NEW YORK STATE BAR EXAMINATION
FEBRUARY 2012 QUESTIONS AND ANSWERS

QUESTION-ONE

Sal has operated a marina on Lake Ontario for several years. The marina sells boats and provides dock space and winter boat storage to its customers. On August 1, 2010 Ben purchased the marina from Sal. As part of the sale, Ben took over all of the existing contracts Sal had for the storage and docking of boats.

Renter had a contract with Sal to store his boat at the marina over the winter and to rent a dock space at the marina during the boating season. The contract was due to expire on March 31, 2011.

When Renter went to the marina on October 1, 2010 to arrange to have his boat removed from the water and placed into storage for the winter, he learned that the marina had been sold. Ben told him that he would be willing to renew Renter's contract for dock space and storage for the period of April 1, 2011 through March 31, 2012, at the same price he had paid in 2010, if Renter would agree immediately. Renter orally agreed.

Thereafter, on March 1, 2011, Renter notified Ben that he was moving his boat to another marina and had arranged to have his boat towed to the new marina. Ben demanded that Renter pay him for the dock space and storage for 2011-2012, claiming that he and Renter had an enforceable contract. Renter refused to pay.

In the spring of 2011, Ben hired Contractor to replace all of the docks at the marina. Although the contract specified that the dock's top surface decking would be made of pressure-treated wood, Contractor used a composite material which was visually indistinguishable from pressure-treated wood. The material used was comparably priced to pressure-treated wood, and had comparable properties, including strength, slip and rot-resistance, longevity, and maintenance requirements. When the work was completed, Ben refused to pay Contractor, claiming Contractor had not performed in accordance with the contract. Contractor commenced an action against Ben to recover damages for breach of contract.

In preparation for stocking his showroom, Ben telephoned Distributor on March 15, 2011 to order a Model A boat. Distributor told Ben that the boat would cost $22,000. Ben told Distributor to ship the boat. The same day, Distributor confirmed the order in a fax to Ben that specified that a Model A boat would be shipped to Ben for delivery on or before April 15, 2011, at a price of $22,000. Ben received the fax, but did not respond.

On April 1, 2011, Ben discovered that he could buy a Model A boat from another distributor for $19,000. He immediately called Distributor and canceled the order for the boat. Two weeks later, Distributor, who had a large unsold inventory of Model A boats, sold the boat he had planned to deliver to Ben to another customer for $22,000.

Distributor has commenced an action against Ben for breach of contract. Ben has answered raising the defense of the statute of frauds.

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1. Was the contract between Ben and Renter enforceable?

2. Is Contractor entitled to recover on his contract with Ben?

3. (a) Is Distributor likely to succeed in his action against Ben?

(b) If Distributor is successful in his action against Ben, what damages may he properly recover?

First Answer to Question One

1. The issue is whether an oral contract for services that will last longer than one year is enforceable.

A valid contract is entered into where the proponent has established (1) mutual assent, (2) valid consideration, (3) and the absence of any defenses to formation. In most circumstances, a contract need not be in writing in order to be enforceable, provided those elements are satisfied. However, where the Statute of Frauds is applicable, the contract must be evidenced by a writing to be enforceable. In New York, the statute of frauds applies to the following contracts: conveyances of land, sale of goods for $500 or more, executor's agreement to pay for the debts of the estate out of his own funds, suretyships, agreements in contemplation of marriage, finder's fees for broker commission, assignment of a life insurance beneficiary, and contracts that cannot be completed within one year. The Statute of Frauds in the State of New York therefore requires that agreements lasting longer than one year be in writing and signed by the party against whom enforcement is sought in order to be enforceable. The measure of duration for such contracts begins on the date of agreement's execution, and not on the date of commencement. In order for a contract to satisfy the Statute of Frauds, it must be evidenced by a writing or writing. The writing need not contain all terms of the agreement, but must only be sufficient to demonstrate the existence of a valid contract. Furthermore, in order to be enforceable, the contract must be signed by the party against whom enforcement is sought. In this case, Renter and Ben orally agreed to a contract for storage space at Ben's marina on October 1, 2010. The contract was set to commence on April 1, 2011 and continue through March 31, 2012. The oral agreement of October 1 was not evidenced by writing. Under the Statute of Frauds, the measure of duration began on October 1, 2010 and ran through March 31, 2012. Accordingly, this contract was one for services that could not be completed within one year. Ben's attempt to enforce the agreement against Renter will fail because the agreement is unenforceable under the Statute of Frauds. The agreement was not reduced to a writing and signed by Renter, the party against whom enforcement is now sought.

In conclusion, Ben will be unable to enforce the agreement for dock space against Renter.

2. The issue is whether a party is required to pay the agreed upon consideration in a contract for services where the other party to the contract substantially performed but nonetheless breached the terms of the agreement.

Under the laws of the State of New York, a party's obligation to pay under a contract is discharged only where the breaching party failed to substantially perform under the agreement. This position is contrary to the Uniform Commercial Code's requirement in contracts for the sale of goods, which requires a perfect tender. The measure of a party's substantial performance is guided by the analysis used for determining the materiality of breach. A breach will be deemed material where a party fails to comply with the contracts terms in a significant way, seriously affecting the non-breaching party's expectancy under the contract. Should it be determined that a party materially breached the agreement, and, thus, did not substantially perform under the contract, the other party to the contract is permitted to sue for damages and his/her required performance is discharged. However, should it be determined that the party substantially performed under the agreement, and only breached the contract in a "minor" way, the other party's performance will be discharged and that party will be permitted to sue for damages. The measure of damages against a party who substantially performed the contract but breached in a minor way will be the difference between the actual value of the contracted service and the service as actually performed.

In this case, Ben and Contractor entered into a contract to replace all of the docks at the marina, and the contract specified the type of wood to be used on the top surface decking. Contractor (C) completed the work, but failed to use the materials specified in the contract. B's assertion that his performance - his obligation to pay for the services rendered - was discharged by C's failure to use the materials specified in the contract is incorrect. C breached the agreement by failing to use the correct materials, but this breach was not material. C substantially performed under the contract by completing the dock replacement, and deviated from the contract's requirements in only a minor way. Furthermore, the materials used by C - though not in accordance with the contract's terms - were substantially similar to those set out in the contract. Therefore, C will be entitled to recover on the contract with Ben. C will be entitled to the price of the contract, less the decrease in value as a result of his minor breach in using different materials. Specifically, Ben will be entitled to the difference in value between the services required under the contract - the use of pressure-treated wood - and the difference in the services actually rendered - the deck built with composite material. In conclusion, C will be entitled to enforce the agreement, less the decrease in value as a result of his minor breach.

3. a. The issue is whether an oral contract between merchants that was subsequently confirmed in writing will be enforceable.

Under the Uniform Commercial Code, a contract for the sale of goods worth $500 or more is required to be evidenced by a writing under its Statute of Frauds. In order to satisfy the statute of frauds, the UCC requires that the contract proponent demonstrate the existence of some writing evidencing the agreement that is signed by the party against whom enforcement is sought. Should the proponent, fail to demonstrate the existence of such a writing, a contract for the sale of goods greater than $500 will be unenforceable. However, the UCC provides several exceptions to the writing requirement for sale of goods. These exceptions include: goods sold and accepted, specially manufactured goods, provided the manufacturer makes a substantially beginning in their manufacture, judicial admission, and the merchant's confirmatory memo.

Under the merchant's confirmatory memo exception, a party will be able to enforce a contract upon proof of a writing bearing his own signature that was submitted to the other party to the contract within a reasonable time following the oral agreement. In order for the exception to be allowed, both parties to the contracts must be merchants. The writing must be bear the signature of the contract proponent, and the memo must have been actually received by the other contracting party, and the memo must not have been rejected by said party within ten days after receipt. Where these elements are satisfied, the contract proponent will be able to enforce the contract on the basis of his own signature, as opposed to the Statute of Frauds' requirement that the writing be signed by the party against whom enforcement is sought.

In this case, Distributor (D) and B entered into an oral contract for the sale of a Model A boat. Because this boat - a good under the UCC - was valued at $22,000, it exceeds the $500 requirement of the UCC and must be in writing in order to be enforceable. The contract here was not in writing, and therefore must satisfy one of the UCC's exceptions in order to be enforced. This contract satisfies the merchant’s confirmatory memo exception. Both B and D are merchants, as both parties are regularly engaged in commerce. Following the oral agreement, B sent D a writing that confirmed the oral agreement, and this writing was sent within a reasonable time following the actual agreement. While the fax do not indicate that the writing was signed by D, the UCC permits a signature to be found upon a party's writing of the memo on corporate stationary - the signing requirement is liberally construed and will be found upon some mark by the sender indicating his/her signature. Because B failed to object to D's written confirmation within ten days after receipt of the fax, the contract will be enforceable against B.

In conclusion, D is likely to succeed in his suit against B.

3. b. The issue is whether a vendor of goods may recover the profits lost on a contract breached by the purchaser.

The normal measure of seller's damages in a contract for the sale of goods is the difference between the contract price and the cover price or, if cover was not reasonably available, the difference between the contract price and the market price at the time of breach. However, for vendors who regularly engage in the sale of the goods at issue, such persons may also be entitled to be recovering their lost profit on the sale. The "loss volume" seller will be able to recover his or her profits if he/she demonstrates that he/she regularly deals in the goods of the kind at issue and would have made the sale to another party based on his inventory and status as a vendor. The loss volume seller will be permitted to recover his profits on the sale even where the same good was subsequently sold for the same price.

Here, B and D entered into a valid contract for the sale of a Model A boat. B breached this agreement, and D subsequently sold the boat to another purchaser for a price identical to that contracted for with D. Despite the fact that there was no difference between the contract price with B and the cover price with the subsequent purchaser, D should be able to recover his lost profits on the sale. On the basis of his large inventory of Model A boats, and the quickness of D's subsequent sale, D arguably meets the requirements for a loss volume seller. As a loss volume seller, D will not be limited to the difference between the contract and cover price, but rather will be permitted to recover the lost profit on his sale to B.

In conclusion, should D succeed in his claim for breach of contract, D should be entitled to the profit lost on the contract with B.

Second Answer to Question One

1. The issue is whether an oral contract to rent space for more than one year is enforceable. New York's common law of contracts and the NY General Obligations Law ("NYGOL") apply to this contract because it is a contract to rent space, which does not involve the sale of goods.

Under the NYGOL, the statute of frauds provides that any contract that cannot by its terms be completed within one year from the date of entering the contract must be in writing to be enforceable. The one year time period begins running from the date that the contract is formed. Thus a contract that is for one day less than one year, entered into six months before the one year starts, requires a signed writing. Additionally, all agreements for the sale or lease of an interest in land must be in writing, unless it is an agreement to lease land for less than one year. The one year time limit starts running at the date of contracting. Because this is an agreement to rent land, the writing must describe the land to be rented, the dates of the rental, and the price of the rental, and be signed by the party to be charged with enforcement (here, Renter).

Here, on October 1, 2010, Renter ("R") went to the marina and orally agreed with Ben ("B") that he would renew his contract for dock space and storage for the period of April 1, 2011 through March 31, 2012. This contract required a writing because it was an agreement to lease land that could not by its terms be performed in less than one year from the date of contracting, October 1, 2010. It would be impossible to perform a lease until March 31, 2012 before October 1, 2011, which is one year after the date of contracting. There is no indication that there was any writing evidencing the material terms of this contract. The facts indicate that R has refused to pay B and has indicated that he is moving his boat to another marina, which ordinarily would be a breach of contract by anticipatory repudiation but for the fact that this oral contract is not enforceable.

Ben is, however, able to recover from Renter for the month of March because the facts indicate that there was already a contract between R and Sal ("S"), B's predecessor in interest to rent the space for the month of March 2011. There is no indication in the facts that this contract was oral or otherwise unenforceable and it was validly assigned to B when S sold B his business. R must pay for the month of March 2011 even though he has no obligation to keep his boat at S's dock after March 2011 due to the statute of frauds.

Therefore, because of the statute of frauds B may not enforce the agreement between B and R to rent the space for April 1, 2011 to March 31, 2012.

2. The issue is whether a contractor in a services contract who substantially performs the contract is entitled to recover for breach of contract damages.

The New York common law of contracts and the NYGOL apply to these facts because this is a contract to replace docks, which is a services contract. Under the NYGOL, a material breach offers a contracting party a complete defense to performance of the contract. That is, a material breach discharges the nonbreaching party's obligation to perform, while a minor breach, or "substantial performance," does not. To determine whether a contracting party has substantially performed the contract, courts look at whether the nonbreaching party has received the substantial benefit of the bargain. This could include a consideration of the following factors: whether the breach was intentional, the value of the benefits received versus the value of the contracted benefits, and the cost to repair or obtain substitute performance. If the breach is judged to be minor because the breaching party substantially performed, the nonbreaching party may still recover any damages he suffered.

Here, there was a valid contract between B and Contractor ("C") to replace the docks at the marina, which required that the deck's top surface decking be made of pressure-treated wood. The facts indicate that in performing this contract, C did not use such pressure treated wood, but instead used a composite material that was visually indistinguishable from the pressure treated wood and was comparably priced to pressure treated wood, and had comparable properties, including strength, resistance, longevity, and maintenance requirements. A court would find this to be substantial performance of the contract because B received something that appears to be almost identical to what he contracted for in terms of the price, appearance, and strength, resistance, longevity, and maintenance requirements. Although the contract required pressure-treated wood, B received something almost identical to it. It is not clear whether C intentionally used this other wood or whether he did so accidentally, but even if this were intentional, this would not be considered a material breach because he would have intentionally used something that is basically the same as pressure-treated wood. The value of what B received is also identical to the value he contracted for. Additionally, while it might be costly to replace the top surface decking with another type of wood, given that B received something just as good, the court would not find this a material breach.

Because C substantially performed the contract, C is entitled to recover on the contract. Because C completed performance and substantially performed, he is entitled to the contract price, less any damages that B may prove for the less than perfect performance. However, on these facts, it appears that B would not be able to assert that there are any damages because B received a deck made of something of equal value, strength, and longevity to the pressure-treated wood which he contracted for.

Therefore, C is entitled to recover damages from B for breach of contract.

3. a. The issue is whether a contract for the sale of goods which is memorialized in a writing by a merchant is enforceable.

Article 2 of the UCC applies to this contract because it involves a sale of a boat, which is a moveable good. Under Article 2 of the UCC, a sale of goods for $500 or more must be in writing, unless an exception to the statute of frauds applies. There is an exception under Article 2 of the UCC for an oral agreement memorialized in a merchant confirmatory memorandum. Under Article 2, between merchants, where a merchant sends another merchant a written

confirmation within a reasonable time after an oral agreement is reached, the writing claims a prior oral agreement and is signed by the merchant, the other merchant receives it and has reason to know of its contents and does not object in writing within ten days, the writing, which is sufficient against the sender is also adjudged to be sufficient to bind the recipient to the contract. Under Article 2, "merchants" are broadly defined to include those who are "in business."

Here, the contract involves a sale of a Model A boat, for $22,000, for more than $500. The boat is a good because it is movable property. The parties reached an oral agreement because D made an offer by telling D what the boat would cost after B called inquiring about, and B then accepted by telling D to ship the boat. This bilateral agreement was supported by consideration, or bargained-for exchange, because B agreed to pay and D agreed to ship. Therefore, under the UCC's statute of frauds, the agreement is unenforceable unless an exception applies.

However, the merchant confirmatory memorandum exception applies here. B, a lessor of dock space, would be considered a merchant, as would Distributor ("D"), a seller of boats, because both are "in business." They orally agreed for the sale of a boat because the agreement occurred in a telephone call. The same day D sent B a written confirmation claiming the prior oral agreement and adequately reflecting its terms. Although the prior agreement did not include a delivery date and D's confirmation did, as discussed below this is a reasonable addition to the contract which would become part of the contract. The fax would be considered "signed" by D because it presumably would include either his signature, letterhead, or a fax cover sheet with his name on it, all of which are sufficient under Article 2. B received the agreement and would be found to have reason to know of its contents, and he never responded in writing. B will argue that he orally objected to the written confirmation, but oral objections are insufficient and B did not do so until April 1, 2011, which is 16 days after he received the confirmation on March 15, 2011. Because the objection was oral and was not done within ten days, a court would find it to be insufficient. This agreement, which is sufficient against the sender, D, is also sufficient to bind B.

The agreement would be found to include the April 15, 2011 delivery date. Under the UCC Article 2, a definite and seasonable expression of acceptance is an acceptance even if it contains additional terms. Between merchants additional terms in the acceptance or written confirmation become part of the contract if they do not materially alter the contract or if objection is not received within a reasonable time. Material alterations usually involve changing risk and remedies. Where there is no agreement as to the date of delivery, the date is a reasonable time after the contract. Here, B and D are merchants and B's written confirmation contained an additional term that was not part of the original contract - a date of delivery. This would not be material because one month is a reasonable time of delivery for a boat, and B never actually objected to this term, he simply tried to cancel the order.

Therefore, the court would find that an enforceable agreement exists between D and B, including the delivery date of April 15, 2011.

3. b. The issue is whether a seller of goods who has a large unsold inventory is entitled to lost profits damages.

Under Article 2 of the UCC, which applies to this question because it involves a sale of goods (a boat), a seller is generally only entitled to either the resale price minus the contract price, or the market price at the time and place of delivery minus the contract price. However, lost volume sellers, which are sellers who have an unlimited volume and could obtain as many as needed, are entitled to lost profits damages on the theory that a lost volume seller could have entered into both the original contract and the substitute contract.

Here, B materially breached the contract with D because he committed an anticipatory repudiation. An anticipatory repudiation occurs when one party to an executory contract unambiguously indicates that he cannot or will not perform. An anticipatory repudiation operates as a material breach of the contract. This includes canceling a contract, as B did here. Because B committed a material breach, D is entitled to damages. The facts indicate that D sold the boat for $22,000 to another buyer, which is exactly the price that D would have obtained from B. D would be entitled to no resale damages, however, D is eligible for lost profit damages because he is a lost volume seller who has a large volume of unsold boats. Because D could have entered into both the contract with B and the contract with his other customer, he is entitled to the profits he would have made on the sale to B. The facts do not indicate how much profit that is, but it would be the difference between the price of purchasing the boat and $22,000, the price for which he would have sold it.

Therefore, D is entitled to lost profits damages under Article 2 because he is a lost volume seller.

QUESTION-TWO

Doctor was having breakfast in the kitchen of his home when he heard noises coming from his medical office. The office was attached to Doctor's house with a separate entrance from the street. The office had not yet opened for the day. Upon entering his office from his kitchen, Doctor saw an intruder wearing a ski mask standing near a locked cabinet where Doctor stored his drugs. The intruder saw Doctor and picked up a heavy glass paperweight from a nearby desk and threw it at him, barely missing his head as it shattered against the wall. The intruder then bolted out an open window and made his escape in a car parked outside.

Doctor raced to the window in time to see a car pull away and was able to write down the last four digits of the license plate. Doctor called the police, and Officer responded to the call. Doctor told Officer that he did not see the face of the intruder, but that the intruder was real big. Doctor gave Officer the partial plate numbers.

After checking out locally registered cars with those partial plate numbers, Officer determined that one such car was registered to Bill. Officer also conducted a criminal history search and found that Bill had a long criminal record that included convictions for sale and possession of narcotics. Officer obtained Bill's home address from motor vehicle records and went to his house to question him. Officer rang the doorbell, identified himself as a police officer to a woman who answered the door, and said he wanted to speak to Bill. The woman responded that Bill was not home and that she was his live-in girlfriend. She told Officer that Bill had just gone to buy

cigarettes and invited Officer into the house to wait for him. While inside the house, Officer spotted what appeared to be a prescription pad on top of a desk in the corner of the room. He walked over to the desk and saw on the face of the pad that it belonged to Doctor.

When Bill returned, Officer questioned him about the burglary at Doctor's office. Bill denied that he had anything to do with the burglary and said that the prescription pad must belong to one of his five houseguests. Officer then seized the prescription pad and arrested Bill for burglary. Bill was six feet four inches tall and weighed over 300 pounds.

At his arraignment, Bill pleaded not guilty to the charge of burglary in the first degree, which is defined as:

A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument; or

(d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

1. Do the above facts satisfy the elements of burglary in the first degree?

2. (a) Did Officer legally enter Bill's house? (b) Assuming legal entry, was the prescription pad legally seized?

3. Was there a legally sufficient basis to arrest Bill?

First Answer to Question Two

1. The issue is whether the conduct of the defendant satisfies the elements of burglary in the first degree.

In order to be convicted of a crime, the government must prove all elements of that crime beyond a reasonable doubt. Burglary in the first degree has five elements. To be convicted of burglary, a defendant must (1) knowingly (2) enter or remain unlawfully (3) in a dwelling (4) with intent to commit a crime therein. The fifth element is satisfied by at least one of a list of four aggravating factors that the defendant does (5) in effecting entry or while in the dwelling or in immediate flight therefrom.

(i) The issue is whether the defendant knowingly committed the crime. Whether a defendant knowingly commits a crime goes to the defendant's intent. The defendant must appreciate and intend the consequences of his actions. This is the highest intent threshold in the Model Penal Code, and is akin to specific intent. Intent can often be proved circumstantially by identifying conduct that demonstrates the defendant knew and intended his actions.

Here, Bill's mere presence in Doctor's house before the Doctor's office opened demonstrates intent. There was no good reason for him to be there at that hour. Further demonstrating intent is the fact that Bill wore a ski mask, which means he probably wanted his face to remain hidden to avoid being identified, showing an intent to do misdeeds. Finally, he threw a heavy object at Doctor in his house, further demonstrating that he had no good reason to be there. Accordingly, Bill knowingly committed the offense.

(ii) The issue is whether the defendant entered or remained unlawfully. Whether a defendant entered or remained unlawfully depends on whether he had permission to be where he was. A trespasser is almost always unlawfully on the premises.

Here, Bill was not invited by Doctor to be in his office or house. Although the office may have been public, it was not yet open for the day, so Bill had no invitation to enter. Bill was a trespasser and there are no mitigating facts that suggest he had a lawful purpose on the premises. Therefore Bill entered and remained unlawfully.

(iii) The issue is whether the defendant was in a dwelling. A dwelling is a building in which someone lives.

Here, Bill was in Doctor's house, so he was in a dwelling. Although he was in the office part of Doctor's house, it still is part of a house. The presence of an extra entrance on to the street does not make the office any less part of a dwelling. Therefore Bill was in a dwelling.

(iv) The issue is whether the defendant intended to commit a crime. Burglary has a second intent requirement because the defendant must not only intend to commit the burglary, but as part of committing the burglary, he must intend to commit another crime inside the dwelling. Intent can again often be inferred by identifying conduct that demonstrates the defendant intended to commit a crime.

Here, as discussed in element (i), Bill's presence in the house at the early hour, his wearing a ski mask, and his throwing a heavy object at the Doctor all demonstrate he intended to commit a crime inside the house. Additionally, a prescription pad was found at Bill's house. This evidence can be further used to show intention to commit a crime in the dwelling, because Bill's intent was to steal that prescription pad. Thus, Bill intended to commit a crime in the dwelling.

(v) The issue is whether one of the defendants used a dangerous instrument while committing the burglary. This element actually allows for any one of four aggravating factors to apply. However, the only one applicable to this case is (c) whether the defendant used or threatened the immediate usage of a dangerous instrument. The other elements are not applicable because the

defendant did not (d) have a firearm, (a) was not otherwise armed with explosives or a deadly weapon, and (b) did not cause physical injury to anyone.

Here, Bill's throwing of the heavy paperweight will likely constitute use of a dangerous instrument to satisfy this element. The paperweight was heavy, it was made of glass, and Bill threw it at the Doctor's head. He obviously intended to cause serious injury, and fact that the paperweight shattered indicates it was thrown with substantial force. While Bill may argue that the paperweight is not inherently dangerous and so should not qualify for factor (c), his use of it caused it to be dangerous. Thus it should satisfy factor (c) in this element.

2. a. The issue is whether a police officer can legally enter a house with the consent of an apparent resident when another resident is absent.

The Fourth Amendment protects against unreasonable searches and seizures by government agents. Searches are unreasonable unless they are either (1) conducted pursuant to a lawfully obtained warrant or (2) qualify for an exception to the warrant requirement. One of the exceptions to the warrant requirement is that an officer can conduct a search without a warrant pursuant to freely given consent by one who has the apparent authority to give such consent. An officer can search a house if the owner of the house consents to the search, as long as the consent was knowing and voluntary. The officer can never search outside the scope of this consent. If more than one person lives in a house, the officer must obtain consent from everyone who is present and can properly give consent. If not everyone is present in the house who needs to consent, the officer may only search areas that the person giving consent can normally access. Thus, private bedrooms and locked areas of those not present are normally not appropriate for searching.

In this case, Officer, a government agent, rang the doorbell of the house listed on Bill's motor vehicle records. He did not have a warrant. The door was answered by Bill's girlfriend who indicated she lived in the house. Since she also claimed she lived there, it was appropriate for her to invite Officer in because she had at minimum apparent authority to consent to Officer's presence. This consent was knowingly and voluntarily given because Officer did not induce Bill's girlfriend in any way. She invited him into the house without his suggestion. She limited the scope of her consent to wait for Bill to return; she did not give Officer consent to go searching around the house, and he did not do so, such that his conduct was in the scope of her consent. Finally, she did not attempt to give Officer access to any of Bill's private areas, which would not be a proper form of consent.

Therefore, Officer legally entered Bill's house pursuant to his girlfriend's consent.

b. The issue is whether a police officer legally on the premises can also legally recognize contraband in plain view.

As described in (2)(a), the Fourth Amendment prohibits unreasonable searches and seizures by government agents. Seizures are also unreasonable unless they are conducted pursuant to a lawfully obtained warrant or qualify for an exception to the warrant requirement. One exception is that an officer can seize anything in plain view that he clearly recognizes as contraband as long

as he is lawfully on the premises. Such seizures are allowed, even without a warrant. Here, assuming the entry was legal, Officer's presence in the house was lawful. As discussed in 2(a), he did not exceed the scope of his lawful entry, because he was waiting in the house for Bill. As a result, he can lawfully seize readily-apparent contraband in plain view even though he is a government agent acting without a warrant. In this case, Officer is investigating the burglary of Doctor's Office, so his observance of the prescription pad in plain view is recognition of contraband.

As a result he can legally seize the pad without a warrant.

3. The issue is whether a police officer can legally arrest a defendant in his own home without a warrant.

Arrests, like seizures, under the Fourth Amendment are unreasonable unless they are conducted pursuant to a lawfully obtained warrant or qualify for an exception to the warrant requirement. Felony arrests of individuals in public places require only probable cause. An arrest of a defendant in their home, however, almost always requires an arrest warrant. There is a limited exception for if the defendant is deemed armed and dangerous.

Here, the Officer has probable cause because as discussed, Bill's alleged conduct satisfies the elements of burglary, and the Officer has lawfully seized evidence to prove it, along with identification evidence provided by Doctor including Bill's license plate number and stature. However, Officer cannot arrest Bill in his home without an arrest warrant. The only exception would be if Officer deemed Bill to be armed and dangerous, but there is no evidence that Bill was armed. The fact that he threw the paperweight is in fact evidence that he probably wasn't armed. His large size alone does not make him dangerous.

As a result, Officer's arrest of Bill in his home without a warrant was a violation of the Fourth Amendment.

Second Answer to Question Two

1. The issue is whether all elements of burglary in the 1D have been met.

The Constitution provides that prosecution must prove each element of the crime beyond reasonable doubt in order to hold a defendant liable for the charged crime. This statute provides the following elements of the crime for the 1D burglary:

1) knowingly enter or remains unlawfully

2) in a dwelling

3) with intent to commit a crime therein,

4) additional elements (a), (b), (c) or (d)

Here, element (1) is met from the given facts (masked intruder entered the office without permission of the Doctor); satisfaction of element (2) depends on whether the office would be deemed a dwelling. It is established that an office connected to a dwelling can be deemed a dwelling, especially if it is attached to the dwelling, regardless that it has a different entrance. Element (3) depends on the intent of the intruder, and the facts do not give us enough information to conclude he did intend to commit a crime. Element 4(c) is met by the intruder throwing the heavy glass paperweight at the doctor, because the paperweight did in fact shatter the glass of the window, qualifying it as a dangerous instrument if thrown at a human being.

Thus, assuming that the intruder had an intent to commit a crime inside (element 3), the elements of the 1D burglary have been met, by the prosecution proving them by beyond reasonable doubt.

2. a. The issue is whether there was consent by the third party for the police to enter the intruder's house without a warrant.

The 4A Search and Seizure of the Constitution requires that warrant supported by probable cause must be issued in order for a police to enter a house to search the premise. Since the house is a place where a person can expect to have privacy, a warrant would be required. The exception to this general rule is where consent to enter the premise by the owner is obtained. In case of a consent given by the third party, the third party is required to have common authority, or the owner of the house should have assumed the risk of the third party giving consent to enter.

Here, the girl friend consented to the police's entry into Bill's house. The consent was not given by Bill himself, but by the girl friend instead, who is a third party. Since she is a live-in, she would have common authority to consent to the police entry of the premise. Even if the girlfriend lacked common authority, since no facts indicate that the intruder locked a specific area, and that police do not seemed to have searched any locked area, the intruder is deemed to have assumed the risk of the live-in girlfriend to give consent to the police. Thus, the officer legally entered Bill's house.

b. The issue is whether evidence obtained without a warrantless entry would be legal.

The general rule is that warrantless search and seizure violates the 4A of the Constitution. However, there are exceptions to this general rule, such as the plain view rule. The rule provides that even absent warrant, seizure of a evidence is lawful if the 1) entry into the house was lawful, and 2) the evidence seized was in the plain view of the premise entered.

Here, the pad was on the desk in the corner of the house, and the officer did not open any containers to find it, making it evidence obtained under the plain view exception.

Thus, the pad was legally seized.

3. The issue is whether a warrantless arrest violates the 4A Constitution. The 4A of the Constitution requires that an arrest requires a warrant supported by probable cause. One of the

exceptions to this general rule is where exigent circumstances requires the arrest, and probable cause to support that.

Here, the doctor gave partial information of the intruder's plate number, which matched Bill's car number plate. The doctor's description of the intruder being "real big" is in line with Bill's physical condition.

Thus, the doctor had a probable cause of Bill being the intruder, and there was sufficient basis to arrest Bill.

QUESTION-THREE

David and Lisa met while attending college in State X. From 2000 through 2008, they lived together in State X in a manner which State X recognizes as a common-law marriage.

In 2004, David returned to school in pursuit of a master of business administration degree (MBA). David financed graduate school through his savings and student loans without any financial contribution from Lisa. While David attended school, Lisa assumed greater responsibility for household duties and expenses and provided David with emotional and moral support. After graduating, David was unable to find work. In 2008, David and Lisa moved to New York.

David was still unable to find work and persuaded his friends, Chris and Pete, to start a business brewing specialty beers. They formed Brewers Corp., a New York business corporation whose shares were not publically traded. Based on their initial capital contributions, Chris, Pete and David each acquired one-third of the shares of common stock of Brewers Corp., and each held a position on the board of directors. It was agreed that David would manage the brewery for a modest salary that would increase once the business became profitable.

In 2009, Lisa gave birth to a daughter, Olivia. Lisa returned to work after Olivia was born because David's income was insufficient to support them.

In 2010, the relationship between David and Lisa began to deteriorate. Lisa resented leaving Olivia in order to work and blamed David for failing to support the family. David complained that Lisa did not appreciate his contributions to the marriage. For the past year, while continuing to live together, David and Lisa kept separate social and personal schedules, communicated only with regard to Olivia, and stopped having sexual relations.

In 2011, Brewers Corp. became profitable. David felt he was responsible for the success and demanded a significant increase in salary. Instead, the board of directors, over David's vote, terminated David's employment and implemented a freeze on corporate dividends. Chris and Pete refused to permit David to participate in the business of Brewers Corp. Last month, David commenced a proceeding seeking dissolution of Brewers Corp. Within one week, Chris and Pete opposed dissolution and sought to acquire David's shares.

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1. (a) Does David have grounds for the dissolution of Brewers Corp.?

(b) What rights, if any, do Chris and Pete have to acquire David's shares?

2. (a) Would a New York court have jurisdiction to dissolve the

State X marriage of David and Lisa?

(b) Assuming a New York court would have jurisdiction, what grounds, if any, exist for the dissolution of the marriage without a showing of fault?

(c) Is David's MBA degree a marital asset whose value is subject to equitable distribution in a matrimonial action?

First Answer to Question Three

1. a. The issue is whether a minority shareholder and director in a close corporation may obtain involuntary dissolution of a corporation because of fraud or oppressive conduct.

Under the BCL, a shareholder in a close corporation who owns 20% or more of the stock of the corporation may obtain an involuntary dissolution of the corporation if the other shareholders are engaged in fraud or oppressive conduct, or are looting the corporation. The fraud or oppressive conduct standard is a high standard, requiring that the other shareholders (who might also be running the corporation in a close corporation) are acting in such a way as to deliberately lock the complaining shareholder out of the corporation's control and defeat his reasonable expectations.

Here, David ("D") is a minority shareholder in Brewers Corp, whose shares were not publicly traded. D owns more than 20% of the shares of Brewers Corp because the facts indicate that Chris ("C"), Pete ("P") and David ("D") each acquired 1/3 of the shares of common stock. D is thus a 1/3, or 33.33%, shareholder, which exceeds 20%. This is a close corporation because the shares are not publicly traded and such corporations can be managed either by shareholders or directors. After almost three years of labor as the manager of the brewery, the brewery finally obtained a profit which D feels is due to his efforts, and D requested that raise only to have his employment terminated, a freeze on corporate dividends instituted, and importantly, C and P refused to permit D to participate in the business of Brewers Corp. By terminating his employment and freezing dividends over D's objection, C and P ensured that D would not earn money off of the corporation (but they would not either). But by refusing to permit C and P to even participate in the business, combined with D's termination as manager and the freeze on dividends, D is effectively a shareholder without any rights to compensation or control of the corporation. This is oppressive conduct by two thirds of the shareholders, who have sufficient power to oppress B and defeat his reasonable expectations even though he is also a director of

the corporation, who should be entitled to one third of the right to manage the corporation due to his directorship position.

No other grounds for dissolution apply.

Therefore, the court would find that D has grounds for dissolution of Brewer Corp.

b. The issue is whether a close corporation has the right to acquire the shares of a dissatisfied shareholder to avoid an involuntary dissolution.

Under the BCL, a shareholder holding at least 20% of the shares has the right to seek involuntary dissolution of the corporation. However, the BCL provides that when a shareholder has successfully asserted grounds for involuntary dissolution, the other shareholders may avoid such dissolution by offering to buy out the complaining shareholder's shares. They must make an offer to purchase within 90 days and the court has discretion to determine whether the price is fair and reasonable. There is no discount for minority shares that lock control. Here, as described above D has adequately set forth grounds for involuntary dissolution of Brewer Corp. However, C and P have opposed dissolution and sought to purchase D's shares. Within 90 days of D's request for dissolution, C and P have a right to avoid dissolution by such a purchase. The court will ensure that a fair price is set. Moreover although D effectively has no control of the corporation as a 1/3 shareholder, the court will not discount his shares to reflect this lack of control.

Therefore, C and P are entitled to acquire D's shares to avoid an involuntary dissolution.

2. a. The issue is whether a New York state court would recognize a common law marriage and whether a New York court can grant a divorce where the marriage was obtained elsewhere but the parties now live in New York.

Under the New York DRL, New York does not recognize common law marriages of its own citizens. Two New Yorkers cannot obtain a common law marriage by living together as husband and wife in New York - they must have a ceremonial marriage to be validly married. However under principles of conflicts of law, New York courts recognize marriages validly performed elsewhere, unless the marriage is against a strong public policy of New York (e.g. bigamy) or the parties left New York to marry elsewhere and avoid a prohibitory rule. This means that New York courts recognize common law marriages validly performed elsewhere and can grant divorces of common law marriages. Here, the facts indicate that although D and Lisa ("L") never had a ceremonial marriage in State X, they lived together for eight years in State X in a manner which State X recognizes as a common law marriage. Thus under the laws of State X they would have a valid common law marriage and New York would recognize their marriage as valid, as New York courts commonly do in these situations. Common law marriage does not violate a strong public policy of New York and D and L did not leave NY to obtain a common law marriage in State X.

Having established that the court would recognize the marriage between D and L, the next question is whether the court has appropriate jurisdiction to dissolve the marriage which was performed elsewhere. Under the DRL and the CPLR, a court has jurisdiction over a marriage,

which is treated as a res (property) as long as the party seeking divorce is domiciled in New York. Domicile requires physical presence with the intent to remain in New York. To adjudicate collateral issues (spousal support, maintenance), there must also be personal jurisdiction over the parties to the marriage. Finally, durational residency requirements must be satisfied. One option for satisfying those requirements is if one of the parties lived in New York for two years. Another is if both live in New York now and the grounds for divorce arose in New York. The third is if one party lived in New York for one year, and there is a "New York link" to the marriage such as the grounds arising in NY, the marriage occurring in NY, or the obligation to support accruing under the laws of NY or an agreement executed in NY.

Here, the court would have jurisdiction because although D and L were married in State X, it is now 2011, per the facts, and they have now both been living in New York for three years. They have established a domicile in New York because they have been living in New York for around three years and they appear to be intending to remain in New York. Additionally, the New York court would have jurisdiction to award equitable distribution and any spousal support (maintenance) because both parties are New York domiciliaries, which gives the court personal jurisdiction. Finally any durational residency requirements are satisfied because both spouses have been living in New York for more than two years and the relationship began to deteriorate while they were living in New York.

Therefore, the court would recognize D and L's common law marriage from State X and the court has jurisdiction to grant a divorce.

b. The issue is whether a New York court can grant a divorce absent a showing of fault. Under the DRL, there are six grounds for divorce. These include no-fault divorce based on an irretrievable breakdown of the marriage, adultery, abandonment, cruel and inhuman treatment, a conversion divorce based on a separation agreement or separation decree, or imprisonment of three years or more.

Here, no-fault divorce is the only one that requires no showing of fault. A no-fault divorce can be obtained where either spouse asserts in an affidavit that the marriage has irretrievably broken down. The court can only grant such a divorce when all collateral issues have been resolved between the parties. In this case D and L's relationship "began to deteriorate." L is angry that she has had to leave her daughter at home to work and she blames D and his poor business acumen for this because he failed to support the family. D complains that L does not appreciate his contributions. Their marriage has irretrievably broken down because they are unhappy with each other for the stated reasons and are communicating only with regard to their daughter and stopped having sexual relations. Assuming that they no longer believe that they can make their marriage work and one or both of them are willing to swear to this before the court, they should be entitled to a no-fault divorce based on these facts, as they are no longer having sexual relations, are keeping separate finances, and have strong complaints about each other. D and L have been keeping separate finances for some time, but the court would have to resolve the collateral issues related to the marital property and support before entering the divorce.

A conversion divorce could be entered without either spouse actually showing fault against the other, but they would first have to enter into a valid separation agreement and live pursuant to

that agreement for one year, substantially complying with its terms and filing it with the court. Here, no facts indicate that there was a valid separation agreement and they have not been living separate and apart, so a conversion divorce would not be an immediate option for D and L.

As described above, the durational residency requirements for this divorce, which are treated as part of the "merits" of the matrimonial action, are satisfied because D and L have lived in New York for two years and the grounds for divorce arose in New York.

Therefore, D and L are entitled to a no-fault divorce.

c. The issue is whether a professional degree obtained during marriage where the other spouse supported the husband through household work and expenses while he obtained the degree is a marital asset that can be equitably distributed.

Under the DRL, at divorce all separate property is awarded to the spouse who obtained it and all marital property is equitably divided. Separate property includes property obtained before marriage, property obtained by one spouse during marriage by gift, bequest, or devise, and any property that the spouses agree to treat as separate property. Marital property includes all property acquired during marriage, except for that which is treated as separate property. Marital property includes a professional degree obtained by one spouse during the marriage where the other spouse either contributes financially to obtaining the degree (pays for it), or contributes with an increased portion of household expenses and duties. The court considers this marital property to compensate the spouse who did not earn it for the labor she contributed to it. The court will determine the degree to which the degree enhances the spouse's earning capacity and then reduce the degree to present value and award that asset to the spouse who earned it; the other spouse will then earn more of the spouse's other assets to compensate for the degree being awarded to the spouse who earned it. To divide marital property, the court will apply factors including the length of the marriage, the party’s contribution to the property, which spouse will have custody of the minor and whether one spouse left the workforce during marriage.

Here, D returned to school in 2004 during his common law marriage with D and L, which New York recognizes because it was validly performed in State X and there are no defenses to its enforcement for the reasons described above. D paid for his MBA himself by savings and student loans, but L assumed greater responsibility for household duties and expenses as well as provided D with emotional and moral support. While emotional support and moral support alone might not be enough, L contributed tangibly to the MBA by taking care of household duties and paying for more household expenses. This contribution made it easier for D to obtain the degree and it also contributed financially - D, who was not working and was living on student loans and savings, would have had to spend more of that money on the household expenses if not for his wife's contribution. Although D may claim that he did not actually have any increased earning capacity due to this degree - because he was unable to find work after the MBA - this is irrelevant because the MBA will increase his earnings over his lifetime. He also was able to do well as a manager of Brewer Corp, which demonstrates that the MBA did have a benefit on his earning capacity. L helped D earn this degree which increased his earning capacity and it thus became marital property.

Therefore, the court will treat D's MBA as a marital asset whose value is subject to equitable distribution in a matrimonial action.

Second Answer to Question Three

1. The issues are whether a minority shareholder owning more than 20% of shares in a corporation may sue for dissolution on the basis of conduct that is oppressive towards him and whether, in such a suit, other shareholders have the right to prevent dissolution by acquiring the shares of the shareholder suing for dissolution.

Under the NY BCL, a corporation can dissolve either voluntarily, by a vote of a majority of its shares entitled to vote, or involuntarily in a number of ways including by the suit of a minority shareholder of a close corporation (i.e., a corporation not traded on a public exchange and with few shareholders) owning more than 20% of the shares, where that shareholder complains of either a) fraudulent, wrongful, or oppressive conduct towards him, or (b) wasting or dispersal of corporate assets. Any other shareholder has the right to prevent dissolution by acquiring the shares of the shareholder suing for dissolution within 90 days at an agreed-upon price or, failing an agreement, at a price set by the court representing the fair value of the shares.

In this case, David is a shareholder of a close corporation owning one-third, or 33% of the shares. Because he is a minority shareholder owning more than 20% of the shares, he may sue for dissolution on the basis of wrongful and oppressive conduct towards him. He can claim that he has been treated wrongfully and oppressively in that the corporation breached its agreement to increase his salary when the business became profitable and in fact terminated him and implemented a freeze on dividends, apparently in response to his request for an increase in salary and in the face of successful growth under David's management.

However, as noted, Chris and Pete have a right to reacquire David's shares within 90 days to prevent dissolution at fair value. If they cannot agree upon a value, the court will set one.

2. a. The issue is whether a NY court has jurisdiction to dissolve a marriage not valid in NY but valid where it was formed.

The Supreme Court has in rem jurisdiction to dissolve a marriage whenever one spouse is domiciled in NY. Additionally, the substance of a claim for dissolution requires conformity with durational residency requirements which are met when one of the following applies: (1) where both spouses are domiciled in NY and the grounds of the action arose in NY, (2) where one spouse has been domiciled in NY for two years, or (3) where one spouse has been domiciled in NY for one year and either: (a) the grounds for the action arose in NY, (b) NY was the marital domicile at any point in the marriage, or (c) the marriage was performed in NY. Where in rem jurisdiction and the durational residency requirements are met, the court may determine the status of a marriage, notwithstanding that the marriage was formed in another state. NY recognizes marriages formed through a method permitted in the state of formation but not permitted in NY.

In this case, the Supreme Court would have in rem jurisdiction because both parties live in NY and the grounds for marriage, i.e. the facts giving rise to irretrievable breakdown of the marriage (see below), arose in NY. Furthermore, both parties are currently domiciled in NY, so the durational residency requirements are met. Finally, because David and Lisa's common law marriage was valid in State X where it was formed, they are considered as married in NY notwithstanding that NY does not recognize common law marriage, and thus their marriage exists such that it can be dissolved.

b. The issue is whether the requirements of no-fault divorce have been met.

The NY Domestic Relations Law, as recently amended, includes two grounds of divorce that could be described as a "dissolution of the marriage without a showing of fault." First, a validly executed separation agreement filed with the court can be converted into a divorce where the parties have lived for 12 months apart and have not at any point implicitly rescinded the agreement by cohabitating with the intent to reconcile. Since such an agreement can come into being without fault, this does not require a showing of fault (note that conversion divorce based on separation decree would require a showing of fault for the initial separation decree). Second, the DRL now recognizes a true no-fault divorce for irretrievable breakdown of the marriage, where one spouse swears under oath that the marriage has been irretrievably broken down for the previous six months.

In this case, conversion divorce is not available as the parties have not lived apart. However, if either spouse is willing to testify under oath that there has been an irretrievable breakdown of the marriage for the previous six-months, they are entitled to a no-fault divorce under the recent amendment to the DRL. It has not been established whether corroborating evidence is required, but such evidence in any case exists here, as the couple has kept separate social and personal schedules, communicated minimally, and stopped having sexual relations for the past year--more than the six months required.

c. The issue is whether a professional degree is a marital asset subject to equitable distribution in a matrimonial action.

A divorce decree can be accompanied by an order for the equitable distribution of the marital estate, meaning that the party’s property is divided up. To do so, the court will first determine what property belongs to each spouse individually, and then consider a number of factors to determine a percentage that each spouse is entitled to receive from the marital property. All property acquired during the marriage is presumed martial property unless an exception applies, as where the property was gifted or devised to one spouse in her sole name. Furthermore, professional degrees obtained during the marriage are generally considered marital property, especially where another spouse assumed greater responsibility and provided support while the degree was obtained. However, since professional degrees also affect earning potential and thus maintenance and support awards, the courts are careful to ensure that their treatment of such degrees does not result in it being double counted in both the equitable distribution and maintenance and support awards.

In this case, David pursued and received an MBA during his marriage to Lisa while Lisa assumed greater responsibility for household duties and expenses and provided David with emotional and moral support. Because professional degrees are generally considered marital property and the policy reasons have been met here, it will be considered a marital asset subject to equitable distribution.

QUESTION-FOUR

On August 5, 2010, Dan, a private citizen, appeared in a broadcast on WANY, an Albany television station. Dan stated that Prosecutor, the district attorney in a small rural county in New York, had received cocaine for her personal use from various drug dealers in exchange for her allowing the dealers to receive reduced sentences as part of plea bargains. Although the statement was false, Dan had heard it from a police officer friend of his and believed it to be true. At the time of the broadcast, Dan was a resident of New York. In January 2011, Dan moved to State X.

On April 1, 2011, Prosecutor commenced a defamation action in the United States District Court for the Northern District of New York against Dan and WANY. Upon a motion by WANY, the court determined that WANY was a citizen of New York, so that there was not complete diversity of citizenship among the parties. On June 13, 2011, the court dismissed the action for lack of subject matter jurisdiction.

On September 9, 2011, Prosecutor, having settled her claim against WANY, commenced a defamation action in New York Supreme Court, Albany County, against Dan. The following week the summons and complaint were personally served on Dan in State X by a process server authorized to serve process there. The complaint alleged the foregoing relevant facts. It did not allege any special damages.

Dan timely moved to dismiss the complaint on the grounds that (1) the court did not have a basis for the exercise of personal jurisdiction over him and that, in any event, (2) the cause of action is barred by the statute of limitations. The court (a) denied the motion on both grounds.

After serving his answer, Dan moved to dismiss the complaint on the ground that it failed to state a cause of action because it alleged no special damages. Prosecutor opposed the motion on the merits and on the ground that Dan had failed to include this issue in his first motion to dismiss. The court (b) denied the motion.

1. Were the court's rulings (a) and (b) correct?

2. Assuming personal jurisdiction and a properly pleaded complaint, what must Prosecutor prove to establish her cause of action for defamation, and is she likely to succeed?

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First Answer to Question Four

1. a) 1) The issue is whether the court had a basis to exercise personal jurisdiction over an out-of-state Defendant ("D")

The law that governs in NY Practice matters in New York is the CPLR. In order to bring a party to court, the court must have personal jurisdiction over the party. A court may acquire general personal jurisdiction if the D is present in the state, is a domiciliary of the state, or is doing business in the state. If none of these are available, a court may also be able to acquire special jurisdiction over a party by means of their consent, or by long arm jurisdiction. In order to assert Long arm jurisdiction over a D, D must have minimum contacts with the state. This can be shown when the D negotiates a contract in the state, commits a tortious act in the state, or commits a tortious act outside of the state that has an impact in the state, and that the D could reasonably expect that his actions would be likely to subject him to claims in the state. The defendant must also have due process, and notice.

Here, Prosecutor, the Plaintiff ("P"), attempted to exercise personal jurisdiction over D via long arm jurisdiction, by having D personally served in State X. However, the action was based on Ds tortious act of defamation against P in NY, and long arm jurisdiction cannot be exercised over a D in an action for defamation.

Therefore, the court improperly denied Ds motion to dismiss.

1. a) 2) The issue is whether Ps cause of action for defamation is barred by the statute of limitations

The statute of limitations for defamation is 1 year, arising when the defamatory statement was first published.

Here, D made the defamatory statement on August 5, 2010, and P commenced the action for defamation against D on September 9, 2011. Although it appears that the statute of limitations had run because more than a year had elapsed, P had previously commenced a defamation action against D and WANY (the television station on which the defamatory statement was broadcast), on April 1, 2011. This action was dismissed on June 13, 2011 on the basis of lack of subject matter jurisdiction. In NY, when a claim is dismissed for a reason that is not on the merits, and the statute of limitations would otherwise run, the P gets an additional 6 months in which to assert her claim. This would mean that P would have until December 2011 to assert her claim against D in order to remain within the statute of limitations. Therefore, the court properly denied Ds motion to dismiss.

1. b) The issue is whether D is barred from asserting Ps failure to state a cause of action in his Answer, where he had failed to do so in his pre-answer motion to dismiss

In responding to a Ps claim, a D may make a pre-answer motion to dismiss, or an answer. If lack of personal jurisdiction is not asserted in the pre-answer motion to dismiss, it is waived, and may no longer be asserted. In the defendant's answer, he must assert any and all counterclaims and

affirmative defenses he may have, or these are also waived. However, failure to state a cause of action is not a ground that is waived if it was not asserted in Ds first motion to dismiss.

Here, D initially made a motion to dismiss on the grounds of lack of personal jurisdiction, and had that been granted, the case would have been dismissed. Since the court denied this motion, D had to serve answer, in which he properly asserted that P failed to state a cause of action.

Therefore, the court was correct in denying Ps opposition to Ds motion.

2. The issue is whether the P will succeed in a cause of action for defamation against D

In order to assert an action for defamation, P must prove 1) D made a defamatory statement of or concerning P, 2) that the statement was published, and 3) in certain defamation causes of action that are not in the slander per se category, P must also prove damages. In addition, when there is a public figure, or the matter is of public concern, she must also prove 4) that the statement was false, 5) and that the statement was made with malice, or at least recklessly. Here, P is a Prosecutor, therefore this is a matter of public concern. Element 1) is satisfied because D stated that P received cocaine for her personal use in exchange for allowing dealers to receive reduced sentences. This statement is defamatory on its face because it affects Ps reputation both personally as an accused cocaine user, and professionally, because making plea deals in exchange for drugs is clearly damaging. Element 2) is also satisfied, because D made the statement on a broadcast on TV, which satisfies the element of publication. Though it should be noted that even saying the defamatory statement to one other person would qualify as publication.

With respect to Element 3, of damages, damages are not required when the defamatory statement falls under a slander per se category. Slander is defined as spoken defamation, while libel is either written defamation or defamation that is otherwise captured in a permanent format. Given that this statement was made on television, it would qualify as libel, and given that this statement on its face is defamatory because it directly affects Ps business reputation, no damages need to be proven.

With respect to Element 4, the facts tell us that the statement was false, therefore this element is also satisfied. Finally with respect to Element 5, P may not be able to successfully assert that the statement was made with malice, because D heard it from a police officer whom he believed to be a reliable source, and he believed this statement was true. Generally, this is not a defense when it comes to defamation of private citizens, however when it comes to public figures, as the Prosecutor is here, malice or at least recklessness must be shown.

Thus, unless P is able to show that D made the statement recklessly, she will not likely succeed in her cause of action for defamation.

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Second Answer to Question Four

1. Does the court in NY have personal jurisdiction for a defendant who resides out of state?

In order to have personal jurisdiction, a defendant must either reside in NY, have a business in NY, or have a business outside NY but have a lot of business generated in NY. If these requirements are met, the court has general jurisdiction over defendant. The court can also attain specific jurisdiction through the use of the long-arm statute for tortious acts committed in NY or done outside of NY but where the injury occurs in NY. The exception to this rule, however, are defamation suits.

In this case, Dan is a resident of State X and has no residence in NY nor does he have a business in NY nor does he engage in business in NY. The only way to have personal jurisdiction would be through the long-arm statute. But since this case is for defamation, it would fall outside the long-arm statute and the court would have no personal jurisdiction over Dan. The court was incorrect in denying Dan's motion based on this reason.

Is the cause of action of defamation barred by the statute of limitations in this case?

Defamation has a one year statute of limitations from the date the comment is publicized. If a case begins one year after this date, it will be barred by the statute of limitations.

In this case, the alleged defamatory statement took place on 8/5/10. Any suits commencing on 8/6/11 would be barred by the statute of limitations. However, there exists an exception if plaintiff brings a suit but it is dismissed through no fault of plaintiff – a six month grace period is added to allow plaintiff to re-file suit. Since Prosecutor in this case filed within first year and case was dismissed for lack of subject matter jurisdiction – not on merits – six months were given to Prosecutor to cure defect. Prosecutor then filed suit in Supreme Court within those six months on 9/9/11 (from 4/1/11). Therefore, the court was correct in denying the motion on these grounds.

Was the court correct in denying a motion because it failed to state a cause of action?

In a defamation case, plaintiff must allege that there was a statement made, that said statement injured plaintiff's reputation and that the statement was about plaintiff. A plaintiff must also allege damages. Additionally, in cases involving public figures, a plaintiff must prove that the defamatory statement was made with malice. In libel cases, where defamation is written, special damages are presumed. Special damages are also presumed in cases of slander (defamation) per se; those cases involving plaintiff's business or livelihood.

In this case, Dan was allowed to include in his motion to dismiss following his answer that it failed to state a cause of action. A party does not waive all defenses if not raised in first motion to dismiss. This applies only to contesting personal jurisdiction. The court should not have denied it based on this reason. However, since the defamatory statement deals with plaintiff's business or livelihood, and it was oral, it would fall under the category of slander per se and

special damages would not have to be shown. Based on this reason, the court would be correct in denying Dan's motion to dismiss.

2. As stated above, plaintiff Prosecutor would have to show defamatory statement was published – that it was about Prosecutor and that it injured Prosecutor's reputation. Additionally, because Prosecutor is a public figure – the district attorney in a county in NY – Prosecutor would have to prove malice on the part of Dan. All of the requirements are met except the malice requirement. In this case, Dan acted in good faith in believing what his police friend had told him. Since he as acting in good faith in saying something he believed to be true, Prosecutor will likely not succeed in a defamation case against Dan.

QUESTION-FIVE

In 2009 Frank, a widower, wanted to give Blackacre, a house he owned, to his son, Sam. Sam was having financial difficulties, and Frank wanted to protect Blackacre from Sam's creditors. In Sam's presence, Frank's daughter, Dot, agreed with Frank that she would take title to Blackacre until Sam's financial difficulties were resolved, at which time she would convey Blackacre to Sam. Frank then conveyed Blackacre to Dot.

On July 20, 2010, Frank executed a will with the following dispositive provisions:

1. I give and bequeath the sum of $100,000 to my trustee, Tom, to be held and disposed of in accordance with the Frank Inter Vivos Trust Agreement which is in the process of being prepared.

2. I give, devise and bequeath all of the rest, residue and remainder of my estate to my daughter, Dot, and my son, Sam, in equal shares.

Declaring the instrument to be his will, Frank signed it in front of Dot and his friend, Joe, both of whom signed as witnesses.

On August 10, 2010, Frank signed the Frank Inter Vivos Trust Agreement, which named various charities as the beneficiaries. No one witnessed Frank signing the agreement, but he acknowledged his signature before a notary public. Tom, as trustee, duly executed the agreement.

Frank died on December 22, 2011, survived by Dot, Sam, and Greta, his only grandchild. Greta is the daughter of Frank's deceased son, Cory. Frank intentionally made no provision for Greta in his will.

Sam has resolved his financial difficulties and is demanding that Dot convey Blackacre to him, but Dot is refusing to do so.

Greta is claiming that the will was improperly witnessed, and thus Frank died intestate.

Sam is claiming that the will should be admitted to probate but that he is entitled to the entire estate, because the bequests to Dot and to Tom, as trustee, are both void, and in any event, the trust agreement is invalid because it was improperly executed.

Tom plans to apply for letters of trusteeship and claims the $100,000 bequest should be paid to him as trustee.

1. If Sam seeks judicial intervention, should the court direct Dot to convey Blackacre to Sam?

2. Should Frank's will be admitted to probate?

3. Assuming Frank's will is admitted to probate, what are the rights, if any, in Frank's estate of the following?

(a) Tom, as Trustee

(b) Dot

(c) Sam

(d) Greta

First Answer to Question Five

1. The court should direct Dot to reconvey Blackacre to Sam, because of the equitable remedy of a Constructive Trust.

Under New York law, a constructive trust is an equitable remedy in which the court will impose when there has been an unjust enrichment. The court will hold property until it can be determined who is the rightful owner. A constructive trust will be imposed if the party can show (1) fiduciary / confidential relationship existed between the transferor and transferee, (2) unjust enrichment on the part of the transferee; (3) there has be a conveyance with a promise to reconvey and (4) the transferee is keeping possession of the property. Further, the only defense that a party opposing the constructive trust would have is unclean hands. Unclean hands is established when a plaintiff has also acted in bad faith.

Here, Frank owns Blackacre and he conveys it to his daughter under the agreed upon premise that Franks daughter - Dot, will only hold the property for Sam, Frank's son, until Sam's financial difficulties subside, at which point dot will reconvey the property to Sam. There is a fiduciary relationship between Frank and Dot since they are father and daughter. There is unjust enrichment on the part of Dot, since the property was never intended for her and was always intended for Sam. Dot made a promise to reconvey the property to Sam once his financial

difficulties had subsided and lastly, Dot as transferee is keeping the property in her possession regardless of Sam's financial difficulties dissipating and him asking for the property back. Furthermore, the only defense Dot would have against Sam would be unclean hands, but Sam has done nothing in bad faith to not rightfully receive the property, so any claim of this defense would fail

Due to all the elements of a constructive trust existing, the court should direct Dot to reconvey the property to Sam.

2. Franks will should be admitted to probate, because an interested witness will not make the will void and the pour-over-trust will fall into the residuary. Under the EPTL, in order to have a validly executed will the testator must be 18 or older, here must be a writing, the testator must sign the writing at the end of the document, the testator must publish the will in front of two witness - stating the will is his last will and testament, the testator must sign the will in the presence of the witnesses or attest to the signature in their presence, and the witnesses must sign within 30 days of each other. Further, under the EPTL an interested witness is one who signs the will as a witness and is also receiving a gift under the will. An interested witness will not make the will void, however, the interested witness will not receive his/her gift under the will. In New York, if the interested witness would also be an intestacy distributee, than the interested witness will receive the less of either (i) his/her gift under the will or (ii) his/her gift under the will. Further if there are 3 witnesses to the will, two of whom are disinterested, the interested witness will then be able to receive his/her gift under the will.

Under the NY EPTL, a pour-over trust, is the single only exception to the incorporation by reference doctrine. The incorporation by reference states that no document other than those properly executed in the same way a will is (i.e. only a will or Codicil) can be made reference to in a will. However, a pour-over-trust is created by a bequest in a will allotting money to a specific trust. However, for a pour-over-trust to be valid, the trust must already be made, or made contemporaneously with the will.

Here, nothing in the facts state that Franks will did not comply with the standards of the EPTL in creating a duly executed will. The only issue that arises is Dot signing the will as a witness and also receiving a bequest under the will. Dot would be an interested witness. In accordance with her gift in the will, Dot and Sam would split Frank's estate in equal shares. However, via intestacy, Dot, Sam and Greta (via Cory) would split Frank's estate 3-ways. Since Dot would receive less splitting the estate 3 ways than she would splitting it two ways - Dot will receive the lesser of the two and therefore she will receive her intestacy share (discussed in 3 below).

Further, the pour-over-trust was not valid, and thus all bequests in reference to the pour-overtrust would fall into the residuary. The will was executed on July 20, 2010 and the "Frank Inter Vivos Trust" referenced in the will was created on August 10, 2010. Therefore, the trust was not created prior to or contemporaneously with the will. Since the pour-over-trust was invalid, any bequests in the trust would fall into the residuary of the estate and be devised as such. However, just as the interested witness would make the entire will void, neither will an improperly executed pour-over-trust.

Thus, Frank's will should be admitted to probate, despite the interested witness and invalid pour-over-trust.

3. a. Under NY EPTL, Tom, as trustee is not entitled to the bequest of 100,000 because the pour-over-trust was not properly created. As stated above, for a pour-over-trust to be valid, it must be executed contemporaneously or prior to the bequest in the will. Here, the pour over trust was executed a few weeks after the will was created. Thus, any gifts made in accordance with the pour-over trust would fail, and as such, the 100,000 bequest to Tom fails.

b. Under NY EPTL, Dot, as an interested witness [also described above in 2], would receive the lesser of her intestate share, or her bequest under the will. Since Dot was Frank's daughter, if Frank died intestate - without a will - his estate would be divided amongst his living issues. Under the NY EPTL, the distribution would be per- capita. Thus, here Dot would receive under intestacy as she is a daughter of Frank. Under intestacy, she would have to split the residuary of the estate amongst herself, Sam and Greta (being Cory's issue and Cory being deceased).Under the will, Dot would only have to split the estate with Sam, since Frank disinherited Cory. Therefore, Dot receives the lesser of the two amounts, and thus receives 1/3 of 100,000 plus any remainder.

c. Under NY EPTL Sam receives the residue of the estate, less the amount Dot receives in (2)

Here Sam is entitled to receive the rest, residue & remainder of the estate. Tom's gift as trustee fails because the pour-over-trust was not validly created so the gift fails. Further Dot as an interested witness takes the less of her intestacy share of her bequest under the will. The lesser of the two is her intestacy share. Therefore, Sam receives all the rest of the estate, less Dot's intestacy share.

d. Greta is not entitled to receive anything under Franks will, because Frank affirmatively disinherited Cory.

Under the NY EPTL, children are not automatically entitled to bequests under their parents will. A parent is allowed to disinherit his child. When a parent creates his/her will and all his/her children are living and the will specifically makes a bequest for certain children and not for others, the disinherited children have no right to a bequest under the will. If a child is a pretermitted child, and thus born after the will is made and the will provides for all the other children, and no other gift is made to the pretermitted child (i.e. life insurance proceeds), than such child will have a right to share proportionately in the other children's gifts. However, no other situation will allow for the child to be entitled to a gift under the will. Further, the courts will always look to the testator's intent when probating a will. Under NY's anti-lapse statute, if a gift to a brother, sister, or issue would fail for the beneficiary predecease or renouncing, the gift is saved by the anti-lapse and falls down per-capita. However, this only applies if such person (brother, sister or issue) is actually provided for in the decedents will.

Here, Frank specifically provided for Dot and Sam and did not provide for Cory. Under his rights, Frank is entitled to disinherit one of his children. Furthermore nothing in the facts state

that Cory was born after Dot or Sam and thus not provided for. Furthermore, since Cory predeceased Frank, Frank had the opportunity to add Greta to his will and made the decision not to. Thus, the court will deem it was Frank's intent to not provide for Greta. Had Cory been provided for in the will and predeceased Frank, than the anti-lapse statute would have saved the gift, but this too is not the case here. Since Cory was entirely not provided for, anti-lapse statute does not apply and Greta does not receive under the will.

Thus, in accordance with Franks will and intent, Greta will receive nothing under the will.

Second Answer to Question Five

1. The question is whether Dot held Blackacre in a constructive trust for Sam's benefit.

A constructive trust can arise when a property is transferred to a party having a confidential relationship with the plaintiff, leading to unjust enrichment of the transferee party and prejudice to the plaintiff, who is claiming status as an equitable beneficiary of the constructive trust. The elements of a constructive trust are a transfer of property to a transferee, a confidential relationship between the transferee and the plaintiff, unjust enrichment to the transferee if the transferee is permitted to keep the property, and prejudice to the plaintiff if he is denied the property. Frequently constructive trusts are found when parties in a close or confidential relationship agree to a transfer of property to avoid creditors, with the implicit understanding that the property will eventually be re-transferred to the plaintiff. If these elements are established, the court may find that the property's transfer was intended to be in trust for the plaintiff, and will direct the re-transfer of the property from the transferee to the plaintiff. Parol evidence of the parties' oral negotiations may be admitted to establish the existence of a constructive trust.

One defense is that of "unclean hands," in which the defendant-transferee may argue that the plaintiff was complicit in the transfer to avoid creditors. If the court finds unclean hands it may preclude the plaintiff from recovering.

Here, the facts indicate that Frank, Sam, and Dot are family members, thus establishing a confidential relationship among them. Further, Frank agreed to transfer the property to Dot specifically to protect Blackacre from Sam's creditors and with the oral understanding that Dot was to re-convey the property to Sam once his financial difficulties were resolved. If Dot is permitted to keep Blackacre, she will be unjustly enriched, and Sam will be prejudiced. Dot could argue that Sam has unclean hands because he was present at the time of the oral agreement in which Dot agreed to hold Blackacre to keep it from Sam's creditors, and thus was arguably complicit in avoiding creditors. However, the court is likely to side with Sam because of the clear unjust enrichment to Dot if she is permitted to keep the property.

2. The question is whether Frank's will was properly executed since it was witnessed by a beneficiary.

Under New York law, a will must be in writing, signed by the testator at the very "end" of the document, witnessed by two witnesses who sign in the testator's presence and within 30 days of one another, and published, such that the witnesses know they are signing the testator's will. A person who is designated as a beneficiary under the will may serve as a necessary witness. This will not invalidate the will, but the beneficiary-witness will be forced to forfeit her bequest under the will, or, if she is entitled to an intestate share, she will be entitled to only the lesser of her bequest or her intestate share.

Here, Frank properly signed his written will in the presence of two witnesses, who also signed in Frank's presence. Additionally, Frank declared the instrument to be his will in front of the witnesses, and therefore the will was properly published. However, Dot was one of the witnesses to Frank's will, and Dot is also a beneficiary under the will, entitled to 1/2 of the residuary of the estate. Dot's status as both a witness and a beneficiary under the will does not invalidate the will, but it will cause Dot to forfeit her bequest, unless it is less than Dot's intestate share. The will was validly executed and should be probated.

3. a. The question is whether Frank's will validly made a bequest to the Frank Inter Vivos Trust and therefore whether Tom, as Trustee, has the right to receive the bequest.

New York law does not recognize the incorporation by reference doctrine in construing wills. As such, if a will purports to incorporate by reference a separate, unattested document, that will provision will not be given effect when the will is probated. However, a will can incorporate by reference a properly executed attested document, including a trust document, so long as the trust document had been executed at the time the will was executed.

An Inter Vivos trust document does not have to be witnessed by two independent witnesses to be validly executed. Such a document must be executed by the creator and acknowledged by a notary in the same manner used to record a deed. Frank properly executed the trust agreement.

Here, Frank had not yet executed the Frank Inter Vivos Trust at the time he executed his will. At that time, the Trust document was unattested and unexecuted, and therefore it could not be incorporated by reference into Frank's will. As such, the Surrogate will delete this bequest, and Tom will not be entitled to receive the bequest under the will.

b. The question is what, if anything, Dot is entitled to receive under Frank's will.

As noted, Dot, as an interested necessary witness to Frank's will, must forfeit her right to the bequest in the will, or take the lesser of the bequest or her intestate share. In this case, because the bequest to Tom is invalid, it will pass to the residuary beneficiaries -- Sam and Dot -- in equal shares. Thus, under the will Dot would have been entitled to receive 1/2 of Frank's entire estate.

Under the law of intestacy, when a decedent has no surviving spouse, his surviving children will take the entire estate "by representation." Because Frank had 3 children, each of them, including Dot, would be entitled to 1/3 of the estate under the law of intestacy. Dot will be limited to 1/3 of the estate because she was a necessary, interested witness to Frank's will.

c. The question is what, if anything, Sam is entitled to receive under Frank's will.

As noted, had both Sam and Dot been permitted to receive their full bequests, they each would have received 1/2 of the estate, because the bequest to the trust was invalid.

However, because Dot is limited to 1/3 of the estate, Sam now will be entitled to receive 2/3 of the estate as the residuary beneficiary.

d. The question is whether Greta is entitled to receive under the will. In New York, a testator is permitted to completely disinherit his children or grandchildren. Here, Frank chose to disinherit Greta, and therefore she has no right to inherit under Frank's will.

MPT-ONE

Franklin Resale Royalties Legislation

In this performance test, examinees are employed by the law firm that represents the Franklin Artists Coalition. The Coalition supports enactment of legislation which would require a five percent royalty to be paid to artists and their heirs on the resale of their visual artworks. To this end, the Coalition has asked the law firm to prepare a document which they can hand out to legislators and which will set forth the need for and benefits of the legislation, especially in light of the fact that similar legislation was introduced but not adopted in the neighboring state of Olympia. Examinees' task is to draft the leave-behind —a persuasive document that will convince legislators to vote in favor of the resale-royalties legislation. In doing so, examinees must set out the arguments in favor of the legislation, respond to the objections to the legislation, and address the legal issue of whether the legislation is preempted by the 1976 federal Copyright Act. The File contains the instructional memorandum from the supervising attorney, a letter from the client, a template for the leave-behind, and testimony by three witnesses before the Olympia State Senate regarding the similar legislation in that state. The Library contains the text of the proposed legislation, excerpts from the federal Copyright Act, and two cases bearing on the legal issue of preemption.

First Answer to MPT

Introduction:

Franklin Assembly BIll 38 (F.A. 38) seeks to provide royalties to artists and their heirs on resales of "visual art". Specifically the bill will only provide royalties for the resale of paintings, sculptures, or drawings existing in a single copy. The bill will only apply to artists who at the time of resale are either citizens of the United States or residents of Franklin. Furthermore the bill will only apply to sellers that reside in Franklin or to sales that take place in Franklin. The

royalties to be paid will be five percent of the profits of the sales, and failure to pay the artist or his agent will result in liability to the artist. The right to these royalties will be held by the artist's heirs for a period of 70 years after the artist's death. Finally this bill will not apply to initial sales of art by the artist, resales for a profit of less than one thousand dollars or to resales between art dealers for a period of ten years after the initial sale.

Why We Need F.A. 38:

Visual art is unlike other art mediums such as music, art and drama. The value to the artists in these other mediums generally comes from copyright rights or the sale of mass produced physical copies. This is not the case for painters, sculptors and other visual artists. Almost all of the money these artists receive is from the original sale of their work. In fact an economic study from the Olympia Art Collective in our neighboring state of Olympia found that 93% of their visual artist's income comes from these initial sales. When this is viewed in connection with the fact that the life for the majority of these artists is financially very difficult (the same study showed that 97% of Olympia's artists made only $35,000 annually) we can see the need to help support and foster our visual art community.

Secondly, this is not simply an appeal for charity. The argument in favor of F.A. 38 is based in equity. As things currently stand a visual artist stands to make almost nothing from the resale of their work. Yet those who buy and sell their art can realize tremendous profits. It seems only fair that the original creator of that work be compensated, even if only with a meager 5% royalty.

Third, the production of visual art requires the investment by the artists in tools and materials. They need the ability to earn income beyond their initial sales so that they can keep on investing in their work and keep the visual art community alive.

There have been several criticisms advanced against bills that provide for royalties such as these. One of the main ones is that laws like this will work to drive art collectors away from Franklin as they seek to buy in places where they won't have to pay these royalties. Again referring to the study of The Olympia Art Collective, Olympia's art sales dropped initially after the enactment of the law but rebounded very quickly. The drop in art sales in the short term will be outweighed by the long term value given to support the growth of the visual art community.

Laws like this have also been attacked for requiring a percentage of the sale price to be paid as a royalty rather than a percentage of the profit. F.A. 38 will only cover resales where a profit of more than one thousand dollars is made. Therefore an art patron who loses money when reselling a piece of art will have to forfeit nothing. The same will go for a patron who only realizes a small profit, as they will not have to spend any money in the transaction costs of tracking down the artist and paying checking account fees.

Finally these laws have been attacked as not recognizing the need for art dealers to develop a market for an artist's work. Again F.A. 38 takes this into account by giving art dealers a 10 year grace period to sell the art amongst themselves without paying any royalties before the art is sold to the public.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2012 QUESTIONS AND ANSWERS

Why F.A. 38 is not preempted by the Federal Copyright Act:

It has been argued that a state statute such as the one proposed by F.A. 38 is preempted by federal law, specifically the 1976 Copyright Act. This argument is based on the theory that when the federal government seeks to fully occupy a field of law, no state laws may conflict with the federal law. For a long time it had been well settled precedent that royalty laws like the one proposed in F.A. 38 were not preempted by Federal law. In the 1977 case of Samuelston v. Rogers the United States Court of Appeals for the 15th Circuit stated that the state law in question "provided an additional right" that was not then covered by the then federal law. The federal law had only stated that the copyright holder had right to sell their work, it said nothing about royalties to be paid after the work had been sold. Furthermore the court also noted that the royalty law in question did not " 'restrict the transfer' of a copy of the work" which was a matter also covered by the then Federal law. Rather it merely created a liability to the artist, but was not a legal restraint.

Since Samuelston the law has been changed. The new federal law has an explicit preemption provision which says that the exclusive rights within the general scope of the federal law are governed exclusively by the 1976 Copyright Act. Among these included in section 106 of the law are the right "to distribute copies...of the copyrighted work to the public by sale or other transfer of ownership. A more recent case of the 15th circuit court of Appeals Franklin Press Service v. E-Updates has stated that in order for a state statute to be preempted by federal law it must meet a two part analysis. First it must come within the subject matter of copyright and second the rights involved must be exclusive rights granted to the copyright owner by the Copyright Act of 1976.

While the works of visual artists do in fact come within the subject matter of copyrights, it is not the case that the rights of the artists to royalties on subsequent sales of their works are one of the rights exclusively granted in the Copyright Act of 1976. Rather, as the court stated in Samuelston these royalties are additional rights that have not been preempted by federal law. Therefore there is no issue with Federal preemption in our attempts to get F.A. 38 passed.

Second Answer to MPT

Introduction:

Franklin Assembly Bill 38 ("FA 38") is an essential piece of legislation that aims to protect the economic interests of the artists of Franklin and their heirs. To that end, FA38 establishes a system by which artists or their heirs receive royalties on any resale of a work created by the relevant artist. Besides providing much needed compensation to the artistic community which has historically been vastly underpaid, this bill also serves to put artists on par with musicians, authors, and other creative creators by allowing them to receive compensation not just on the initial sale of the artist's work, but on certain subsequent sales as well. Specifically, FA 38 calls for resellers of works of visual art to pay the artist five percent of the resale value of the work,

subject to certain limitations. We greatly appreciate your consideration of this bill and hope you choose to support it.

FA 38 is necessary and appropriate to Protect and Support Franklin's Vibrant Community of Artists:

FA 38 is essential to encourage and support Franklin's artists for a number of reasons ranging from economics, to fairness, to enhancing culture and promoting the American way of life. Here are a number of reasons why you should support FA 388:

a. Economics. Artists generally must deal with very harsh economic realities as they produce their work. In our neighboring state Olympia, 97% of visual artists earn less than $35,000 per year and still must pay for a great deal of expensive equipment to produce their works. Allowing Franklin artist to collect royalties on resales of their work will help ease this burden in our state, encouraging more artists and more great works from those we have already.

b. Fairness. It is only fair that artists be allowed to benefit from the increase in the value of their works. The example of Lawrence Higgins, an artist who sold a sculpture for $45 in 1983, is telling. That sculpture was resold in 2006 for $780,000; Lawrence received nothing from the resale, despite its value's drastic increase. Musicians and authors receive royalties when the value of their work increases, it is only fair that artist should too. When you are successful and the work you create is in high demand, you should reap the benefits - it's the American Way!

c. Enhancing culture. This bill provides artists with incentives to produce more work. They will be better paid and have more time to spend on their art (as opposed to working part time jobs to make ends meet).

There are also a few arguments that have been made against FA 38 and similar bills introduced in other states. However, none, is compelling enough to deprive the artists of this much deserved benefit. Those arguments include:

a. The bill will only make rich artists richer because artists who are not yet successful do not often have their works resold. While it is true that successful artists will reap substantial rewards, this will serve as incentive to the not-yet-successful group.

Also, there are a number of resales of artists who are not yet stars and royalties from these sales would go a long way for them.

b. The bill may diminish the art trade in Franklin because dealers will go out of state to avoid the tax. This goes together with the argument that galleries will then have less money to fund new artists. FA 38 was crafted to avoid this result by creating an exception for resale to other dealers (no royalties would be paid) in the ten year period following the initial purpose. Since my early sales are to other dealers, this exception nullifies the argument.

c. There must be lower limits on resale. Previous bills did not have lower limits and allowed for royalties to be collected even if the work is sold at a loss; FA 38 does restricting royalty payments to resales for which the profit on the resale is over $1000.

FA 38 is Not Preempted by the 1976 Copyright Act:

There is one legal issue that the legislature should consider in deciding whether to pas FA 38: whether it is prompted by the federal Copyright Act of 1976. This section will guide you through a discuss of the preemption doctrine and show why FA 38 is not preempted.

The preemption doctrine states that federal law preempts state law to the extent that federal law has "occupied the field" and the state law conflicts with federal laws. This basically means that if the federal laws in a given field are meant to be exhaustive, states cannot create laws in that field that conflict with the federal law. Sometimes, as is the case here, a federal law will specifically state that it intends to fully occupy a particular field. The 1976 Copyright act provides that "all the legal or equitable right that are equivalent to any of the exclusive rights within the general scope of copyright ... and come within the subject matter of copyright ... are governed exclusively by [the 1976 Copyright Act]".

The Copyright Act sets forth two criteria which must both be met for preemption to apply. First, the work must come with the subject matter of copyright. That is the case here because section 102 specifically includes pictorial, graphic or sculptural works in the subject matter.

Second, the rights involved must be within the exclusive rights granted to a copyright owner. This is where the legal argument for preemption falls apart. Section 106(3) of the 1976 Copyright Act sets forth the exclusive rights, including in relevant part: the right to "distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership." (emphasis added). FA 38 does not discuss the distribution of copies of the artist's work; it only concerns the resale of the original work of art produced by the artist. This means that a law calling for royalties to be paid on the sale of prints of an artists' work (or imitation sculptures) would fall within the gambit of copyright law. But here, it is clear that FA 38 deals only with the original work of art and thus, copyright law does not apply.

As such, there is no reason to fear that FA 38 is preempted.