However, it was not immediate. If Dan had threatened to hurt her at that time, and she wrote the check in response to that immediate threat, it would be duress, but the fact that Dan was threatening to come back later on to hurt her does NOT suffice.

Secondly, Ann can defend because she deposited sufficient funds in her account within 10 days of issuing the bad check. Generally this is a defense to the crime of issuing a bad check; if the issuer of the check knows funds are insufficient but responds by depositing funds into their account within 10 days, they have a defense. Ann's deposit of funds was 4 days after she issued the check, and once she deposited the money the check cleared and funds were available to pay Dan.

3. The issue is whether the "IOU" from Dan to Ernie was a negotiable instrument under the UCC (Article 3)?

To be a negotiable instrument under the UCC (as opposed to a mere contract), the instrument must satisfy several criteria. The instrument must be 1) in writing, 2) made to order, 3) for a sum certain, 4) signed, 5) an unconditional promise (e.g. not containing any conditions or conditional promises), 6) payable in currency, and 7) payable on demand or on a date certain.

The IOU from Dan to Ernie was not a negotiable instrument because it did not meet these criteria. It was in writing and signed by Dan, for a sum certain ($500), and contained an unconditional promise (IOU would probably suffice as an unconditional promise) to pay. However, it was not made to order, payment in currency was not specified, and most significantly, the payment was not specified to be on demand or at a date certain. Because this information is not provided on the face of the instrument, it is not negotiable.

As a consequence, Ernie cannot transfer the instrument because it is not negotiable. He also cannot enforce it as a contract because it is not a valid contract. It can be construed as a promise by Dan to pay Ernie $500, but there is no consideration for that promise. Normally past consideration is not valid, and though it is valid in NY as long as there is a signed writing, the signed writing must state the past consideration. The simple phrase "IOU $500" is not a statement that references any past consideration. Therefore, this is not a valid contract nor a negotiable instrument.

Question-Three
Husband and Wife were married in New York in 1995 and thereafter resided in Suffolk County. They had two children, Daughter, born in 2000, and Son, born in 2002. In May 2004, after years of bickering, Husband and Wife, each represented by counsel, entered into a valid separation agreement. The separation agreement included the following provisions:

"(1) Husband and Wife shall have joint custody of Daughter and Son. Both children shall reside with Wife, but Husband and Wife shall consult and make joint decisions concerning the

upbringing of the children. Husband shall have visitation rights with the children on Wednesday night each week and on alternate weekends.

(2) Husband shall pay Wife maintenance of $200 per week during his lifetime or until Wife remarries or dies, whichever occurs first.

(3) Pursuant to the Child Support Standards Act, Husband shall pay Wife child support of $140 per week for each of their two children while the children reside with Wife and until each child is emancipated.

(4) In the event of a subsequent divorce, the separation agreement shall be incorporated into but shall survive the judgment of divorce."

The separation agreement was promptly filed in the Suffolk County Clerk's office. In June 2004, Husband moved into an apartment with Girlfriend.

During the next two years, Husband continued to live with Girlfriend, and he fulfilled his financial obligations under the separation agreement, except that he was as much as a week late in making his maintenance and child support payments on six separate occasions. He also failed to exercise his Wednesday visitation rights with his children.

In 2006, Husband duly commenced an action for divorce against Wife in Suffolk County, based upon their separation agreement. In her answer Wife asserted, in defense, that Husband was not entitled to a divorce because of his continuing adultery with Girlfriend, his late payments of maintenance and child support, and his failure to exercise visitation on Wednesdays. After a trial, at which the foregoing facts were established, the court granted Husband a judgment of divorce against Wife. The judgment expressly incorporated Husband's obligations to Wife for maintenance and child support as set forth in the separation agreement and further provided that the separation agreement would survive the judgment.

Following their divorce, Husband and Wife argued constantly about Daughter and Son. Wife objected to Husband taking Daughter and Son to the apartment Husband shared with Girlfriend. Husband, on the other hand, complained that Wife often left the children unattended, refused to consult with him concerning their upbringing, and frequently prevented him from exercising his weekend visitation rights.

In January 2008, Husband became permanently and partially disabled as a result of which he lost his job, at which he had been earning $1,000 per week. Thereafter, because of his disability and despite his earnest efforts, he was only able to find employment paying $500 per week. Husband has no other source of income and has no assets.

In May 2009, Husband duly moved for an order reducing his maintenance obligation to Wife, granting him sole custody of Daughter and Son, and if the court declined to grant him sole custody, reducing his child support obligations to Wife from $140 to $65 per week for each child due to his disability. In opposing Husband's motion, Wife asserted that her separation agreement

with Husband constituted a binding contract in all respects which was not subject to modification. The motion papers of the parties recited the pertinent foregoing facts.

On the return date of the motion, the court (i) ordered a hearing on Husband's request for a downward modification of maintenance and child support, and (ii) without ordering a hearing, denied Husband's motion for a change of custody on the grounds that the provisions of the separation agreement were conclusively binding with respect to custody, and that in any event, the facts alleged by Husband do not justify a change in custody.

1. Did the court properly grant Husband a judgment of divorce against Wife?

2. What are the legal issues and factors that the court should consider at the hearing for downward modification for maintenance and child support?

3. Was the court correct in denying Husband's motion for a change of custody of Daughter and Son?

ANSWER TO QUESTION 3

1. The issue is whether Husband was entitled to a conversion divorce from Wife.

Under the Domestic Relations Law (DRL), a party can obtain a conversion divorce by showing that the spouses had lived apart, pursuant to the terms of either a separation decree or a valid, filed separation agreement, for at least one year with no intent of reconciling. The other spouse is barred from raising adultery as a defense. The agreement will only be deemed to have been breached if it is violated in a material way; minor failures to keep to its terms do not rise to the level of a breach.

In this case, the requirements for a conversion divorce were met. As a result, the DRL bars Wife's adultery counterclaim. Husband and Wife entered and filed a valid separation agreement. (Note also that the court has jurisdiction over them—both appear to remain within the state, and, in any event, the divorce arises under an agreement entered into within New York.) Further, they lived apart for two years, and there is no evidence whatsoever of any intent to reconcile during that time. Husband mostly fulfilled the requirements of the agreement, too. Admittedly, he was late making maintenance and child support payments by up to a week on six occasions. But because these delays were brief and occurred rarely—6 times out of 104 opportunities—they are not material violations. He therefore did not breach the agreement because of his minor problems fulfilling his financial obligations.

Husband's failure to exercise his visitation rights on Wednesday nights also does not amount to a material breach. Husband had visitation rights on both Wednesday nights and alternate weekends, and the facts indicate that he exercised them on the weekends. The visitation clause was therefore only partially breached. Because he and Wife lived pursuant to the terms of the agreement, with only immaterial violations of its terms, Husband is therefore entitled to a judgment for divorce.

Note: the issue of breach with regard to visitation rights is not entirely clear-cut. A court might find that Husband's failure to exercise his rights deprived the children (or Wife) in a material way of some benefit. If a court did find this, Husband would not be entitled to a divorce judgment on the grounds that he failed to satisfy the requirements of the separation agreement. Wife could then obtain a divorce on the ground of Husband's adultery.

2. a.) The question is what legal issues and factors the court should consider in determining whether to modify the maintenance award downward.

A separation agreement is a contract. The standard for modifying it after a divorce depends on whether it merges with the divorce decree or whether it is incorporated by and survives it. If it survives, the standard for modification is extreme hardship suffered by the party seeking the modification. If it merges, the standard is a substantial change in circumstances for the party seeking the modification. In determining how to modify it, the court looks at equitable factors, including fault, the needs of the parties based on their accustomed style of living, their current and future earnings capacities, and any other equitable factors the court deems relevant.

Here, because the separation agreement survived the divorce decree and Husband seeks the modification, the standard for making a modification to maintenance is extreme hardship to Husband. I now discuss the relevant considerations. Apparently through no fault of his own, his income has been cut in half from its prior level despite his honest efforts to mitigate the harm. He also has no assets. We know less about Wife's circumstances. It is unclear whether she is currently working or whether she used to work, and, if so, as what. She does have physical custody, however, of two fairly young children—ages 7 and 9—which cuts a bit against her earning capacity. The court should also examine both Husband and Wife's current expenditures. Both are entitled to have them remain as close to the status quo as possible. Because the divorce was a separation divorce, fault is not a relevant consideration.

Note: If the standard for making a modification is actually a substantial change in circumstances, the same factors should be considered.

b.) The question is what legal issues and factors the court should consider in determining whether to modify the child support award downward.

Under the DRL, child support agreements are set by default by the Child Support Standards Act, but that may be overridden by agreement. The best interests of the child are what matters when a court sets a child support figure. A child support agreement can be modified for two reasons: (1) if it is in the best interests of the child to do so or (2) if one party has suffered a substantial change in circumstances that is unreasonable and unforeseen. In determining the best interests of the child, the court again looks at a range of equitable factors, including which parent has physical custody, and many of the factors listed above. Fault and visitation rights are not to be considered.

In this case, Husband has asked for a downward modification of child support on the ground that he has suffered a substantial change in circumstances that was unreasonable and unforeseen. He is not basing it on the best interests of the child. He likely satisfies this standard. The change in

circumstances was unreasonable—he lost his job because of a permanent partial disability, and his income was cut in half because, despite his good faith efforts, he was unable to find a replacement position that paid as well. It was also likely unforeseen that this would happen. The court should then use the same equitable factors as discussed in part (a) to determine the size of the modification.

In addition to those factors, it will also matter which parent has physical custody. The best interests of the child, however, must remain the paramount consideration for the court.

3. The issue is whether the court was correct to deny without a hearing Husband's motion for a change of custody of Daughter and Son.

The standard for child custody determinations is the best interests of the child. This applies to initial custody determinations and to later modifications. There are no presumptions in favor of one parent or the other, but the court must look at the totality of the circumstances, encompassing a range of equitable factors. These include the preferences of the parents and children, the circumstances in each household, the disruption to the children resulting from a change in custody, and any other factors the court deems proper.

In this case, the court was incorrect to deny Husband's motion without a hearing. The best interests of the child is the governing standard—the separation agreement is not conclusively binding on the issue of custody. Further, the court's alternative grounds, that the facts alleged do not justify the change in custody, is improper. Husband has made out several valid claims for a change in custody. He alleges neglect, which, if proven, is decidedly not in the best interests of the children. He also alleges that Wife is preventing him from visiting his children or otherwise play as full a role in their upbringing as he is entitled to under the separation agreement and under the DRL. These are serious claims that go to the children's best interests. (We presume that it is in the children's best interests to have both birth parents involved in their upbringing.)

Wife's response is insufficient to overcome these allegations. It lacks specificity as to why exactly taking Daughter and Son to Husband and Girlfriend's apartment is objectionable. Unmarried people cohabitating promiscuously may be seen as objectionable, but a stable relationship between unmarried people should not be. In any event, this response is not sufficiently powerful to overcome Husband's allegations.

Thus, the court was incorrect to deny Husband's motion without holding a hearing to gather evidence about the truth and weight of his allegations and Wife's response. The allegations should not be accepted without corroboration, but they are sufficiently weighty to demand a hearing. Daughter and Son could be called on to testify, or at least to speak to the judge in camera, without any lawyers present, but with a record made of the discussion to permit review on appeal.

ANSWER TO QUESTION 3

NEW YORK STATE BAR EXAMINATION
JULY 2009 QUESTIONS AND ANSWERS

1. The issue is whether adultery is an appropriate defense to the filing for a conversion divorce.

The Rule in NY is that a divorce may be granted only in the presence of certain grounds. One of those is that the couple has been living apart under a valid separation agreement or separation decree for at least a year. If the terms of the separation agreement are not substantially complied with, the court may rescind the agreement, and a conversion divorce may not be granted. In that case, other grounds for divorce may be raised, such as adultery, to seek a divorce. If, however, the agreement has been complied with, it may not be rescinded and it is inappropriate to raise adultery in the action. Further, the only time adultery of one spouse is a defense to a divorce action is when the spouse bringing an action for divorce based on the adultery of the other is defended against based on his own adultery.

In this case, Husband and Wife have been living apart for over a year under a separation agreement because Husband moved out of the marital home two years before commencing the divorce action. To sue under a separation agreement, it must have been duly executed and filed with the court. The agreement must be in writing, signed, authorized and the physical separation must be before or soon after the agreement. Here, although there was a lag of one month between the drafting of the agreement and Husband moving out of the house, he did move out shortly after the agreement was made. Also, the agreement was filed with the court before the action was commenced because it was filed shortly after being made. (They could have waited to file the agreement until right before bringing the action, it is not necessary to file the agreement immediately.) There is no indication that Husband and Wife ever cohabitated with the intention to reconcile, thus they appear to have been living apart under a valid agreement for over a year, which is sufficient grounds for a conversion divorce.

However, if one party has not substantially complied with the requirements of the separation agreement, the other party may seek for rescission, thus preventing a conversion divorce. Perfect, exact compliance with the terms of the agreement are not required and the court will not rescind the separation agreement for minor deviations.

Here, Wife has argued that Husband's adultery, failure to make payments on time, and failure to take visitation as often as agreed to are breaches of the agreement allowing rescission. However, as previously discussed, adultery is not an appropriate defense to a conversion divorce and will not cause the agreement to be rescinded. Further, Husband's violations of the agreement are not severe enough to warrant rescission. He was to make weekly payments of support and maintenance to Wife, and over the course of two years (104 weeks) was late 6 times, which would not be a substantial violation. Further, the fact that he failed to exercise his visitation right with the children as often as he could have is not a breach of promise to Wife and will not cause rescission despite the fact that he gave up his visitation right once a week, every week.

Therefore, the court properly granted Husband's request for a conversion divorce.

2. The issue is what are the legal issues and factors that should be considered in a downward modification of maintenance and child support under a separation agreement that survives a divorce.

The rule is that although the court may consider any relevant evidence in setting maintenance and child support payments, if those payments were set under a separation agreement that was duly executed, they will not be modified by the court absent extreme hardship or unforeseen and unreasonable changes in circumstances, or some problem with the creation of the separation agreement to begin with. The terms of a separation are presumed to survive the divorce unless there is an express merger. Furthermore, when setting child support payments, although the court will give weight to the voluntary agreement of the spouses, it must also consider the best interests of the children to make its decision.

Here, both parties were represented by counsel in drafting the separation agreement, so there is no reason to think that the terms were unfair to either party at the time of drafting. This is borne out by the fact that Husband was able to make his payments without problem for the two years of separation and three years of divorce. Additionally, the separation agreement was not merged into the divorce decree, so it remains enforceable.

However, here Husband has a strong argument that support should be adjusted downward. His permanent partial disability could be something unforeseen by either party, although this is not clear from the facts. (If the parties had seen this disability coming, for example as a result of a chronic illness, this would be a weaker argument, because presumably they worked the coming disability into their calculations at the time of drafting.) Furthermore, the fact that his salary has been cut in half may make the current payments unreasonable, since he searched for new work in good faith and did not purposefully seek less remunerative employment to get out of paying his obligations to his former wife and children. Currently, he must pay his ex-wife $200 per week in maintenance, and child support of $280, for a total of $480. Since his salary is only $500, this leaves him only about $80 per month to live on. This makes the payments seem unreasonable.

Furthermore, the original child-support calculations were made based on the Child Support Standards act which calculates payments based on the family income, then pro-rates the payment based on each spouse's individual income. Since this has radically changed, it may be appropriate for the court to reassess the child support payments.

If the court does choose to reduce payments, it will only change his obligation going forward, not reduce any amounts he owed from before the suit but after he lost his job.

3. The issue is what is sufficient grounds for a change in custody.

Absent a showing of unfitness and extreme circumstances, the court will generally be unwilling to revoke custody from a biological parent. Furthermore, the best interests of the children must be considered in any custody decision, and the agreement of the parties in a separation agreement will usually be given significant weight, so the court is unlikely to change the custody arrangements in a separation agreement. (Additionally, in making custody decisions, the court may not presume that children should be with the parent of matching gender, or that children of "tender years" are presumably better off with their mother.)

Here, the facts do not show either Wife's unfitness to parent nor any extreme circumstances that would justify revoking her custody of Son and Daughter. The fact that she does not consult with him concerning their upbringing may indicate a difference of parenting styles, not unfitness. The fact that she has violated her promise to consult with him regarding the children's upbringing and grant him visitation rights in the separation agreement is not cause to revoke her custody, but may be reason to hold her in contempt or seek an injunction to compel her to comply with the agreement. The strongest showing Husband has is that she "often left the children unattended," but it is unclear what he means by this. Children age seven and nine have some ability to fend for themselves, and it is not clear whether she is abandoning them for long stretches of time or in dangerous situations. Thus, absent a higher showing of neglect, Husband has not given sufficient grounds to revoke custody.

However, the court was wrong to dismiss without granting a hearing because the separation agreement is not conclusively binding and the court must consider the best interests of the child. However, as discussed above, the facts alleged by Husband do not rise to the level required to revoke custody, so the court was correct to dismiss for that reason.

Question-Four
Mom and Dad, residents of State X, rented an apartment at Happy Shores, a vacation community in Suffolk County owned and operated by HS Corp., a New York corporation.

Mom and Son, age four, went to Happy Shores for a two week vacation while Dad worked in his New York City office. After Mom settled into the apartment, Son fell asleep, so Mom decided to take a walk around the grounds. Mom locked the front door, but neglected to lock the back door. Son woke up and walked out the unlocked back door, which opened into a fenced-in section of Happy Shores that was under construction. Although there were numerous "No Trespassing" and "Danger" signs posted on the fence, the gate to the construction area was open. Son walked through the gate, fell into an unprotected, unmarked hole, and broke his leg. Son was taken by ambulance to the hospital.

When Dad heard about Son's accident, he asked Friend to drive him to the hospital. Dad sat in the front passenger seat, but did not fasten his seat belt. While in route at high speed, Friend lost control of the car and hit a telephone pole. Dad, because he was not wearing a seatbelt, hit his head on the windshield and suffered a fractured skull.

Dad, on Son's behalf as his father and natural guardian, duly commenced an action in New York Supreme Court against HS Corp. to recover damages for Son's injuries, alleging that HS Corp. was negligent in maintaining Happy Shores. HS Corp. brought a third party action against Mom alleging negligent supervision and seeking contribution. Mom moved to dismiss the third party action against her for failure to state a cause of action. The court (a) granted Mom's motion.

At trial, Dad proved the foregoing pertinent facts. In addition, the prior tenant of the apartment testified that during the two weeks before Mom's arrival at Happy Shores, he told HS Corp.'s property manager that the gate to the construction area was always open, and that he had often

seen children playing in the area. When Dad rested, HS Corp. moved to dismiss the action for failure to prove a prima facie case. The court (b) denied the motion.

The law of State X provides that recovery of damages for pain and suffering in any negligence action must be limited to $10,000. At the conclusion of the trial, the jury found in favor of Dad, and awarded $250,000 in damages for Son's pain and suffering. On motion of HS Corp. and over Dad's objection, the court (c) applied State X law, and reduced the award to $ 10,000.

Dad is considering bringing an action against Friend in New York Supreme Court to recover damages for the injury he sustained in the automobile accident.

1. Were rulings (a), (b) and (c) correct?

2. What effect, if any, will Dad's failure to wear a seat belt have on his ability to recover damages from Friend?

ANSWER TO QUESTION 4

1. a.) The issue is whether a third party may bring a cause of action against a parent for negligent supervision of that parent's child.

Generally, in New York there is no intra-family tort immunity. However, a child may not bring a cause of action against its parent for negligent supervision. Third parties are also barred from bringing a cause of action against the parent for injuries flowing from the child's action based on the theory of negligent supervision of the child.

In this case, HS Corp is specifically alleging Mom is liable under the theory of negligent supervision of the child and seeks contribution. HS Corp has failed to state a cause of action on which relief can be granted under New York tort law. This cause of action would essentially allow Mom to be held responsible for the injuries suffered by the child specifically based on a claim of negligent supervision, which would be in complete contrast to the rule barring children from holding their parents liable for negligent supervision.

It should be noted that if HS Corp had instead brought an ordinary negligence action, and successfully shown that Mom breached a duty of care that she owed to HS Corp when she left the door unlocked, they could recover on this theory. However, under these facts, they would not be able to allege such a cause of action. First, HS Corp is arguably an unforeseeable victim, and thus Mom did not owe them a duty of care. Additionally, HS Corp did not suffer any independent damages as a result of Mom's action. The only "harm" it suffered is its duty to pay damages to the child for the child's injuries.

Therefore, the Court was correct in ruling that HS Corp failed to state a cause of action for which relief can be granted.

b.) The issue is whether Dad, on behalf of the child, has stated a prima facie case of negligence.

Generally, a prima facie case for negligence must establish that there was (1) a duty owed to the plaintiff, (2) the duty was breached, and (3) the breach was the proximate cause of (4) damages. New York has rejected the categorical approach to the type of duty that a landowner owes to persons who come onto the land. This means the duty of care owed to person's on the property's land are not categorically governed by that person's status as an invitee, licensee, known or unknown trespasser, etc. Instead, New York applies the basic "reasonable person" standard of care and requires that a plaintiff show that the reasonably prudent person would have acted in a particular way under the given set of circumstances, and the defendant failed to adhere to that standard.

In this case, the facts establish that HS Corp had put signs up on the fence, but had left the gate to the construction area open. It appears that there were no employees or other persons left to safeguard the site. Further, the site was left with an unprotected and unmarked hole. Finally, there is evidence that HS Corp had prior notice that children were often seen playing in the area and thus was on notice that the signs it had put up were likely to be insufficient to warn child trespassers who may be incapable of reading or not have the capacity to appreciate those warnings. Under these circumstances, an ordinarily prudent person would have taken further steps to safeguard the area, including making sure that the hole was covered and the gate was closed, or persons were there to ensure that no one was coming onto the land. HS Corp failed to adhere to that standard of care.

Additionally, even absent further evidence that an HS Corp employee or agent was responsible for leaving the hole uncovered and the gate opened, the father can successfully establish a breach of the duty based on res ipsa loquitur, because the construction site was under the control of HS Corp, and these types of injuries rarely happen absent some kind of negligence.

Therefore, Dad has established that HS Corp owed a duty of care and further HS Corp breached that duty. It is also clear that the child suffered damages as a result of the breach. Those damages were caused in fact by HS Corp's breach of the duty, and there were no superseding factors subsequent to the breach that cut off HS Corp's liability. A defendant will be considered the proximate cause of the foreseeable consequences of his actions.

Therefore, the Court was correct in ruling that Dad stated a prima facie case of negligence against HS Corp.

c.) The issue is whether the Court has properly applied the Governmental Interest approach to the choice of law issue in this case.

Generally, New York has rejected the vested rights approach to choice of law problems. This approach stated that the law of the situs where the cause of action vested is the law that should be applied in a cause of action. This approach gave a clear cut answer to choice of law problems, but often led to the law of a completely disinterested State being applied to a controversy.

Instead, New York applies the Governmental Interest analysis approach, which was developed in the Babcock case. Under this approach you examine the connections that each State has to the parties and the events of the litigation, analyze the difference between the State laws, pinpoint

the underlying policies behind those State laws, and then apply the facts to the law to determine which State has a greater interest in having its law applied. The three general Neumeier principles developed out of this analysis and are applied to loss distribution problems in tort cases.

Under Neimeier, when both parties are domiciled in the same State, that State's laws apply. If the plaintiff and the defendant are domiciled in different states, you generally apply the law of the situs of injury as long as that State's law would protect its own domiciliary. However, in an unprovided for case, i.e. one that does not fit into either of the first two categories, you apply the law of the situs of injury, unless another State has a much greater interest in the litigation.

In this case, plaintiff is a domiciliary of State X. The defendant, HS Corp, is a domicile of New York because it is incorporated under the laws of New York. The law of New York does not provide a cap on the damages for a plaintiffs pain and suffering in a negligence action. This law would protect the plaintiff, who is not a New York domiciliary. The law of State X reflects a tort reform policy meant to protect defendant's from paying large amounts in negligence claims for pain and suffering. But the defendant in this case is not a domiciliary of State X.

Therefore, since this is an unprovided for case under the Neumeier approach, the law of the situs of injury (New York) should be applied. Nothing in the facts suggests that State X has any legitimate interest in the outcome here because its law does not protect its own domiciliary.

2. The issue is what effect Dad's failure to wear a seat belt may have under his ability to recover damages from the defendant.

Generally, New York applies a pure comparative negligence approach. Under this approach, a jury will determine if the plaintiffs negligence contributed to the injury, and if so the plaintiffs recovery will be adjusted downward to reflect his degree of fault. Additionally, the theory of negligence per se may be used to establish that a party acted negligently. Negligence per se arises when one party establishes that the other violated a New York State Statute (as opposed to a municipal statute or regulation) in the particular transaction or occurrence. The party alleging negligence per se must also establish that the statute was intended to prevent harm to the same class of persons and the same class of harms that are at issue in the cause of action.

However, in New York, as a matter of law, failure to wear a seatbelt may not be used to establish negligence per se. Further, a jury may not consider a party's comparative negligence solely based on failure to wear a seatbelt. The jury may however consider the failure to wear a seatbelt as a mitigating factor. This means that when the Jury considers the issue of damages, they may consider that the plaintiff failed to mitigate the damages when they chose not to wear a seatbelt.

Therefore, Dad may not be held to be negligent per se for failure to wear his seatbelt, but the amount of damages the jury finds may be affected by their finding that he failed to mitigate the damages in this case.

ANSWER TO QUESTION 4

NEW YORK STATE BAR EXAMINATION
JULY 2009 QUESTIONS AND ANSWERS

1. a.) The issue is whether Happy Shores has properly stated a cause of action against Mom for negligent supervision.

Under the New York CPLR, a motion to dismiss for failure to state a cause of action may only be granted if, taking all of the allegations in the relevant pleadings as true, there is no possible way in which a party could recover. The party opposing the motion is entitled to every favorable inference, and if there exists any claim for relief under the substantive law, the motion must be denied.

Here, Mom has moved the court to dismiss Happy Shores claim for contribution against her for her failure to adequately supervise Son. A party is liable for contribution if she has breached any duty in tort which aggravated or contributed to the damages against the plaintiff, regardless of whether such a duty is owed to the plaintiff directly. NY, does not recognize a cause of action by a child against his parents for negligent supervision. By extension, New York courts have refused to acknowledge such a cause of action by a third party against the parents for damages resulting from the negligent supervision of the child. Here, Mom has allegedly breached a duty to supervise Son. As a result of this breach, Happy Shores is making a claim for contribution. However, under the substantive law of torts, New York recognizes no duty for a parent to exercise reasonable care in the supervision of her children, as discussed above. As a result, Mom has breached no duty in tort, and there is no basis for Happy Shore's claim for contribution. Thus, the court properly granted Mom's motion, as there was no possible way for Happy Shores to succeed in its claim.

b.) The issue is whether Dad has stated a prima facie case for negligence.

A prima facie case for negligence in tort consists of the following elements: 1) duty, 2) breach, 3) actual and proximate causation, and 4) damages. To make a prima facie case, a party must offer evidence sufficient that a reasonable jury could find all of these elements have been satisfied.

As an owner of land, Happy Shores owed all foreseeable plaintiffs the duty to exercise reasonable care in maintaining its premises free of dangerous conditions and activities. New York has rejected the old common law rule which classified the duty owed to entrants to land based on the status of the entrant, and instead requires owners of land to exercise the care of a reasonably prudent person towards all entrants. The status of the entrant goes only to what care is reasonable under the circumstances.

Here, Happy Shores was aware that children were often on its premises, and in particular, that they were often playing in its construction area. It thus owed them a duty of reasonable care to ensure their safety. However, it breached this duty by failing to adequately take steps to ensure that children could not get access to the construction area and injure themselves. Given that it knew that children were trespassing in the construction area, the failure to adequately secure the gate so that children could not enter represents a breach of its duty. Such a step would have been simple and economically feasible. The signs, while helpful to Happy Shores, are insufficient as a reasonably prudent person could foresee the likelihood of children too young to read or understand such signs.

Happy Shore's breach was both the actual and proximate cause of Son's injury. A breach is the actual cause of an injury if, but for the breach, the injury would not have occurred; here, had Happy Shores taken reasonable steps to secure its construction area, Son would not have entered and been injured. The breach is also the proximate cause, in that it is the natural and foreseeable consequence of Happy Shore's breach. The danger that a child might fall into an unmarked hole is exactly the sort of risk that the duty here seeks to avoid.

Finally, a plaintiff must show actual damages to succeed on a negligence claim. Here, Son's damages are the injury to his leg, the costs of medical treatment, and his pain and suffering.

Thus, Dad has established all of the elements of negligence sufficient to make a prima face case, and court was correct to deny Happy Shore's motion.

c.) The issue is whether the law of NY or State X should be applied.

The NY Court of Appeals has rejected the old vested rights approach to choice of law analysis, under which the law governing a claim in tort would be the law of the place where the injury occurred. Instead, NY follows the governmental interest approach, which attempts to apply the law of the state with the greatest governmental interest in the outcome. This approach first identifies the factual contacts with each state; identifies the laws in issue; identifies the policies that support each of the laws; applies the factual contacts to the policies; then finally applies the law of the state with the greater interest in the outcome. In torts cases, the Court of Appeals has refined this approach with the three Neumeier tests. This case falls into the third Neumeier category, the "unprovided-for case," in which the law of the state where the injury occurred does not favor its resident. In such a situation, the law of the state where the injury occurred is applied absent some strong governmental interest to the contrary.

Here, Son is considered a domiciliary by operation of law of State X, as children have the domicile of their parents. Happy Shores, as a NY corporation, is a NY domiciliary. The law of state X does not favor its domiciliary's interests here, as it is resulting in a substantially smaller verdict than that to which Son would otherwise be entitled. However, New York does not seem to have any other interest in seeing its law applied, as its law would not provide any limit on the damages against HS, its domiciliary. Therefore, under the third Neumeier test, the correct law to apply is that of State X, rather than New York. The court therefore decided correctly to apply State X law.

2. The issue is whether failure to wear a seatbelt will bar recovery in an action for negligence based on an automobile accident.

Under NY law, failure to wear a seatbelt in an automobile accident is treated as an affirmative defense which must be pleaded and proven by the defendant in a case for negligence. If the defendant is able to establish this defense, it will have the effect of reducing the amount of any damages award to which the plaintiff might otherwise be entitled through the application of comparative negligence.

Here, Friend will be able to raise Dad's failure to wear a seatbelt as an affirmative defense should Dad bring an action against him. However, it will not prevent Dad from recovering damages from Friend, should Dad be able to establish the elements of a negligence claim, instead, Dad's failure to wear a seatbelt will be considered for the purposes of establishing the degree to which he was negligent, and the ultimate amount of damages which Dad will be able to be recover will be reduced in proportion with his degree of fault.

Question-Five

After Tim's first wife died, Tim frequently drank to excess and was habitually intoxicated, causing him to be estranged from Son, his adult son. In 2005 Tim executed a Will which in part provided: "I bequeath the sum of $100 to Son, who shall take no greater part of my estate. Further, if Son contests this Will, he shall forfeit this bequest." The Will gave all of the rest and residue of Tim's estate to Tim's mother, Mom, and named Mom as executor.

In 2007 Tim stopped drinking and married Spouse, an independently wealthy person. Spouse had a child, Daughter, then ten years of age, from a previous marriage.

Spouse decided to establish a trust using B Bank as trustee. Spouse and a trust officer of B Bank both signed a trust agreement providing for the income of the trust to be paid to Tim for his lifetime and upon his death, to Daughter, upon whose death the principal is to be paid to several named charities. The agreement is silent as to whether Spouse may revoke or amend it. Spouse's signature was witnessed by two witnesses who also placed their signatures on the agreement, but the trust officer acknowledged his signature before a notary public. Spouse delivered $1,000,000 of assets to B Bank to fund the trust, and during Tim's lifetime the income was paid to Tim.

Tim died in March 2009, survived by Mom, Spouse, Son and Daughter. Spouse has not expressly waived any rights she may have in Tim's estate.

In addition to those items passing to Spouse not as assets of the estate, but pursuant to the statutory family exemption, the property and assets which Tim owned or in which he had an interest at the time of his death consisted of:

(i.) The family's residence valued at $360,000, which Tim and Spouse, owned as tenants by the entirety,

(ii.) Various corporate stocks worth a total of $600,000, all of which Tim had purchased in the name of "Tim, pay on death to Mom,"

(iii.) A qualified profit-sharing retirement plan account containing $240,000 with Mom as the only named beneficiary, pursuant to a designation of beneficiary that Tim had signed in 2005, and

(iv.) $300,000 in cash, after payment of all debts and estate administrative expenses.

Tim executed no other Will after the 2005 Will, and Mom presented that Will for probate. The Surrogate's Court admitted the Will to probate over objections filed by Son on the grounds of Tim's habitual intoxication at the time the Will was executed. In support of his objections, Son produced evidence that Tim, during the year prior to executing the Will, had two felony convictions for driving while intoxicated; that when Son visited him on several occasions in the evening, Tim was delusional and would pass out from excess alcohol; and that the day before Tim executed the Will, he staggered past Son on the street and appeared not to recognize him. The witnesses to the Will testified that when Tim signed the Will, they smelled alcohol on his breath, but that he seemed to know what he was doing and that he talked openly about his estrangement from Son and his desire to provide for Mom. Son did not appeal the Surrogate's ruling.

Spouse would now like to revoke the trust she created with B Bank as trustee.

1. Did the Surrogate's Court properly admit the Will to probate in view of the objections filed and evidence produced by Son?

2. What are the rights, if any, of (a) Spouse, (b) Son and (c) Mom in the property and assets identified in (i.) - (iv.) above?

3. Was the trust validly created, and, if so, may Spouse now revoke it?

ANSWER TO QUESTION 5

1. The issue is whether the testator possessed testamentary capacity at the time of executing the will.

Under the Estate Powers and Trust Law (EPTL), the proponent of the will has the burden of proving that the testator possessed testamentary capacity. Whether the testator had testamentary capacity is a question of fact for the Surrogate Court to decide. Testamentary capacity requires 1) that the testator know that nature of his act, i.e.: that he is making a Will, 2) that he know generally the nature and extent of his property, 3) that he know the natural objects of his bounty, 4) and understand how each of these components relate to each other. This is a lower standard than contractual capacity. A testator has no obligation to leave his children anything. Intoxication and insane delusions will not prevent a person per se from having testamentary capacity if they execute the Will during a coherent moment.

In this case, Mom (proponent) provided proof that the testator was aware that he was making his Will, which fulfills the requirement that he know the nature of his act. She also provided testimony that he understood the general nature of his property in that he provided for a coherent distribution of his property. Third, Mom also provided testimony that Tim was aware of the natural objects of his bounty since he talked openly about why he was providing for mom and not his estranged son. Finally, the fact that he states specific reasons for his bequests and provided for a complete distribution of his property was evidence that Mom also provided proof for the last factor of the test. Tim appears to have executed the Will during a coherent period, even if he did drink a lot. Son has provided no specific evidence that Tim did not have capacity

to execute a Will at the time in question. Moreover, Tim apparently continued to remain distant from his son despite stopping drinking and chose not to include Son in his Will to any greater extent. While the evidence that Son put forward.

2. The issue is what effect a spouse's forced elective share will have on the assets of the testator's estate.

Note that the courts' general rule is to enforce the testator's intent when probating a valid Will.

Spouse - Under the EPTL, a dead spouse may not fail to provide for their surviving spouse, even if the spouse becomes a spouse after the testator created the Will (also called a pretermitted spouse). Thus, a spouse is entitled to elect against a decedent's Will and take the greater of $50,000 or 1/3 of the estate. The "estate" is the net probate assets plus testamentary substitutes such as Pay on Death (POD) accounts, joint tenancies, and employment retirement plans. In this case, the net estate includes the probate assets of $300,000. It also includes 1/2 of any joint tenancy with the spouse, here this is 1/2 times $360,000 of the family residence. It also includes the entire ($600,000) Pay on Death stock account naming Mom as the beneficiary. Finally, it includes 1/2 times $240,000 of the employee retirement account. This produces a net probate estate of $1,200,000. Spouse has the right to elect to take 1/3 of this outright (since that is greater than $50,000). Thus, Spouse is entitled to elect against the will within 6 months of the beginning of the probate of the Will to take her share equal to $400,000. Spouse's 1/2 interest in the property ($180,000) will be counted in the total $400,000, thus she can force the remaining beneficiaries, Mom and Son, to contribute to her share pro rata. Since Mom is the only remaining beneficiary (see below), Mom will have to pay out this $220,000 balance necessary to make up Spouse's elective share.

Mom - Mom will take the bequests in (ii.), (iii.), and (iv.) but will have to pay her pro rata share to Spouse to satisfy Spouse's remaining $220,000 elective share claim. Thus, she will get the $600,000 POD account, the $240,000 retirement account, and $300,000 in probate assets as the residuary beneficiary. She will also take Son's $100 bequest since he challenged the Will (see below). Thus, she will take $1,140,100 minus Spouse's $220,000, for a total of $920,100.

Son - Son would normally only take the $100 left to him by the Will, however, because he challenged the Will the court will enforce the forfeiture clause. Tim was entitled to leave his son out of his Will and appears to have a valid reason for doing so. Negative bequests are allowed in New York and cutting a beneficiary out completely or limiting their bequest is enforceable. Unlike most states, however, New York courts will give full effect to forfeiture clauses (in torrorem clauses) that disqualify beneficiaries that challenge the Will. None of the exceptions such as the legitimate challenge to the court's jurisdiction or that the Will was revoked by a later Will will apply in this case. Thus, Tim forfeits his $100 bequest and takes nothing. He will be treated as having died the day before Tim and his $100 will go to Mom, the residuary beneficiary.

3. The issue is whether a trust instrument must be acknowledged before a notary by the settlor of the trust and whether a settlor of a trust may validly revoke a trust when the trust is silent as to revocation.

In New York, the creation of a trust requires that there be a writing that is either acknowledged before a notary or witnessed in the manner required for a Will.

In this case, the trust instrument was witnessed by two witnesses and thus fulfilled the requirements for a validly executed trust. Had the document not been executed according to Wills Act formalities, it would have been necessary for Spouse herself to appear and sign before the notary.

In New York, a trust is presumed revocable unless the settlor (creator) specifically reserves the power to revoke. A settlor may revoke an irrevocable trust if he can obtain the consent of all beneficiaries in being. Consent may not be giving by a minor beneficiary and thus any trust with a minor beneficiary may not be revoked.

In this case, Spouse may not revoke the trust because Daughter is a minor. Spouse did not provide the right to revoke the trust when she created it. Thus, the trust is irrevocable. Because Daughter is a minor, she lacks the capacity to consent to termination. Thus, even if Spouse obtains the consent of the charities and herself, she will not be able to revoke the trust.

ANSWER TO QUESTION 5

1. The issue is whether Tim had capacity to make a valid Will. The burden of proving a Will is on the person submitting it for probate, here Mom. Under New York, the capacity to make a Will is lower than the capacity required for other legal actions. The required testamentary capacity is that the testator, the person making the Will, understands that he is making the Will, understand the nature and value of his property, understand the nature of his bounty, that is who his family and loved ones are, and that he understand the nature of the gifts he is making. Even insane persons are able to execute a valid Will, provided that the Will is executed during a moment of clarity. Here, Tim may have been impaired by alcohol when he made the Will and he may have a habitual drinker with felony convictions. However, the Witnesses to the Will testified that Tim did know what he was doing, that he was making a Will. He understands his bounty, knowing that he was estranged from his Son and wanted Mom taken care of. That he may have been drunk does not take away from the fact that he knew what he was doing and had the capacity to do it. Even though Son did not appeal his challenge to the Surrogates Court, his original challenge sparked the no-contest clause and he will loose his $100 inheritance. Accordingly, the Will was properly admitted to probate.

2. The issue is what rights Spouse, Son and Mom have in Tim's property.

a.) Under the EPTL, a surviving spouse is entitled to an elective share upon the death of a spouse. The amount of the elective share is the greater of $50,000 or one-third of probate assets and testamentary substitutes. The elective share is in addition to the statutory family exemption. Where the spouse elects to take the elective share, that share comes out of the estate first, pro rata from other named beneficiaries. It does not matter that the surviving spouse is independently wealthy or wealthier than the decedent, the share applies regardless and to spouses of either gender. Here, the total estate from which the Spouse is to take her elective share is the probate

assets and the testamentary substitutes. Testamentary substitutes are property of the decedent that do not pass in probate because of their nature. They include survivorship assets, Totten Trusts, life insurance, half of employee pension plans, certain government bonds and powers of appointment. Here, the family residence valued at $360,000 is a survivorship asset. Half of it, Tim's half interest, is a testamentary substitute that is included for calculating the elective share. The other half is value going to Spouse which counts towards her taking of the elective share and will be subtracted from any recovery. The stocks purchased in Tim's name to pay Mom is to be treated as general probate property. To decide to pay it to Mom on death is an attempt by Tim for the property to move outside of probate and avoid the elective share, an attempt to partially disinherit his Spouse. The language "pay on death to Mom" is invalid to achieve his goals and the stock will be treated as general estate property and included in the estate for calculating the elective share. The retirement plan is a testamentary substitute, to which Spouse is entitled to half. Including testamentary substitutes in the estate for calculating elective share prevents maneuvers by the deceased spouse intended to reduce the recovery by the surviving Spouse and will be included in the estate despite the language that it go to Mom. Finally, the $300,000 is general probate property included for the elective share. Therefore the total size of the estate, both probate assets and testamentary substitutes is one half of $360,000 plus $600,000 plus one half of $240,000 plus $300,000 for a total of $1,200,000. Of the $1,200,000, Spouse is entitled to one third, for a total amount of $400,000. The $400,000 must be reduced by the value of the survivorship property already received by the Spouse, $180,000. Therefore, Spouse is entitled to an additional amount of $220,000, to come from the estate. Spouse will also take title to the family's residence by operation of the survivorship nature of a tenancy by the entirety.

b.) Son has been left $ 100 by the Will. However, the Will also included a no-contest clause that says Son forfeits his bequest by challenging the Will. Under the EPTL, a challenge to a Will, despite a no-contest clause, does not forfeit the challengers rights if it is argued that the Will was procured by fraud, or that there is a mistake in it, or to interpret a ambiguity, if only discovery is sought and then the challenge is dropped or if brought on behalf of a minor. Here, Son's challenge does not fit into any of the exceptions. A testator has a right to die and have his Will probated with out any attacks to his credibility or ability to leave a valid Will. These were Tim's wishes and Son's actions thus lead to him forfeiting his share in the Will.

c.) Mom is the residuary beneficiary of Tim's Will. She is entitled to everything not given Spouse by the elective share. She is also entitled to the half of the profit-sharing retirement plan that was not considered a testamentary substitute. Accordingly, she will take the $1,020,000 of estate property not given to Spouse and $120,000 worth of the profit-sharing account.

3. The issue is whether the B Bank trust created by Spouse was validly executed and whether it may be revoked. For a trust to be valid under New York there needs to be a Settlor who makes delivery of title of property to a trustee who takes title in the property for the benefit of a beneficiary. There needs to be intent on the part of the Settlor to make a trust, it must be for a lawful purpose and it must be executed in a lawfully executed document. Here, there is a Settlor, Spouse, who had intent to make a trust. She delivered property, $1,000,000 of assets, to the trustee, B-Bank and transferred title so it will be held for the benefit of beneficiaries, first Tim then Daughter. Paying income to a spouse, a child and a charity is lawful purpose. Moreover, it was executed with proper legal formalities. The law requires signatures be

witnessed by either two witnesses or acknowledged by a notary. Here, both occurred and both were valid to make this a legal trust.

Under New York law a trust is considered irrevocable and unamendable unless stated otherwise when formed. Here, the agreement was silent as to revocability so by operation of law it will be considered irrevocable. There is an exception that allows an irrevocable trust to be revoked by the settlor. In order for a settlor, here Spouse, to revoke the trust, she will need the consent of all beneficiaries in being. However, minors do not have legal capacity to consent to revoking a trust and there is no one who is able to give consent on behalf of a minor. Because Daughter is below 18 years old she is unable to consent and her consent cannot be gotten in any form. All beneficiaries thus will not be able to consent and the trust will not be revocable, despite the wishes of the settlor.

MPT - JACKSON V. FRANKLIN SPORTS GAZETTE, INC.
The client, the Franklin Sports Gazette, a weekly tabloid sports newspaper, has been sued by Richard "Action" Jackson, a star baseball player, for an alleged violation of Jackson's right of publicity under Franklin's recently enacted right-of-publicity statute. The Gazette ran a photograph of Jackson, only partially visible, sliding into home plate as part of its coverage of a baseball game. Jackson's complaint arises from the Gazette's, use of that same photo in a print advertisement soliciting subscriptions. The Gazette seeks the law firm's assistance in defending against the suit. Applicants' task is to draft an objective memorandum analyzing whether there is a cause of action under Franklin's right-of-publicity statute and identifying the Gazette's, possible legal arguments to oppose such a cause of action. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview and background research, an internal memorandum from the Gazette approving the advertisement, and a copy of the advertisement itself. The Library contains the Franklin Right of Publicity Statute, excerpts from its legislative history, and three right-of-publicity cases decided under the previous common law in Franklin.

ANSWER TO MPT

Memorandum
To: Robert Benson
From: Applicant
Re: Jackson v Franklin Sports Gazette, Inc.
Date: July 28, 2009

This memorandum will discuss whether Jackson has a cause of action under the right of publicity statute for use of his image in an advertisement by and for our client, the Franklin Gazette, a news medium under Franklin's new Right of Publicity Statute. Furthermore, the memorandum will discuss any defenses available to our client. Part I of the memo will discuss the cause of action Richard Action Jackson is asserting and will weigh this claim. Part II of the memo will discuss and analyze the defense that the printed photograph is not readily identifiable, as set out

by the statutory guidelines. Part III of the memo will discuss a second potential defense of newsworthiness.

Part I: Cause of Action:

"Under Section 62 of Franklin's Right of Publicity Statute, any person who knowingly uses another's photograph or likeness in any manner on or in products....for purposes of advertising or selling...or soliciting purchases of products....shall be liable for any damages sustained by the person or persons injured as a result thereof."

Although the statute pre-empts common law rights and the common law cause of action, it is still helpful to analyze how prior cases were decided under the similar standard set out by the common law:

1) Defendants use of the plaintiffs persona

2) Appropriation of the plaintiffs persona to the defendant's commercial or other advantage

3) Lack of consent

4) Resulting injury

Richard Jackson certainly has a claim against our client. The Franklin Gazette used his persona in order to solicit sales without his consent and as a direct result of using the picture, advertisements increased by 18%.

Part II: Defense that the photograph is not readily identifiable.

The Franklin Gazette can argue that Jackson is not readily identifiable from the Photo that they used in soliciting sales. In enacting the new statute, the legislature's goal was to establish a single standard for this analysis. The statute purports that "A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye...the person depicted in the photograph is the same person..."

In Holt v JuicyCo Inc and Janig Inc the court said that the test was not whether one could recognize an individual's features, but whether one can identify the specific individual from the use made of his image. The court found that the lower court erred as a matter of law in saying the skier could not be identifiable as Holt because it failed to attribute proper significance to the distinctive appearance of Holt's suit and its potential, as a factual matter to allow the public to identify Holt as the skier in the commercial. The suit's color scheme and design are unique to Holt and their depiction could easily lead a trier of fact to conclude it was Holt and not another. It is a factual question to be decided by the jury. The readily identifiable standard was not employed in this case.

In Brant v Franklin Diamond Exchange, Ltd the photograph showed her from the waist to the toes, while her head and torso to her waist are not visible since they have already entered the

water. All the picture showed was her legs and the generic bathing suit that was required to be worn by all female divers who participated in the championships. Court dismissed the complaint. Differentiated from Holt where the skier whose picture was used was identifiable because of his unique uniform which although somewhat altered nevertheless remained basically the same and clearly visible. Thus the public to whom the advertisement was aimed could easily identify the figure depicted as Holt and no other skier. The court simply could not find that her legs, which have no unique scars, marks or tattoos are identifiable by the public compared to any other diver's legs. Court found there was no way the public could conclude this was a picture of Brant as opposed to any other diver. Neither her likeness nor any other identifying attribute was present in the photograph and her right of publicity was not infringed.

We should analyze the facts at hand according to the readily identifiable standard to determine if our client has a valid defense. In The Photo, a spray of dirt from the slide obscured most of Jackson's body and uniform number allowing only the second zero to be partially visible. Additionally, no part of his face could be seen. His uniform, was one that was worn by all members of the Blue Sox and three other players (two who were also Caucasian) wore uniform numbers ending in zero. In addition, the players did not have their names on the back of their uniform. Jackson may argue that it didn't matter that his name was not on the back of his uniform or that just one zero was showing, that his fans still could readily identify him. However, although Jackson was famous amongst his fans, the Photo was not one of a memorable moment or a memorable season. It's hard to imagine that this photo can be deemed "readily" identifiable and on the contrary appears to be quite obscure. Our client will probably be successful in asserting this defense.

Part III: Defense of newsworthiness.

"For purposes of this section, a use of...photograph or likeness, in connection with any news....shall not constitute a use for which consent is required."

The legislative history behind enactment of the statute states that the most important right is the exception for news reporting. It further notes that the guarantees of freedom of the press in Franklin and the US Constitution are such that no individual can complain of legitimate news reporting.

In the Miller v FSM Enterprises, the court found that Miller's image was incidental to the advertising of a news medium and in relationship to its news reporting function even though the republication of the picture was in motivation, sheer advertising and solicitation. The court concluded that so long as the photo was used only to illustrate the quality and content of the periodical, in which it originally appeared and nothing more, Miller's rights were not violated. It may have been different if the advertisement had somehow tied her explicitly to the solicitation for subscription, as by featuring her name in its heading or text thus implying endorsement. Similar to Miller, our case at hand can be distinguished from Jancovic where the use of the image was printed on a large poster and sold by the newspaper to retail stores who in turn sold it to the public. The court found that this was not by any function of a newspaper since in the mind

of the consumer there was no relationship between the poster with Jancovic's image and the newspaper and hence the court could not use the common law exception for news reporting.

The problem for us and our client is that in Miller, the advertisement did not use her name at all where in our case the Franklin Gazette used Jackson's nickname, Action. Based on prior case law, it may be argued that his actual name was not used and "Action" was simply a play on words, but this defense does not seem to be very strong since Jackson was readily identifiable by his name Action. He was a much-beloved fixture in the sports scene and majority of fans at Blue Sox games would wear apparel with his name, nickname or unique double zero number. It is important, however, to keep in mind that the committee explicitly said that common law is not controlling and the committee intends that the legislation set forth the full extent of the right thus preempting the common law cause of action in the area. The legislature specifically noted that there has been some uncertainty as to whether news reporting organizations were liable for infringement of the right of publicity when they included an individual's picture in ancillary uses and that the important right of freedom of the press must supersede. From these excerpts from legislative history it appears as though the dicta in the Miller case will not at all be controlling and just because our client used the name Action, they will probably be successful in asserting this defense. They did not use Jackson's full name or real name in its ancillary use and instead used "Action" as a play on words.

ANSWER TO MPT
Benson & DeGrandi
Attorneys at Law
120 Garfield Avenue
Franklin City, Franklin 33536
MEMORANDUM
From: Bar Applicant
To: Robert Benson
Date: July 28, 2009

Re: Jackson v. Franklin Sports Gazette, Inc.

Introduction

This memorandum will address the complaint that has been filed against our client, the Franklin Sports Gazette, by Richard "Action" Jackson, for infringement of his right to publicity under Section 62 of Code. The statute addresses the tension between the public's right to access information and the rights of individuals to make productive use of such information in today's celebrity culture, with the rights individuals have in the use of their person for those commercial purposes. The memorandum will present in turn each of the elements of the cause of action, as set forth in the recent statute, and identify any arguments we may make to refute Jackson's claims.

NEW YORK STATE BAR EXAMINATION
JULY 2009 QUESTIONS AND ANSWERS

I. To fall within the purview of the statute, defendant must have used another's "photograph, or likeness," and photograph is defined as "any photographic reproduction, still or moving...of any person, such that the person is readily identifiable.

A threshold issue in the cause of action is whether the action the complaint is based on is properly actionable under this statute. The Franklin Right to Publicity statute applies to the use of another's persona. For purposes of the statute, this is limited to photographs or likenesses, which is further defined by the statute to include photographs where the subject is reasonably identifiable. Per Section (b)(1), a person is deemed to be readily identifiable from a photograph when one viewing that photograph with a naked eye can reasonably determine that the person depicted in the photograph is the plaintiff. Therefore, if Jackson is not readily identifiable in the photograph being used by the Gazette, he will not have a cause of action, regardless of what the photograph is used for. The term "readily identifiable" has previously been addressed by the courts in several cases, and those decisions shed some light on how the court will apply the text of the statute to the particular facts of our case. While these decisions will not be binding on the courts as they rule as a matter of first impression on the statute, which specifically preempts the common law, to the extent they are in accord with the legislative provisions they will remain persuasive. In Holt, the court clarified that 'identifiability' does not turn solely on the ability to recognize an individual's likeness, or facial features. Rather, it is a question of whether as a factual matter, a member of the public could identify the specific individual, based on such considerations as distinctive appearance of clothing; one must look at the totality of the persona depicted. However, in Brant the court clarified that if a uniform is the basis of the identification, it must be unique, rather than a generic, identical outfit, paired with no facial or distinctive body features that could be recognized, and therefore declined to find a violation on the basis of a picture of the lower half of a diver's body, including her team suit.

Here, Jackson was photographed in his game uniform, which is the same uniform that all of the other ballplayers wear. He has a distinctive number, 00, but only the second zero is visible. At the time, 3 other players had 0 as the second number, and today 5 other players do. As a factual matter, the situation appears closer to that of Brant than Holt, since there are more generic characteristics to his uniform than there are unique ones. In contrast to a gold and purple colored suit, particularly distinctive and memorable against the backdrop of snow, this is a generic, team-mandated uniform partially obscured by the spray of dust, in much the same manner that the Brant had a uniform and was partially obscured by the water. No evidence has been provided that Jackson has a particularly unique bodily characteristic, other than the fact that he is Caucasian, as are several other members of the team. As in Brant, this would not likely be enough to serve as an identifier, since from the back there is nothing distinguishing about his body itself. Additionally, the events depicted in this picture occurred 5 years ago, although Jackson is still a member of the team. Because of the lack of distinguishing features, it appears more similar to the situation in Brant, which had a 7 year gap between the event and the use of the photograph, and so the public would be less likely to recognize it. However, since like in Holt, where, Ken was still actively competing and in the public eye at the time of the use, Jackson is on the team, this is not likely to be a particularly strong argument for us to rely on.

While as a factual matter this would have to be determined by the jury, we have a strong argument that Jackson is not readily identifiable, and therefore that there should not be liability under this statute.

II. If the person is determined to be readily identifiable, it may not be used for purposes of advertising or selling products without consent, unless it falls within an exemption for incidental advertising of a news medium itself.

If the use of the product is for a commercial use, such as an advertisement to solicit subscriptions, then it is improper without the consent of the individual. However, the statute provides an affirmative defense where the photograph is used in connection with any news, public affairs, or sport broadcast, or any political campaign, in which case consent is not required. The statute does not provide additional clarification regarding 30 the extent of the definition, but prior case law suggests that the inclusion of the affirmative defense was an attempt to preserve the court's reasoning in Miller. In that case, the court found that where the photograph is being used in an advertisement for a newspaper or other publication, an additional inquiry must be conducted. If the use of the photograph was incidental to the advertising of the paper in relationship to its news reporting function, it determined that the right to publicity was not violated. Thus, even if the motive is sheer advertising and solicitation, that should be considered to fall within the newsworthy affirmative defense.

Here, as in, Miller, the advertisement illustrates the way in which Jackson was earlier properly and fairly depicted by the magazine in a legitimate news account of the regular season game. The photo is now being used to illustrate the quality and content of that same periodical in which it originally appeared, to show the kind of sports coverage they provide. The advertisement itself emphasizes the quality of the coverage, and uses the photograph of an example of the nature and quality of Gazette reporting. Moreover, unlike in Jancovic, the image is being used in the paper, clearly in connection to the newspaper itself, and could not be confused with the proprietary functions of a sports memorabilia store. On these facts, we have a strong argument that the paper falls within the purview of the affirmative defense, and that banning it would run afoul of the First Amendment.

III. If the statute incorporates the court's dicta on implied endorsement, the Gazette may nonetheless face liability for its actions in utilizing the photograph.

Despite the applicability of the newsworthy defense to the specific class of advertisements by publications, it is possible that that defense will be further limited than in the past when courts apply it to the new statute. If the court adopts the incidental advertising exemption, it may adopt it in its most limited form, because the legislature has attempted to comprehensively address the issue and avoid disparate verdicts; therefore, we must consider whether the ad will run afoul of the implied endorsement prohibition. In Miller, the court suggested that a limit on the exemption for incidental advertising would be where the photo was used for purposes beyond illustrating the quality and content of the periodical in which it originally appeared. If the advertisement had "somehow tied [the plaintiff] explicitly to the solicitation for subscriptions (as, for example, by featuring her name in its headline or text), and thus implied an endorsement," that could bring the use out of the newsworthy exception. The dissent added that where a plaintiff is already in

the business of endorsing products, use of the picture is sufficient to imply an endorsement, because "a picture is worth a thousand words."

Here, Jackson's full name is not used, but the ad does make reference to "Action." Depending on how commonly known this nickname is, a court could find that this was using the persona for commercial advantage, and therefore inappropriate. Since Miller was decided in 1998, endorsements have become even more important in our commercial culture, and therefore the dissent might have more weight with a court today, to the extent that the public is very ready to believe a public figure could potential endorse anything. Further, the text says "Get in with the Action," implying that Action is already a part of the organization.

In order to avoid litigation, it would probably be in our client's best interests to remove the mention of "action" from the ad. As Sandi Allen stated in her memo, the photo itself conveys the excitement and kind of sports coverage the paper offers, and a few words in the text are likely incidental.

IV. Conclusion

Our strongest argument is that Jackson is not readily identifiable in the picture, and therefore does not have a cause of action. If the court fails to accept that argument, we should advise our client to remove the words "action" from the advertisement, and argue for the application of the newsworthy exemption.