February 2016

New York State
Bar Examination

Essay Questions

QUESTION 1

In 2000, Wife purchased Blackacre, a commercial building. In 2002, Wife married Husband, and thereafter Husband managed Blackacre by collecting rents, negotiating leases and making repairs and improvements that increased the value of Blackacre. Wife continued to own Blackacre in her own name.

At the time of the marriage, Husband was employed as a firefighter in C City, where the couple lived. Husband worked an overnight shift, which allowed him the flexibility to manage Blackacre.

In July 2010, Husband negotiated a lease for one of the commercial units in Blackacre with Tenant, the operator of a retail store, for a five-year term ending in June 2015. In addition to the rent, the lease required Tenant to be responsible for all repairs to the store.

After the lease expired in June 2015, Tenant remained in possession, paying the rent each month. In December 2015, a water pipe burst in the store, causing extensive damage. Tenant remained in possession but refused to pay any further rent or to repair the damage to the store, claiming that, because the lease had expired, he was no longer required to make repairs.

Shortly after their marriage, Husband and Wife had purchased a lot in a subdivision of 50 lots owned by Owner. The deed for every lot Owner sold in the subdivision, including Husband's and Wife's lot, contained a restrictive covenant stating that only a single-family house could be built on each lot, and that the covenant would be binding on all successors in interest. The deeds for all of the lots were recorded with the county clerk. In 2008, Husband and Wife built a single-family house on their lot and moved in.

In 2013, Husband and Wife sold the house to Wife's sister, Val. The deed from Husband and Wife to Val did not contain the restrictive covenant.

Val decided to convert the house into a two-family residence and rent the second apartment. Val was about to begin the conversion when she received a letter from Owner, who still owns some lots in the subdivision. Owner threatened legal action to prevent Val from converting the house into a two-family residence in violation of the restrictive covenant contained in the deed from Owner to Husband and Wife. Val contends that the restrictive covenant is invalid as an unreasonable restriction on her use of her property and, in any event, is not applicable to her, as it does not appear in her deed.

As an employee of C City, Husband has participated in C City's pension plan since before his marriage to Wife. For each month and year of service, he receives incremental credits which enter into the computation of what his pension will be when he reaches age 60. Husband is vested in the plan, and if he leaves C City employment before reaching age 60, he will nevertheless receive a pension at age 60.

Husband continues to manage Blackacre, which has substantially increased in value. Wife is considering seeking a divorce from Husband.

1. If Wife seeks a divorce, under equitable distribution:

   (a) To what extent, if any, will Husband have the right to share in the value of Blackacre?

   (b) To what extent, if any, will Wife have the right to share in the value of Husband's pension plan?

2. What liability, if any, does Tenant have for rent and the repairs?

3. Is the restrictive covenant valid and enforceable against Val?

QUESTION 2

Oscar, the owner of a convenience store, was having financial difficulties. He approached Al, whom Oscar knew to have a criminal record, and asked Al to burn down the store so that Oscar could recover an insurance settlement. Al agreed to do so for $5,000.

Al told his friend, Fred, who was on parole from an arson conviction, that Oscar had asked him to burn down Oscar's store. Al asked Fred if he would help by making an incendiary device for him to use to burn down the store. Fred agreed to do so for $1,000. Fred thereafter made the incendiary device and delivered it to Al.

The next day, Fred had second thoughts about what he had done because he truly wanted to reform his life. He called the police to report the planned crime. He also called Al and told him he should abandon his plans because the police knew of the intended arson.

Based on Fred's call, the police opened an investigation. Ignoring Fred's warning, the next night Al drove to the store when it and all nearby businesses were closed. He set off the incendiary device, causing the store to burn to the ground.

Oscar, Al, and Fred were all arrested and charged with the crimes of arson and conspiracy to commit arson. Fred was also charged with the crime of criminal facilitation.

Fred agreed to testify against Oscar and Al. At the trial of Oscar and Al, the district attorney presented: evidence to show the store had burned down as the result of arson; Fred's testimony regarding his conversations and transactions with Al; and an eyewitness who testified that he saw Al's vehicle outside the store a few minutes before the fire. All evidence presented by the district attorney was legally admissible.

1. Without regard to what evidence was presented at trial, based on the above facts:

   (a) Did Oscar commit the crimes of (i) arson and (ii) conspiracy to commit arson?

   (b) Did Fred commit the crimes of (i) arson, (ii) conspiracy to commit arson, and (iii) criminal facilitation?

   (c) Assuming Fred committed the crimes of arson, conspiracy and criminal facilitation, may he successfully assert the defense of renunciation to each of those crimes?

2. Was the evidence presented at trial sufficient to convict Oscar and Al of the crime of arson?

QUESTION 3

Ash Corp., a New York business corporation, owns and operates a gypsum mine. Gypsum is the basic raw material used in the production of wallboard. Wall, Inc., also a New York business corporation, manufactures wallboard and sells it to building supply houses. Brock is a 50% shareholder of Wall, Inc. but does not serve as a director of that corporation. Brock is a director of Ash Corp., but owns none of its shares.

In June 2014, Ash Corp. and Wall, Inc. entered into a contract by which Ash Corp. agreed to provide Wall, Inc. with gypsum at the price of $40 per ton, the then fair market price, for a one-year period, commencing that month. The contract did not specify a quantity of gypsum to be provided, but stated that Ash Corp. would provide all the gypsum Wall, Inc. required during the contract period. The parties had not previously done business together, but the contract stated that Wall, Inc.'s typical and anticipated future requirement for gypsum was 10,000 tons per year.

The contract was approved by the Ash Corp. board of directors by a four-to-three vote, with all the directors of Ash Corp. present and voting, including Brock, who voted in favor of the contract. Brock did not disclose that he was a shareholder of Wall, Inc., and none of the other directors were aware of Brock's financial interest in that corporation. The contract was not put to a vote of the shareholders of Ash Corp. The certificate of incorporation of Ash Corp. contains no restrictions on contracts between the corporation and an entity in which a director has an interest.

In August 2014, a hurricane caused extensive damage to homes in the area served by Wall, Inc.'s customers, resulting in an increased demand for wallboard to rebuild the damaged homes. This increased the demand for gypsum, and its market price rose to $60 per ton.

Ash Corp. advised Wall, Inc. that it would supply Wall, Inc.'s requirements of gypsum for the contract period, but at an increased price of $60 per ton. In September 2014, Wall, Inc. placed an order with Ash Corp. and advised Ash Corp. that it expected Ash Corp. to fill the order and honor the contract price. Ash Corp. advised Wall, Inc. that it would not fill the order or any future orders unless Wall, Inc. agreed to the higher price.

Wall, Inc. thereafter purchased gypsum from another supplier for $60 per ton, purchasing 20,000 tons during what would have been the one-year period of its contract with Ash Corp. Wall, Inc. has now commenced an action against Ash Corp. for breach of contract. Brock has now advised the board of directors of Ash Corp. that he is a 50% shareholder in Wall, Inc., and he has recused himself from discussions regarding the lawsuit.

In answering Wall, Inc.'s complaint, Ash Corp. raised as defenses that: (a) the contract was unenforceable as too indefinite for failure to specify a quantity; and (b) the contract was void in any event because of Brock's previously undisclosed significant financial interest in Wall, Inc.

Ash Corp. had previously engaged Mine Design, P.C., an engineering firm incorporated in New York, to design a process for removing the impurities from the raw gypsum extracted from the mine. The design project was supervised by Park, a licensed engineer and shareholder of Mine Design, P.C. Park had assigned Eva, an engineer employed by Mine Design, P.C., to do the design work for the project under Park's control. Eva was not a shareholder of Mine Design, P.C.

The process for removing impurities from the raw gypsum designed by Eva was flawed, resulting in wallboard that was defective. Ash Corp. had sold substantial quantities of the impure gypsum to SR, Inc., a wallboard manufacturer. An action has now been commenced by SR, Inc. against Ash Corp. to recover damages caused by the impure gypsum. Mine Design, P.C. is now insolvent, and Eva's whereabouts are

unknown. Ash Corp. wishes to bring a third-party action against Park, claiming that Park is personally liable for the loss. Park claims that, as a shareholder in a professional service corporation, he is free from personal liability for the negligence of Eva.

(1) Is Wall, Inc. likely to succeed in its action against Ash Corp., in light of Ash Corp.'s asserted defenses (a) and (b)?

(2) Assuming Wall, Inc. succeeds in its action, what is the measure of damages it is entitled to collect and for what quantity of gypsum?

(3) Can Park be held personally liable for the damages caused by the malpractice of Eva?

QUESTION 4

Emma, a New York resident, was driving on a highway in State X when Driver, who was operating a van coming in the opposite direction, lost control of his van. The van swerved into Emma's lane, forcing her car off the road and into a ditch. Emma suffered serious injuries in the accident. She was talking on her hand-held cell phone at the time the accident occurred. An investigation revealed that the steering on the van was defective, having been improperly serviced by Mechanic. Both Driver and Mechanic are New York residents. State X has a law apportioning liability among joint tortfeasors that differs from that of New York.

Emma commenced an action against both Driver and Mechanic in Supreme Court, Queens County, for damages sustained in the accident. Although Emma was a resident of adjoining Kings County, she selected Queens County as the place of trial for the convenience of her attorney, whose office is in Queens County. Both Driver and Mechanic are residents of Nassau County, which also adjoins Queens County.

In their answers, Driver and Mechanic each raised as an affirmative defense that Emma's culpable conduct contributed to the accident, and they cross-claimed against each other for contribution. After having made a demand for a change of venue to which Emma did not respond, Driver and Mechanic each timely moved for a change of venue to Nassau County because it is the county of residence of both defendants. The court denied the motions.

Driver thereafter timely served upon Emma a Notice to Admit that she was not watching the road at the time of the accident because she was talking on a hand-held cell

phone. Emma timely moved for a protective order to vacate the Notice to Admit. The court granted Emma's motion.

At the trial, evidence was introduced of the foregoing facts. The jury returned a verdict in Emma's favor awarding $100,000 in damages for her medical expenses and $100,000 in damages for her pain and suffering. It apportioned liability at 10% for Emma, 60% for Driver and 30% for Mechanic. Emma intends to enter judgment and seek execution for the entire $200,000 damage award from Mechanic.

1. Which state's law regarding apportionment of liability among joint tortfeasors should the court apply?

2. Was the court correct in (a) denying defendants' motions for a change of venue, and (b) granting a protective order vacating Driver's Notice to Admit?

3. Assuming that New York law applies:

   (a) What amount of the damage award is Emma entitled to recover from Mechanic?

   (b) Assuming Emma recovers the maximum amount possible from Mechanic, what contribution, if any, may Mechanic seek from Driver?

QUESTION 5

In 2000, Father and Mother duly executed a lifetime trust instrument entitled the "Smith Family Trust" appointing themselves as trustees and lifetime income beneficiaries. The trust instrument provided that upon their deaths, the principal would be distributed in equal shares to their adult children, Ben and Chuck. The trust was funded with $500,000 and was silent regarding the creators' power to amend or revoke its provisions.

Chuck had been legally adopted by Mother and Father as an infant, having been born out of wedlock to the daughter of a prominent local family. Father and Mother knew Chuck's biological ancestry and shared this information with Ben and Chuck.

Ben resented Chuck and treated him with animosity, angering Father and Mother. As a result, in 2010 after Mother died, Father executed a document, which by its terms

amended the trust by designating Chuck the sole remainder beneficiary. Father also duly executed a durable power of attorney, in the form designated by New York law, without modifications to the statutory form, appointing Chuck as his sole agent. In addition, Father duly executed a will containing the following dispositive provisions:

> First: I direct my Executor to distribute all of my personal property pursuant to a list of instructions I will leave in my desk drawer.
>
> Second: All of the rest of my estate, I give to the Smith Family Trust.

Last year, Father was diagnosed with dementia and was declared by his physician to be incompetent to handle his own affairs.

Two months ago, Chuck, acting pursuant to the power of attorney, signed a contract to sell Father's comic book collection. Ben strongly objected because Father had always promised to leave the collection to him.

Last month, Father died and was survived by Ben and Chuck. Father's will was admitted to probate. An undated and unattested document directing the disposition of all of Father's personal property was found in his desk drawer. The document directs that Father's comic book collection be donated to his college fraternity.

Chuck's biological mother recently died. Chuck has been apprised that before he was born, his biological maternal grandfather established a trust for the benefit of Chuck's biological mother. This trust provides that upon Chuck's biological mother's death, the assets, now valued at $5 million, are to be divided "into as many shares as there shall be issue" of his biological mother. The trust did not define issue or state whether issue included adopted or adopted-out children.

1. Was Father's attempted amendment of the trust effective?

2. Did Chuck have the authority to enter into a contract to sell the comic book collection once Father became incompetent to handle his own affairs?

3. Should Father's personal property be distributed in accordance with the document found in his desk drawer?

4. Is the residuary gift to the trust effective?

5. Is Chuck entitled to participate in the class gift to the issue of his biological mother?

MPT – In re Anderson

Examinees' law firm represents Nicole Anderson, a residential landlord in Lafayette, Franklin. Anderson seeks legal advice regarding a workers' compensation claim that has just been filed against her by Rick Greer, a handyman Anderson retained to perform general maintenance and repair work on the 11 single-family homes that she rents out. Greer fell off a ladder and broke his arm while he was painting the exterior of one of Anderson's houses. Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, she could face substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide this coverage. However, if Greer was an independent contractor at the time that he was injured, he is not covered by the protections of the Workers' Compensation Act. Examinees' task is to draft an objective memorandum analyzing whether Greer would likely be considered an employee of Anderson or an independent contractor under the applicable statutory provisions and case law. The File contains the instructional memo from the supervising attorney, a transcript of a client interview, an email exchange between Anderson and Greer, and a copy of the workers' compensation claim submitted by Greer to Anderson for processing. The Library contains excerpts from the Franklin Labor Code and two Franklin cases.

February 2016

New York State
Bar Examination

Sample Essay Answers

FEBRUARY 2016 NEW YORK STATE BAR EXAMINATION

SAMPLE CANDIDATE ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO QUESTION 1

1. Equitable Distribution

(a) Husband's Right to Share in the Value of Blackacre.

The issue is whether Husband will have a right to share in the value of Blackacre, despite the fact that Wife purchased it prior to the marriage. New York's equitable distribution law splits property obtained by each spouse as marital property and separate property. Separate property constitutes any property acquired before marriage, any specific gift to an individual spouse during the marriage, and any passive appreciation of assets or property during the course of the marriage. Marital property constitutes any other property acquired during the marriage and any active appreciation of assets during the course of the marriage. Active appreciation of assets is defined as any property that increases in value as the result of any active effort by a spouse. At time of divorce, Separate property remains with each spouse and marital property is distributed according to certain equitable factors determined by the court.

In the case at bar, if Wife seeks divorce, Wife purchased Blackacre in 2000, prior to the marriage. As a result, the "baseline" value of Blackacre, or the value that it had when Wife purchased it, will remain Wife's separate property. However, after Wife married Husband in 2002, Husband managed Blackacre by collecting rents, negotiating leases, and making repairs and improvements that increased the value of Blackacre. Additionally, Husband worked the overnight shift as a firefighter, allowing him to manage Blackacre. Since Wife kept Blackacre in her name the entire time, Husband will not have title or the "baseline value" when acquired, which will be in Wife's separate property. However, Husband will be able to recover at least part, if not most, of the "active appreciation" in the value of Blackacre as a result of his efforts.

(b) Wife Right to Share in the Value of Husband's Pension Plan.

The issue is whether Wife will have the ability to share in Husband's pension plan, even though Husband was the employee for which the pension plan was created. As stated above, New York's equitable distribution law splits property obtained by each spouse as marital and separate property. Separate property is any property acquired before marriage or any specific gift to an individual spouse during marriage, as well as any passive appreciation of assets or property during the course of marriage. Alternatively, marital property constitutes any other property acquired during the marriage or any property acquired before the marriage that increased as a result of active appreciation. Even if one spouse is not actively involved in the appreciation of an asset or property, the spouse will still share in the increase in value as a result of their support of the spouse who was involved in the active appreciation.

Here, Husband participated in C City's pension plan since before the marriage. In that case it would appear to be separate property. However, for each month and year of service, Husband received incremental credits that enter into the computation of what his pension will be when he reaches age 60. Husband is vested in the plan, so even if he leaves C City employment before age 60, he will nevertheless receive a pension at age 60. Since Husband continued to receive credits for each month and year of service that added to the total amount under the calculation, this will likely constitute active appreciation. Even though Wife was not the employee, spouses are still considered to attribute to the active appreciation based on support. As a result, Wife will be able to share in the active appreciation of the value of the pension plan at divorce. The total amount will be determined in an equitable finding by the court.

2. Tenant's Liability for Rent and Repairs.

The issue is whether Tenant is liable for rent and repairs, despite the fact that Tenant's original 5 year lease had expired and a water pipe burst causing extensive damage. Under New York law, a lease that is for a fixed period of time is known as a "tenancy for years." Under a tenancy for years, if a tenant holds over after the conclusion of a lease, a month to month tenancy is created under the same terms as the prior lease. In the case of commercial leases (as opposed to residential), courts will sometimes determine that the holdover of a fixed lease for years results in another year-long lease at the same terms. In residential leases, the landlord owes the tenant a warranty of fitness for habitability. However, in a commercial lease, there is no implied warranty of fitness for habitability. Additionally, unless the landlord expressly contracts that he will fix repairs, the tenant is liable to make and pay for all repairs.

Here, there was a commercial lease with Tenant, the operator of a retail store, for a five-year term ending in June 2015. Additionally, the lease required Tenant to be responsible for all repairs to the store. After the lease expired, Tenant remained in possession, resulting in a continuance of the lease at the same terms as were previously agreed upon between the parties. Despite the fact that the water pipe bursting would generally violate the warranty of fitness for habitability in the residential setting, this is a commercial lease, so landlord is not in breach. Additionally, the provision in the lease requires the Tenant to make all repairs. As a result, the Tenant is liable to make all repairs, and he also must continue to make rent payments.

3. Restrictive Covenant Against Val.

The question is whether the restrictive covenant is valid against Val, despite the fact that it was not contained in her deed. In order for a restrictive covenant to run with the land and be valid to impair an individual's property, there must be: (i) a writing, (ii) intent of the parties to create the restriction (iii) touch and concern the land, (iv) horizontal privity, (v) vertical privity, and (vi) notice. Notice can be actual or

constructive. Additionally, when a developer creates a common scheme or plot, any member of that scheme or development plot can sue on breach of the covenant. A common scheme or plot arises when a restriction is contained in all deeds at the time of the creation of the plot and it binds all owners with the intent of creating a common scheme.

As a baseline matter, the restrictive covenant was in writing in the deed, it was the intent of the Owner (and Husband and Wife) to create the restriction, it touched and concerned the land because it restricted the building of single family houses on each lot, there was horizontal and vertical privity between Owner and Husband and Wife, and then Val, and there was notice because despite the fact that Val was not directly told about the covenant and although it was not in her deed, the covenant was recorded with the country clerk and as a result, there was constructive notice and the restrictive covenant is valid and enforceable against Val. Additionally, it is likely that this could also fall under a common scheme or development plot because the Owner initially owned all 50 lots in the subdivision and recorded them all with the same covenant binding successors in interest and recorded all of them. Therefore, Owner should have standing to bring suit.

ANSWER TO QUESTION 1

1. a. The issue is whether Husband has rights to share in the value of Blackacre, property acquired by Wife before the marriage that Husband managed and improved during the marriage, under equitable distribution, and the extent of those rights. Under New York law, the court will grant equitable distribution of marital property, but each spouse may retain their separate property that was acquired prior to the marriage. The issue is whether Blackacre is marital or separate property, and to what extent it may possess characteristics of both marital and separate property. The rule is that property acquired by one spouse before the marriage is separate property and not subject to equitable distribution. This rule includes passive appreciation of the property, but does not include active management that leads to appreciation of the property. When the active management and improvement of property by the spouse who does not own the property results in an appreciation in value, then that appreciation in value is marital property subject to equitable distribution. The value of the property prior to the marriage, however, remains separate property and is not subject to equitable distribution. Here, Wife owned Blackacre before the marriage and continues to own the property in her own name. During the marriage Husband actively managed the property by making repairs, collecting rents, negotiating leases and making other improvements that substantially increased the value of the property. Accordingly, this increase in value is marital property and is subject to equitable distribution and Husband may receive the equitable proportion of the increase in value. Wife did not engage in the active management, so Wife may not be entitled to a 50% share of the increase in value, but the court will determine the

equitable distribution. Wife is still entitled to the value of the property before the marriage because that is separate property and not subject to equitable distribution as she continued to own the property in her own name.

b. The issues is whether Wife has rights to share in the value of Husband's pension plan, which husband participated in before and during his marriage to Wife as part of his employment with City C as a firefighter, and the extent of those rights. Under NY law, pension plans may be marital property and subject to distribution. If the pension plan is part of compensation for the employee's spouse and the rights in the plan have vested, then the pension plan is subject to equitable distribution; this rule contrasts with Social Security benefits, which are not marital property. Here, Husband participated in pension plain before and during the marriage, and he received incremental units for each month and year of service. Further, the facts state that Husband's rights in the pension plan have vested. Because participation in the plan is related to Husband's time employed by City C and because his rights in the plan have vested, the pension plan is marital property and will be subject to equitable distribution. To the extent the court can determine which portion of the plan was accrued while Husband and Wife were married, Wife will be entitled to that equitable share. If the court cannot so determine the apportionment of the plan, then the entire plan will be subject to equitable distribution by the court.

2. The issue is whether Tenant is liable for repairs under a commercial lease that required tenant to make repairs when the lease has expired, but Tenant has remained in possession and continued to pay rent. Under NY law a commercial tenant may be liable for all required repairs. This contrasts with a Landlord's duty to repair common areas and maintain the premises in accordance with the applicable Housing Code and warranty of habitability in residential leases, and this contrast is due to the different nature of the commercial lease and the business arrangement. Here, Tenant agreed to be responsible for all repairs to the store, and is a valid lease term that Husband, as landlord, may enforce. A written lease of definite duration creates a tenancy of years. Here, the lease was made for five years, and that term expired in June 2015. At the expiration of a lease, a holdover tenant in possession of the premises becomes a tenant at sufferance, and may be evicted by the landlord. However, if the tenant continues to pay rent, and the landlord accepts that rent, then a periodic tenancy at will is created. The periods for the tenancy are not the period of the original lease, but are determined by the frequency with which rent must be paid, typically, a month-to- month tenancy. A landlord or tenant may end this periodic month-to-month tenancy by giving notice of intent to end the tenancy at before the start of the first day of the final period of the tenancy. Here, Tenant continued to remain in possession of the store at the expiration of the lease and continued to pay rent to Husband. Husband accepted that rent. Because Tenant paid rent and Husband accepted that rent, a month-to-month tenancy was established. The terms for that tenancy are the same terms of the original lease. Accordingly, Tenant continues to be bound by the original lease term holding him responsible for all repairs to the store. Tenant is liable for the repairs.

3. The issue is whether the restrictive covenant in the duly recorded deed from Owner to Husband and Wife is enforceable against subsequent purchaser Val when that covenant does not appear in her deed, and whether Owner may enforce that covenant against Val. A restrictive covenant is created when the following elements are satisfied: intent to create a restriction or burden on use, for that burden to touch and concern the land, for that burden to run with the land, and for horizontal and vertical privity of contract. A covenant may be enforced against a subsequent purchaser when that purchaser has knowledge of the covenant. Actual knowledge is not required, record or constructive knowledge is sufficient. When the restrictive covenant appears in the deed of the seller, but not the buyer, but the deed of the seller was duly recorded, then the buyer has constructive, record notice of the covenant because a title search would reveal the existence of the covenant. An implied reciprocal servitude is similar to restrictive covenant, but it applies to planned communities and subdivisions. In addition to the requirements for a restrictive covenant, to be an implied reciprocal servitude, the restriction on use must be part of a common plan or scheme, and the restriction must appear on all or substantially all of the deed conveying property in the subdivision from the developer-owner to the new owners. A member of the community who owns property subject to the implied reciprocal servitude may then enforce that covenant against other members of the community. Here, Wife and Husband purchased a house from Owner in a planned subdivision of 50 lots, and the deed for each lot sold contained the same restriction. The restriction in their deed stated that only one single-family home could be built on each lot, and that this restriction would bind their successors. The common plan was recorded. There is intent to create a burden because there is a restriction of the use of the land, to a single family residence. The burden touches and concerns the land because it is about what can be constructed on the land. It is intended to run with the land because it will bind successors. Horizontal privity exists between Owner and Husband and Wife, and vertical privity exits between Husband and Wife and Val. Although Val's deed did not contain the restrictive covenant, Val is still bound by it. Val had record notice of the restriction because it was in the deed of Husband and Wife, and because of the common plan recorded by Owner. The restriction is a reasonable one, and communities of single family homes are permitted, and it is not against public policy. Finally, Owner has standing to enforce the restriction against Val because he is the developer, and because he still owns lots in the subdivision that are subject to the restriction.

ANSWER TO QUESTION 2

(1)(a)(ii) The issue is whether Oscar committed the crime of conspiracy and whether he is guilty of the completed arson as an accomplice.

Under New York Penal Law, a conspiracy requires an agreement to achieve an unlawful objective, an intent to agree, and an overt act in furtherance of the conspiracy.

New York follows the unilateral conspiracy rule, under which a defendant may be charged with the crime of conspiracy even though his coconspirator did not intend to agree. Conspiracy does not merge with the completed crime.

Here, Oscar approached Al and asked Al to burn down his store so Oscar could recover an insurance settlement, which Al agreed to do. Thus, there was an agreement to commit arson. Oscar intended that Al commit the arson, and Oscar made an overt act in furtherance of the conspiracy by giving Al $5,000.

Accordingly, Oscar conspired with Al to commit an arson.

Arson

Under New York Penal Law, there are five degrees of arson, which depend on the defendant's intent and the severity of harm. Generally, a defendant is guilty of an arson when he intentionally starts a fire with the intent that the structure be damaged. New York has abolished the dwelling requirement, which was required at common law. In order for a conspirator to be found guilty of a coconspirator's substantive crime he must be an accomplice. A defendant is an accomplice when he aids or encourages his coconspirator to commit a crime with specific intent that the crime be committed.

Here, Al, Oscar's coconspirator committed arson because he intentionally set fire with an incendiary device with the intent that the fire damage Oscar's building. Oscar can properly be charged as an accomplice because he encouraged Al to burn down the store with the specific intent that Al burn down the store. Further, it is no defense that it was Oscar's own convenience store because it was done for an unlawful purpose (to receive an insurance settlement) and the insurance company has an interest in the store. Accordingly, Oscar committed arson and conspired to commit arson.
(1)(b) Fred

(i)(ii) Arson and conspiracy to commit arson

The elements of arson and conspiracy are set forth above.

Here, Fred agreed with Al to conspire to commit arson. His intent that the crime be committed could be established by the fact that he agreed to make the incendiary device for an inflated price at $1,000. Further, Fred committed an overt act by making and delivering the incendiary device to Al. Thus, Fred is guilty of the crime of conspiracy. Further, Fred aided Al in the commission of the arson by providing him with the incendiary device, which was used to burn down the building and commit arson. Again, his intent that the crime be committed could be established by the fact that he made the device at such a high price and thus he could be found guilty of the arson as an accomplice.

Accordingly, Fred committed arson and conspiracy.

(ii)(i) The issue is whether Fred is guilty of facilitation.

The crime of facilitation occurs when a defendant knowingly provides another with the means to commit a crime. It is not necessary that he intend that the crime be committed, rather it is sufficient that he knows his assistance will further the crime and he is indifferent to the outcome.

Here, Fred had knowledge that Al would use the incendiary device to commit the crime of arson. Despite this knowledge, Fred agreed to make the incendiary device and delivered it to Al. Thus, Fred knowingly provided Al with the means to commit a crime and thus, is guilty of the crime of facilitation.

(c) The issue is whether Fred successfully renounced the crime of arson, conspiracy, and criminal facilitation.

Under NYPL, in order to renounce the anticipatory crime of conspiracy that defendant must voluntarily abandon the crime, communicate his renunciation to coconspirators and thwart its commission. In order to abandon facilitation, the defendant must make a substantial step to prevent its commission. On order to renounce a substantive crime committed in furtherance of the conspiracy, the defendant must voluntarily renounce, communicate his renouncement and take a substantial step to prevent it (e.g. contact police).

Here, Fred communicated his renouncement of his assistance in the arson to Al. This was voluntary (he had second thoughts and truly wanted to reform his life), and he took a substantial step by contacting the police to report the planned crime. Thus, Fred successfully renounced the arson and facilitation. However, in order to renounce from the conspiracy he must have prevented its commission and here he did not do so.

Accordingly, Fred may successfully assert renunciation for arson and facilitation, but not conspiracy.

(2) The issue is whether a defendant can be convicted on the basis of uncorroborated accomplice testimony.

Under NYPL, a defendant cannot be convicted solely on the basis of uncorroborated accomplice testimony. There must be some other evidence which connects the defendant to the crime. The prosecutor bears the burden of proving each element of the crime beyond a reasonable doubt.

Here, Oscar and Al, and Fred are accomplices to the arson and thus, Fred's testimony must be corroborated. There is some evidence connecting Al to the crime (the eyewitness that saw Al's car before the fire) and thus, this may be sufficient for Al. The only evidence connecting Oscar to the arson is uncorroborated accomplice testimony. However, the prosecutor could attempt to show motive because of Oscar's insurance.

Accordingly, there is sufficient corroborating evidence to convict Al, but not Oscar.

ANSWER TO QUESTION 2

1. (a) The issue is what elements are required to establish that Oscar committed the crimes of arson and conspiracy to commit arson.

The first charge against Oscar is conspiracy. The elements of conspiracy include: (1) an agreement; (2) between two or more persons; (3) to commit an unlawful act; (4) with intent to carry out that act. In addition, New York law (like the Model Penal Code but unlike federal law) also requires an overt act in furtherance of the conspiracy.

First, Oscar had a conversation with Al in which they agreed with Al would burn down Oscar's property for $5,000. This constitutes an agreement, and there were two people. Arson is an unlawful act, and there is no evidence to suggest that they did not intend to actually go ahead with the plan. There are no clear overt acts by Oscar made out on the facts, however it is likely that Oscar took some steps, even if it was to provide information to Al. Perhaps Oscar went and obtained the money to eventually pay Al, or perhaps he locked up the store at a particular time to give Al space to set the fire, or perhaps he gave Al the best time to burn the property. It is very doubtful that the arson could have taken place without Oscar giving Al information necessary to commit the arson (where, when, how, etc.). Although not apparent in the facts, there is an implied transfer of information from Oscar to Al, information necessary to affect the arson. This would constitute an overt act in furtherance of the conspiracy.

The second charge against Oscar is arson. The elements of arson include: (1) the unlawful; (2) burning; (3) of property; (4) usually belonging to another (but not always). There are then five degrees of arson in New York. First degree arson involves arsons of buildings that result in serious bodily harm or death, or arson that involves the use of an incendiary device. Second degree arson is an arson committed when the defendant knew, or should have known, that a non-participant was present in or near the building being burned. For third degree arson - burning a building without any of the aggravating features of first or second degree arson - a defendant can establish an affirmative defense if: (1) the property belonged to them; (2) no one else was present at the time of the

burning; and (3) the defendant believed that had the authority to lawfully burn the property. An accessory before the fact is someone who is not present at the time of the commission of the offense, but nonetheless knowingly helped in its commission prior to its commission.

There would be two flaws with Oscar raising this defense, though. First, although the property belonged to Oscar, and it appears that with all the businesses closed no one else was around at the time, Oscar had asked Al to commit the arson so that he could collect the insurance money. Insurance fraud is not a lawful purpose, therefore Oscar would be unable to properly assert the affirmative defense to third-degree arson. Further, and perhaps more importantly, because Al ultimately used an incendiary device, Oscar would be liable as an accessory to first-degree arson (not third degree), for which the affirmative defense is not available.

Oscar could therefore be successfully prosecuted as an accessory before the fact to the arson committed by Al. He could also be successfully prosecuted for conspiracy to commit the arson. As a side note, the crimes of conspiracy and arson do not "merge" and it is constitutionally permissible to be found guilty of both.

1. (b) The issue is what elements are required to establish that Fred committed the crimes of arson, conspiracy to commit arson, and criminal facilitation.

The first crime charged against Fred is conspiracy. The elements of conspiracy include: (1) an agreement; (2) between two or more persons; (3) to commit an unlawful act; (4) with intent to carry out that act. In addition, New York law (like the Model Penal Code but unlike federal law) also requires an overt act in furtherance of the conspiracy. Fred is guilty of conspiring with Al to commit the arson (as opposed to being guilty of conspiring with Oscar). The conversation between Al and Fred constituted an agreement between two or more persons. They agreed that Fred would provide an incendiary device to burn the building, which was an unlawful act, and they appear to have had every intent to follow through. Fred then created and delivered the device. Fred is guilty of conspiracy to commit arson.

The second crime charged against Fred is arson. The elements of arson include: (1) the unlawful; (2) burning; (3) of property. There are then five degrees of arson in New York. First degree arson involves arsons that result in serious bodily harm or death, or arson that involves the use of an incendiary device. Second degree arson is an arson committed when the defendant knew, or should have known, that a non-participant was present in or near the property being burned. Al used an incendiary device created by Fred to commit the arson. Therefore despite no one else apparently being present, Fred could be convicted of first degree arson as an accessory before the fact (someone who provides assistance or encouragement prior to the commission of the offense).

The final charge against Fred is criminal facilitation. The Double Jeopardy Clause would prevent Fred from being convicted of criminal facilitation – acting in a way that facilitates someone else engaging in criminal behavior. The case of Blockburger provides that a lesser-included offense that completely (or sometimes, substantially if it make the two crimes one and the same) overlaps with a lesser offense prohibits the conviction for both. The lesser crime merges into the greater offense. Criminal facilitation is identical, in this scenario, to being an accessory before the fact to the arson here, therefore Fred can only be convicted of one or the other. Given that he is liable as an accessory before the fact to the arson, he cannot be also held liable for criminal facilitation because that would violate the Double Jeopardy Clause.

1. (c) The issue is whether Fred can successfully assert renunciation as an affirmative defense to the crimes charged.

In New York, it is a defense to the crime charged if the defendant can successfully establish that they renounced their participation in the criminal endeavor in order to successfully assert as a defense that a defendant has renounced their participation, they must establish: (1) full and complete renouncement, (2) prior to the commission of the offense, (3) that is voluntary, and (4) make substantial efforts to prevent the commission of the offense.

Fred was asked to create an incendiary device and provide it to Al for use in the arson. Fred did so. Before the arson, according to the facts, Fred changed his mind, of his own volition. His attempts to prevent the crime included calling police to let them know of the plan and to call Al and tell him not to do it and that police knew of the plan. It is difficult to foresee any further steps Fred could have taken to prevent the crime. It is likely that a court would find that he had taken substantial steps towards defeating the crime before. Police's ongoing investigation and knowledge of the likely arson failing to thwart Al from completing the offense is not important. Fred could successfully assert as a defense to being an accessory to arson that he renounced his participation.

He would, however, still be guilty of conspiracy, as this crime was complete when he made an overt act in furtherance of the conspiracy (building and delivering the incendiary device).

2. The issue is whether the prosecution has established their case beyond a reasonable doubt.

In a criminal trial, the prosecution bears the burden of establishing that the defendant committed the crime/s charged. The standard of proof required is beyond reasonable doubt. In cases involving co-offenders in New York, one co-offender cannot be convicted based solely on the uncorroborated testimony of another co-conspirator.

In the current case, the bulk of the evidence against Oscar and Al was the testimony of Fred, a co-defendant in the matter. There is, however, two other pieces of evidence that corroborate Fred's story. First, the prosecution established that the building burned down due to an intentionally set fire (arson). Second, there was another eyewitness that can place Al at the scene of the arson within minutes of the fire. This circumstantial evidence is sufficient to corroborate Fred's testimony and convict Oscar and Al of the crime of arson. That is, the fact that Al was present within moments of the arson appears to corroborate Fred's version of events (as told before and after the crime was committed) that Al was burning the store on behalf of Oscar.

ANSWER TO QUESTION 3

1. Wall v. Ash

Wall is likely to succeed against Ash in spite of Ash's defenses.

Indefinite Quantity: The issue is whether a contract providing for one party's requirements states a sufficient quantity to form an enforceable contract.

Article 2 of the UCC governs contracts for the sale of goods. Goods are moveable items. To have an enforceable contract, there must be mutual assent (offer and acceptance) and consideration. An offer is a communication to the offeree of a willingness to enter into a contract on sufficiently clear terms and creates an opportunity for acceptance. Acceptance is a manifestation of intent to enter a contract on the terms in the offer (although the UCC does not require the acceptance to be a mirror image of the offer to be a valid acceptance). Typically, a UCC contract must set forth a quantity term to be enforceable. Consideration is bargained-for legal detriment. A contract that lacks consideration is deemed illusory. An exception to both the rule requiring a quantity term and the rule against illusory contracts are requirements and outputs contracts. A requirements contract is a contract in which one party agrees to provide all that another requires of a particular good. This is a sufficient quantity term under the UCC. Additionally, this is not an illusory promise under the UCC as both parties are legally required to act under the contract in a way not otherwise required by law: one must provide all that the other requires, and the other must buy all of its requirements exclusively from the other.

This contract is governed by the UCC because it is a contract for the sale of goods. Gypsum is a good because it is a moveable item. In this case, the parties entered into a requirements contract when Wall agreed to buy of all its requirements of Gypsum and Ash agreed to supply such requirements. The lack of specific quantity term is not detrimental to the contract's enforcement. The contract is also not illusory. Therefore, the

contract is enforceable in spite of its lack of specified quantity term as a requirements contract.

Interested Transaction: The issue is whether an interested director transaction is valid if it is otherwise fair and reasonable to both parties at the time it was entered into.

A director of a corporation owes the corporation a duty of loyalty. The duty of loyalty requires the director to act with good faith and with the same conscientiousness, morality, and honesty that the law requires of fiduciaries. An interested director transaction is a transaction in which a director has a financial or personal interest on both sides. These transactions will be deemed void as a breach of the duty of loyalty unless the interested director discloses his interest and one of the following are met: (i) majority vote of the board not included the interested directors vote, (ii) unanimous vote of disinterested directors where the interested directors would need to be included for a quorum, or (iii) majority vote of the shareholders. If this is not met, the transaction may still be valid if the interested director can prove that it was fair and reasonable to the corporation when it was entered into.

In this case, Brock was an interested director because he was a director of Ash and had a large financial stake (50% ownership) in Wall. He did not disclose this interest to the board of Ash when they voted on the transaction with Wall. Therefore, no vote would be sufficient to cure the transaction. Rather, Brock must show that the transaction was fair and reasonable when entered into. Here, the contract price was the fair market price provided to all other buyers of gypsum, so Brock did not attempt to get a better price for Ash because of his interest in the corporation. Additionally, Wall provided an anticipated future requirement of 10,000 tons per year, which is probably reasonable. Although the market changed due to a hurricane, causing an increase in demand and price of gypsum, the contract was still fair and reasonable when entered into.

Therefore, the contract is enforceable because Brock will likely be able to show that it was fair and reasonable when entered into. Overall, the contract is enforceable and Ash's defenses will be unsuccessful.

2. Damages and Quantity

Wall will receive expectation damages, measured as the difference between the contract price and the cover price, for 10,000 tons of gypsum as was anticipated earlier in the year. The issue is how damages are measured and the quantity to which damages should be applied when the buyer's requirements increase by 100%.

Damages: Contract damages are intended to meet the parties' expectations if the contract had been fulfilled. They are not meant to punish a breaching party. When one party anticipatorily repudiates a contract by making a clear and express statement that the

party does not intend to perform on the contract, then the non-breaching party may do one of four things: (i) immediately treat it as a breach and sue, (ii) wait until the date of performance and sue, (iii) treat the repudiation as an offer to rescind and discharge obligations, or (iv) ignore the breach and encourage performance. The nonbreaching party has a duty to mitigate damages by seeking cover. The damages are then calculated as the difference between the contract price, had the contract been adequately performed, and the cover price. The fact that one party sought to modify the contract price is of no consequence if the nonbreaching party did not agree to it, even though new consideration would not have been required under the UCC. Additionally, a forced modification based on impossibility or impracticability will not be required if performance has simply become more expensive under the contract.

In this case, the initial contract between Wall and Ash set a price of $40. Ash attempted to modify the contract price to $60. Although this modification would have been sought in good faith, Wall was not required to accept the modification to the contract. Ash's performance under the contract had simply become more expensive, but it was not impossible or impracticable. When Wall refused the modification, Ash anticipatorily repudiated by clearly stating that it could not fill the current or any future orders unless the contract price was increased. As such, Wall properly treated this as repudiation of the contract and a breach of the terms. Wall sought cover to get its supply elsewhere. As such, Wall's damages will be $20 per ton: the difference between the contract price ($40 per ton) and the cover price ($60 per ton) in order to fulfill Wall's expectations under the contract.

Quantity: Generally, a requirements contract requires the seller to provide all that the buyer requires under the terms of the contract. However, this is not the case when the buyer's requirements substantially increase beyond (i) that which was commercially reasonable or (ii) a stated estimate in the contract. An increase of 100%, i.e. a doubling of the requirements, is a substantial increase and the seller will not be required to perform to this extent under the contract.

In this case, damages will only be applied to 10,000 tons that Wall received from the other supplier. The original contract stated an anticipated requirement of 10,000 tons per year. However, due to the hurricane, Wall's requirements doubled and it sought 20,000 tons of gypsum when it sought cover from the other supplier. Because Ash would not have been required to provide this quantity under the contract, Ash will also not be required to compensate Wall for the difference in price for the quantity above what would have been required for Ash to provide.

Therefore, Ash will only be required to provide damages for 10,000 tons of gypsum that Wall sought from the other supplier, not all 20,000. Overall, Wall will recover damages at $20 per ton for 10,000 tons of gypsum.

3. Park's Liability for Eva

Park will be liable for Eva's malpractice. The issue is whether a shareholder of a professional service corporation can be held personally liable for the malpractice of one directly under his supervision and control committed in the course of business.

In NY, a professional service corporation is one organized under the laws of NY that provides only one professional service for which it is registered and qualified. Typically, a shareholder is not liable for the torts of a corporation. However, a professional services corporation is not a standard corporation under the Business Corporations Law and a shareholder will always be liable personally for his own negligence and malpractice committed in the course of business. In addition, the shareholder is liable for the negligent acts of those under his direct supervision and control that are committed while working in the course of business of the professional service corporation because, in theory, the shareholder could have prevented the bad act by exercising adequate supervision and control. Such acts include acts of malpractice and negligence.

In this case, Park and Eva are members of Mine Design, PC, a NY professional service corporation. Park is a shareholder of the PC but Eva is not. Rather, Eva was employed to work directly under Park's supervision and control on a particular project. Just like Park would have been personally liable for any of his own acts of malpractice, Park is also liable for those acts of malpractice of those under his direct supervision and control, including Eva, that are committed in the course of work for Mine Design. The act here was committed by Eva in the course of her work for Mine Design because she designed a project to remove impurities at the direction of Mine Design and for which she was hired. This is the same project over which Park had supervisory control over Eva. Additionally, the project was defectively designed by Eva, which was a negligent act that led to impure products. Thus, the plaintiff, Ash, can hold Park directly liable for these acts and the fact that Mine Design is insolvent and Eva cannot be found are irrelevant.

Therefore, Park will be personally liable for Eva's malpractice. However, in the event that Eva is found, Park may seek contribution from her based on the percentage fault assigned to each of them by the trier of fact in creating the negligently designed purification project.

ANSWER TO QUESTION 3

1. Wall Inc. ("W") will succeed against Ash Corp ("A") notwithstanding A's asserted defenses in (a) and (b).

(a) At issue is whether the contract for gypsum must have contained a definite quantity to be enforceable.

Contracts for the sale of goods are governed in New York under Article 2 of the UCC. Goods are those things which are moveable at the time of identification in the contract. Furthermore, for a contract to be enforceable in New York where the value reasonable exceeds $500, the Statute of Frauds requires a writing signed by the party to be charged indicating the fundamental terms of the contract. Contracts under the UCC must contain a quantity term, unless the contract is a "requirements contract" where the amount of goods to be sold will depend on either the seller's ability to produce or the buyer's requirements to consume.

Here, in June 2014, W and A entered into a (presumably duly executed) contract for gypsum at $40/ton. Gypsum, as a moveable good at the time identified in the contract, brings the contract within the scope of Article 2 of the UCC. Normally, a contract for the sale of goods must contain an actual and definite term of quantity. While the contract between W and A did not specify an exact quantity of gypsum, it did state that A would provide "all the gypsum W would require", therefore bringing the contract within the "requirements contracts" exception. The contract also estimated W's requirements at 10,000 tons for the year. Accordingly, A's asserted defenses that a fundamental term to the contract was missing will fail, since the quantity on the contract between W and A can be measured by facts and circumstances of W's requirements.

Since the contract defined the quantity of goods through a "requirements contract" provision, A's defense will fail.

(b) At issue is whether the contract with W and A is voidable as a result of the interested director transaction where Brock failed to disclose his ownership interest in W.

In New York under the BCL, directors and officers (and sometimes shareholders of closely held corporations) have a duty of loyalty to their corporation. This duty requires directors to perform in good faith, honestly, loyally, morally and with the integrity expected of him at law as a fiduciary. Transactions between a director's company and another he holds an interest in will be voidable, unless: (i) the transaction was, after being informed of the material terms of the agreement and interest of the director, approved by the majority of the dis-interested board members (or unanimously by dis- interested board members if quorum would not be met), (ii) the transaction was, after being informed of the material terms of the agreement and interest of the director, approved by the shareholders, or (iii) if not approved under the foregoing methods, the transaction is demonstrated to be fair and reasonable at the time of entering into it.

Here, Brock was a director of A. Brock also owned 50% of the equity of W, and therefore, Brock's approval of the W-A contract was in violation of his duty of loyalty.

Brock stood to benefit from W's profits by approving the transaction as a director of A. The W-A transaction was not properly approved by the board of A, since it was not informed of Brock's interest in W. Furthermore, only 2 dis-interested directors of A voted to approve the deal, therefore the corporate action was invalid (a unanimous agreement of disinterested directors of A would have been required). The W-A transaction was not approved by shareholders. However, at the time the W-A contract was signed for $40/ton, this price was the fair market value of gypsum. Therefore, A's assertion that the W-A contract is voidable will fail, since the contract was fair and reasonable at the time of its entering into (collateral arguments could be made about quantity and market dynamics, but for simplicity on this answer I will assume price will be demonstrative).

Since the contract was fair and reasonable at the time of its entering into by A, A cannot now seek to void the agreement even if it was improperly approved without full and fair disclosure by Brock.

(As a side note, and although outside the scope of this question, W will succeed against A on general contract principles as well since there was mutual assent between the parties, consideration flowing in both directions, and presumably a signed writing evidencing the contract).

2. W will be able to recoup $20/ton as expectation measure of damages for breach of contract, up to approximately the 10,000 ton expected order. At issue is the measure of damages and what upper quantity limit W can claim a breach for.

In New York, the general measure of damages for breach of contract is the "expectation" measure of damages. Expectation measure of damages seeks to account for and place the non-breaching party in the same position as if the contract had been performed (essentially, giving the non-breaching party the same profit as if the contract was completed). If expectation measure of damages are difficult to ascertain or calculate, "reliance" measure of damages may be used (the measure would seek to recompense out of pocket expenses resulting from a reliance on the contract). Furthermore, incidental damages may be claimed for a breach of contract (to cover expenses dealing with remedying the situation) and consequential damages may be claimed by a buyer in a UCC contract for reasonably foreseeable damage to a business resulting from a seller's breach. Importantly, in a requirements contract, damages for breach of contract will be measured by the parties reasonable expectation of quantity at the time of entering into of the contract as to not expose the breaching party to unlimited "upward" quantity demands even under a requirements contract.

Quantity Damages > Here, W and A agreed to a requirements contract for gypsum, which could theoretically have no upper limit if W's demands unforeseeably escalated (this is exactly what happened with the hurricane that sent demand for wallboard way up). However, the W-A contract expressly noted in the contract

documents that the parties estimated W's gypsum demand would be approximately 10,000 tons per year. This collateral evidence would be considered by a court in determining what the parties reasonable expectations were at the time of entering into the agreement. Therefore, W's claim against A will likely be capped at approximately 10,000 tons less the amount of gypsum supplied already to W.

Measure of Damages > Here, "expectation" measure of damages would seek to put W in the same position as if A did not breach. This would mean that W should only have to pay $40/ton for its gypsum supply. However, as a result of the breach, W had to contract an alternate supplier and cover for $60/ton, (a $20/ton damage). Therefore, in order for W to be put in the same position as if A did not breach, A must pay W $20/ton. As noted above and in addition to the expectation measure of damages, W will also be entitled to claim for incidental damages in it's out of pocket expense in covering A's breach. Consequential damages are not available to W on these facts since there was no reasonably foreseeable and additional business damage done to W – the facts indicate that W was able to meet customer demand without.

In summary, since W was forced to pay additional amounts as a result of A's breach, W will be entitled up to $20/ton in an expectation measure of damages, plus an incidental damage amount. The quantity and maximum liability of A will be up to approximately 10,000 tons less what was actually supplied by A since this is the reasonable expectation of supply at the time the W-A contract was entered into.

3. Park can be held personally liable for the professional malpractice of her direct supervisee, Eva. At issue is whether Eva, as an owner of a professional corporation can insulate liability from professional negligence.

A PC (a professional corporation) is a creature of statute and comes into existence upon proper filings being made with the Secretary of State. PCs can be formed by licensed professionals and their purpose is generally to maximize tax efficiencies, shield owners from some general liability and hold business assets and operations. In general, shareholders of a corporation are not liable for the acts of a corporation or its employees. In certain closely held corporations where shareholders supplant directors in managing the business, shareholders can attract liability. Furthermore, in the world of professional corporations, professionals cannot escape personal liability for their own malpractice or malpractice of people directly supervised by that professional.

Here, Mine Design P.C. is a professional corporation owned by Park. Park was a licensed engineer in the State of New York and could properly form that corporation. The design work by Eva, an employee of Mine Design P.C., was directly supervised by Park. Therefore, malpractice damages flowing from Park's own negligence or that of her direct reports cannot be avoided even where a professional corporation is used. Although Eva was negligent in her design of the gypsum system and cannot be found, Park can be held

liable for Eva's negligence arising from professional malpractice. Park cannot use a P.C to shield herself from negligence claims as this would defeat many of the purposes of licensing professionals in New York in the first place.

Since Park directly supervised Eva in her design and since Eva was negligent in the design of the gypsum plant, Park can be held personally liable and her status as a shareholder of a P.C. will not shield her from malpractice liability.

ANSWER TO QUESTION 4

(1) The issue here is whether State X or New York law should apply regarding apportionment of liability among joint tortfeasors.

According to NY Conflict of Laws rules, the "governmental interest approach" has been adopted when applying to Torts cases, as discussed in Babcock. The governmental interest approach means that the court will consider various factors in determining which state has the most interest in having their law be followed in the case at hand. They will look at factors such as domicile of the parties, which means where the parties reside and intend to reside in the future, they will also look at where the action occurs, and the benefit to the parties. In terms of Torts conflict of laws rules, it depends whether the law is conduct regulating or loss allocating in determining what set of rules to follow. Conduct regulating law tries to deter unlawful conduct before it occurs. Loss allocating rules determine which parties will be liable for loss and for how much. In loss allocating rules, there were rules set forth in Neimeier, which determine what state law to follow. There are three rules in particular, (1) if the parties to the suit have the same domicile, the law of their shared domicile should be followed, regardless of where the accident occurred, (2) if the parties to the suit have split domiciles, and the accident occurred where the defendant lives and the law makes the defendant not liable, the law of that state will apply, or if the accident occurred where the plaintiff is domiciled, and the law helps the plaintiff recover, the law of that state will apply, (3) if none of the other two rules apply, then the state where the accident occurs will apply unless it can be shown that the other state has a stronger governmental interest in utilizing their law.

Here, this is a case involving a tort, based on serious injuries Emma suffered from a car accident. Emma is a New York resident, and the van that she got into an accident with, Driver, is a New York resident as well. Further, the mechanic who created the steering wheel on the van that was defective is also a New York resident. The accident occurred in State X. The rule that we are determining whether or not New York or State X's law should apply is a loss allocating rule because it is determining apportionment of liability among joint tortfeasors. The rule in New York, as a pure comparative negligence jurisdiction, and a joint and several liability jurisdiction (with the exception to non-

economic damages), would be that if there are two or more joint tortfeasors for a single harm to one plaintiff, they can both be required to pay the full amount of damages to the plaintiff. Meaning, the plaintiff can recover the full amount in this case either from Driver, or from Mechanic if they are joint tortfeasors. State X has a law apportioning liability among joint tortfeasors that differs from that of New York. In looking to the rules established in Neimeier, the first would apply in that all parties are domiciled in New York and are residents of New York. Therefore, the law of New York should apply. The second and third rules of Neimeier do not apply here because we do not have an instance of split domicile. Therefore, in looking to the governmental interest approach, it is clear that New York would have the greatest interest in the outcome of the case since all of the parties are residents.

In conclusion, New York's law of joint and several liability should be applied in this instance, not that of State X.

(2) (a) The issue here is whether or not the court was correct in denying defendants' motion for change of venue.

In New York, according to the CPLR, venue is proper where either the plaintiff or the defendant reside, which differs from federal law. When a defendant makes a demand for change of venue, and the plaintiff does not respond to this demand, the court must then grant the motion to change the venue unless the defendant's demand was improper in which case the court can deny the motion.

Here, Emma commenced an action against Driver and Mechanic in Queens County, where none of the parties are residents. Emma is a resident of Kings County, and Driver and Mechanic are residents of Nassau County. Emma made the decision to bring this case in Queens County out of the convenience of her attorney, who lives in Queens County. Driver and Mechanic made a demand for change of venue, and Emma did not respond to that demand. When Emma did not respond, Driver and Mechanic each timely moved for a change of venue to Nassau County because it is the county of residence of both defendants. The court denied this motion improperly. Since venue needs to be where either the plaintiff or the defendant are residents, the only two counties that would have proper venue in this instance would be in Kings County or in Nassau County. Emma was improper in bringing the case to Queens County, and her failure to respond to the demand made by Driver and Mechanic, should have made the court grant the motion because where Emma brought the case in the first place was improper and the defendant's demand was permissible.

Thus, the court was incorrect in denying defendant's motion for a change in venue.

(2) (b) The issue here is whether or not the court was correct in granting a protective order vacating Driver's Notice to Admit.

In New York CPLR, a protective order is something that the judge may grant during Disclosure, which is the term used in New York for discovery. A protective order is granted by the court in order to prevent the parties from wrongfully obtaining material that is meant to be disclosed during trial. A protective order is really to "protect" the parties and can properly be granted if the material sought to be discovered would implicate the liability and is a question for the judge or jury to determine after hearing all of the evidence presented during the trial or presentation of the case. A Notice to Admit is simply a notice seeking an admission from an opposing party of a fact that is relevant to the case at hand. A Notice to Admit cannot be proposed when the party seeking it does not know the answer to the question. It is meant to expedite litigation so that the question does not need to be presented to the judge or jury, but rather can be added to the material presented. If a Notice to Admit is improperly requested, a court may issue a protective order.

Here, Driver served upon Emma a Notice to Admit that she was not watching the road at the time of the accident because she was talking on a hand-held cell phone. This is not the proper use of a Notice to Admit because Driver does not know this fact for certain, this is something that needs to be determined by the trier of fact, and would implicate liability to Emma as it would be determined that she contributed to her own incident. The court made the decision to grant Emma's motion for a protective order because it was an improper use of a Notice to Admit, and if "admitted" Emma would be determined liable for something in which the trier of fact has not had a chance to decipher and hear all of the evidence for. The court was correct in granting Emma's motion for a protective order.

In conclusion, the court was correct in granting Emma's motion for a protective order to vacate the Notice to Admit, as there was improper use of the Notice to Admit. (3)(a) The issue here is what amount of damage award is Emma entitled to recover from Mechanic.

In New York, it is a pure comparative negligence jurisdiction, which means that if the court finds that the plaintiff contributed to her own injury, it does not bar her from recovering, but rather, her contribution to the injury will be reduced from her total damage. New York is also a joint and several liability jurisdictions, which means that if there are two or more joint tortfeasors that cause a single harm to one plaintiff, the plaintiff can fully recover from either joint tortfeasor. There is an exception to this rule when it comes to noneconomic damages (i.e.: pain and suffering). When it comes to pain and suffering, if it is found that the joint tortfeasor is 50% or less liable, the plaintiff can only recover that tortfeasors equitable share, or relative culpability when it comes to the non-economic damages. If the joint tortfeasor is 50% or more liable, the plaintiff can recover the entire judgment as in traditional joint and several liabilities.

Here, the jury returned a verdict in Emma's favor awarding $100,000 in damages for her medical expenses and $100,000 in damages for her pain and suffering. It apportioned the liability at 10% for Emma, 60% for Driver, and 30% for Mechanic. Emma seeks to execute the entire $200,000 damage award from Mechanic, and this would be improper. Since $100,000 of the damages were only for pain and suffering and Mechanic was found to only be 30% liable, which is 50% or less, he can only be required to pay damages for his equitable share, or relative culpability, which in this case would be $30,000 of the $100,000 for pain and suffering. In terms of the medical expenses, which are economic damages, Mechanic can be liable for the entire portion, minus, as a pure comparative negligence jurisdiction, Emma's portion of contribution, which is 10%, at $10,000. Thus, if Emma seeks to recover from Mechanic, she will only be able to recover $30,000 + $90,000 which equal $120,000. Whereas, if Emma sued Driver, since he was 50% or more liable, she can recover the entire judgment, minus her comparative fault, for $190,000.

In conclusion, Emma is entitled to recover $120,000 from Mechanic since he was 50% or less at fault, and New York has a special rule with regard to noneconomic damages.

(3) (b) The issue here is, assuming Emma recovers the maximum amount possible from Mechanic, what contribution may Mechanic seek from Driver. In New York, as a pure comparative negligence jurisdiction, and following joint and several liabilities, there is also a concept of contribution. Contribution is where one plaintiff recovers the full amount from one of the joint tortfeasors, and the joint feasor who paid the damages has a right to sue the other tortfeasor if the one that paid ended up fronting more than his equitable share.

Here, if Emma were to recover the maximum amount possible from Mechanic, in this case would be $120,000, Mechanic would be able to recover in contribution from Driver because the amount that Mechanic would have paid in terms of the medical expenses would be more than his equitable share. Mechanic was only liable for 30% and Driver was liable for 60%. Thus, in looking to the medical expenses at $100,000, Mechanic would only be liable in equitable share for $30,000, Driver $60,000 and Emma would not be able to recover the $10,000 due to her comparative negligence. Since Mechanic paid for the $90,000, Mechanic should be able to recover $60,000 from Driver in contribution because Mechanic paid more than his equitable share in the relative culpability. This is permissible under the rules of contribution in New York. Mechanic would not be able to recover in terms of the pain and suffering, since Mechanic was 50% or less liable and only paid his equitable share and not more.

Thus, Mechanic may seek $60,000 from Driver in contribution.

ANSWER TO QUESTION 4

1. The court should apply New York law. The issue is a choice of law matter in which a New York court should apply New York law for an accident that occurred outside of the forum state. When a cause of action has a factual connection to two separate states with two different sets of law, a forum court (i.e., the court in which the action is filed) must engage in choice of law analysis to determine which state's law to apply. New York has adopted an interest analysis test. Under the interest analysis approach, tort claims are determined in accordance with the Neumeier test. Neumeier distinguishes between two types of laws: (i) loss distribution; and (ii) regulatory. Loss distribution concerns, among other things, apportionment of liability between the parties. Regulatory laws, on the other hand, focus on regulating specific conduct; for example, speed limits. New York's choice of law doctrine is also focused on policy, rather than simply facts, and is concerned with the state that has a legitimate interest at stake in the claim. In a loss distribution setting, when all of the parties are from New York, New York courts will apply New York substantive law even if the cause of action arose in a state other than the forum state.

Here, the cause of action arose on a highway in State X when Emma, a New York resident, got into an automobile accident with Driver, also a New York resident. A subsequent investigation revealed that Driver's steering on his van was defective because it was improperly serviced by Mechanic, also a New York resident. Emma then commenced an action against both Drive and Mechanic in a supreme court in New York for damages sustained during the accident. According, this is a tort claim. The New York court is now tasked with assigning apportionment of liability, which is a loss distribution analysis. Moreover, for choice of law purposes, a court will always look at each plaintiff vis a vis each defendant to determine which law is proper to apply to each party, but here all parties are from New York so no issues on that front are present. In a loss distribution, when all parties are from New York, even though the cause of action accrued outside of New York - in this case, in State X, New York courts will apply New York law. As a result, the New York court should apply New York law under the interest analysis.

2. (a) The court was incorrect in denying the defendants' motions for a change of venue. The issue is whether objection to venue is proper when venue is laid in a county in which none of the parties reside. Under New York civil procedure, venue is proper in any county in New York in which at least one of the parties reside. A party resides where he or she is domiciled, which is to say the county in which (i) a party physically makes their usual place of abode; and (ii) intends to stay. If none of the parties reside in New York, venue is proper in any county in New York. Here, Emma lives in Kings County, New York. Meanwhile, the defendants, Driver and Mechanic, both reside in Nassau County. As a result, the Supreme Court of Queens County, the court in which Emma filed her action, is not a proper place of venue. It is of no import under New York law where Emma's attorney, who is not a party to the action, resides or makes his primary office for

this analysis, so the fact that her attorney's office is in Queens County has no impact on venue. Accordingly, none of the parties - all New York residents - live in Queens County. Therefore, the court should not have denied the defendants' motions for a change of venue.

(b) The court properly granted Emma a protective order to vacate the Notice to Admit. The issue here is whether a protective order may be granted when a Notice to Admit is timely served in relation to a factual piece of evidence. Under New York law, a Notice to Admit is proper when it regards factual or legal issues that are not disputed or when a party is compelled by procedural laws (e.g., mandatory discovery disclosures) to provide the other party with required or undisputed information or material. Here, Driver served Emma with a Notice to Admit that she was not watching the road at the time of the accident and therefore contributorily negligent. Since this is a disputed factual assertion of the defense, Emma is under no obligation to admit contributory negligence on her part. Accordingly, the court was correct in granting a protective order vacating the Driver's Notice to Admit.

3. (a) Emma is entitled to recover $120,000 from Mechanic. The issue is whether a joint tortfeasor is liable for the entire amount of damages under joint and severally liability, including, specifically, non-economic damages. Under New York law, tortfeasors can be held jointly and severally liable for harm arising out of their joint and undivided malfeasance. Accordingly, a plaintiff may request the entire amount of damages from any defendant. New York is a comparative negligence state, which means that plaintiffs are not barred from recovery if they are contributorily negligent, but their amount of damages will be reduced by their apportionment of fault. In addition, joint tortfeasors are entitled to both indemnification and contribution in New York. Contribution means that a joint tortfeasor who has paid the entire amount of damages can seek reimbursement from other tortfeasors for their respective apportionment of fault. Indemnity, on the other hand, shifts the entire liability between joint tortfeasors. New York, however, has a unique rule regarding third party contribution for non-economic damages, such as pain and suffering. A joint tortfeasor is not required to pay damages to the plaintiff in an amount greater than their apportionment of liability as it relates solely to non-economic damages.

Here, Emma is entitled to recover from either Mechanic or Driver as jointly and severally liable tortfeasors for her injuries. As a result, she can decide to go after Mechanic for damages. In this case, $100,000 in damages are related to medical expenses, which New York considers economic damages. Emma is entitled to recover this entire amount, minus her apportionment of liability, from either tortfeasor; in this case, Mechanic. Since Emma is 10% contributorily negligent, she can get $90,000 from Mechanic. As it pertains to the $100,000 in damages for her pain and suffering, this qualifies as noneconomic damages under New York law. Since Mechanic was less than 50% at fault, his apportioned liability was 30%, under New York's special statutory third

party contribution rule related to non-economic damages, Emma can only recover $30,000 of these damages from Mechanic. Therefore, Emma can recover $120,000 from Mechanic.

(b) Assuming Emma recovers $120,000 from Mechanic, Mechanic can seek contribution of $60,000 from Driver. The issue is how much a joint tortfeasor can receive from the other joint tortfeasor in contribution. As stated above (where contribution is more thoroughly defined), New York civil practice permits contribution between jointly and severally liable tortfeasors for their apportionment of liability of the total damages. Here, Mechanic paid Emma $90,000 related to the $100 medical cost-related damages. However, Mechanic was only 30% at fault and Driver was 60% at fault (with Emma the other 10% at fault). Accordingly, Mechanic can seek $60,000 in contribution from driver (60% of the $100,000 of total damages for medical expenses). Mechanic, however, cannot seek contribution related to the non-economic damages for pain and suffering because he has paid his full apportionment of liability related to such, $30,000, so he is not owed anything from Driver. Therefore, Mechanic can get $60,000 in contribution from Driver.

ANSWER TO QUESTION 5

1. The issue is whether Father effectively amended an irrevocable trust.

Under the New York EPTL, a trust instrument is duly created when there is a settlor of capacity (age and mental competency), the trust instrument is signed, and the assets are delivered to a trustee to fund the trust. In New York, absent language to the contrary or even no language delineating whether the trust is revocable or irrevocable, all trust instruments are deemed IRREVOCABLE. However, a trust can be revoked or amended if: ALL beneficiaries are made aware of the intent to revoke the trust AND the trustee/settlor receives written consent of ALL beneficiaries. If a beneficiary is a minor child, consent cannot be obtained until they reach the age of 18.

Here, the facts state that the trust was duly created. Father names both Ben and Chuck as beneficiaries of the trust. Father then subsequently, due to the contempt for his son Ben, amended the trust to name Chuck as the sole beneficiary. In New York, Father needed the written consent of BOTH Ben and Chuck to amend the trust instrument. He did not seek nor obtain such consent from either Ben or Chuck, thereby making the amendment to the irrevocable trust void.

Therefore, Father's attempted amendment of the trust was not effective.

2. In New York, a power of attorney is where a principal vests powers (executing documents, decision making proxies, as well as other affairs) in an agent on their behalf. There are two types of power of attorneys. The first kind is where the power of attorney is terminated upon the incompetency of the principal, or when the principal revokes the power of attorney. Next, there is a durable power of attorney where its range survives incompetency of the principal and leaves power and decisions of the principal left to his duly designated agent. Durable power of attorneys is terminated at death.

Here, Father vested his own decision making powers in Chuck by a duly executed power of attorney. Chuck executed a contract to sell Father's comic book collection after Father became incompetent, but BEFORE his died. Since Chuck was fully within his rights vested in him by the durable power of attorney to enter into a contract and sell the comic books, the contract is enforceable.

Therefore, Chuck did in fact have the authority to enter into the contract to sell Father's comic book collection.

3. The issue is whether an instrument that was incorporated by reference in his will can be admitted to probate.

Under the New York EPTL, incorporation by reference in a will is when the testator refers to another document, independent and separate from a will, to do incorporated into the his/her estate. These documents are often, unsigned and unwitnessed. New York STRICTLY PROHIBITS incorporation by reference. This policy is in place to combat fraud and other misgivings during the probate of a will.

Here, in the First Clause of Father's will, it makes a reference to a separate, unsigned, and unwitnessed document. In his will, it directs Chuck to donate his collection to his college fraternity. This clause would NOT be enforced by a New York Surrogate's Court, and normally, any assets referred to in the "reference" document will go into the residuary estate.

Therefore, the personal property listed on the document found in the drawer should NOT be distributed in accordance with the will.

4. The issue is whether the residuary clause is effective.

Under the New York EPTL, when a will refers to a duly executed trust instrument, New York WILL recognize this reference. A reference to a duly executed trust instrument is called a "pour-over will."

Here, in the Second clause of Father's DULY EXECUTED will, it makes reference to a DULY EXECUTED trust instrument, the "Smith Family Trust." The

residuary of Father's estate will "pour over" into the will and a New York Surrogate's Court will enforce this clause. New York has an interest in the disposition of estates and since the trust was in fact, duly executed, signed, and witnessed, there would be a highly unlikely instance of fraud.

Therefore, the residuary gift to the trust is effective.

5. The issue is whether Chuck can still take from his biological family after being "adopted out."

Under the New York EPTL, adopted out children do NOT take from their biological parents, unless the child was adopted by a family member or the spouse of ONE of their biological parents. Also, there is an instance where an adopted out child can take from their biological family and that is they are SPECIFICALLY named as a beneficiary in the biological decedent's will. Class gifts are not considered when referencing an adopted out child. New York treats an adopted out child of the biological family as predeceased, and thereby, any gift to them would lapse, absent the contrary language (specifically named).

Here, Chuck's Grandfather established a trust for Chuck's biological mother. Chuck's biological mother died, and the instrument says to divide the assets into as many issues (lineal descendants) as there are. This would be deemed a class gift. Since Chuck was not specifically named, he would be treated as predeceasing his biological family and will not take as a beneficiary.

Therefore, Chuck will not participate in the class gift.

ANSWER TO QUESTION 5

Question 1: Father's attempt to amend the trust was not effective

Absent a provision to the contrary, express trusts are presumed irrevocable and cannot be modified or revoked by the grantor unless all beneficiaries with a life interest and all remainder beneficiaries consent. In the present case, Father is the lone surviving beneficiary with a life interest, however Chuck and Ben both have a vested remainder interest which cannot be revoked, transferred, or terminated without their consent. Since Father has attempted to revoke Ben's remainder interest without his consent, the attempted amendment to the trust was not effective.

Question 2: Chuck had authority to enter into a contract to sell the comic book collection

A durable power of attorney authorizes the designated person to act as agent for a principal in matters including the formation of a contract. Unlike other powers of attorney or agency relationships, a durable power of attorney does not terminate on the incapacity of the principal. Chuck is therefore authorized by the power of attorney to act in his Father's interests. His powers are, however, limited in a number of ways. Primarily, the instrument granting a power of attorney may limit his authority and provide certain direction. Because Father used an unmodified form designated by New York law, the power of attorney itself does not provide significant limitations to Chuck's power, and does not prevent him from entering a commercial contract on the principal's behalf. A power of attorney also has a fiduciary duty of loyalty and care, and must act in the best interests of the principal. Chuck's sale will only be a breach of the duty of loyalty if, by contracting to sell the comic book collection, he has engaged in self-dealing, attempted to make a secret profit, or otherwise subjugated his Father's interests to his own. There are no facts to indicate that Chuck acted in breach of his fiduciary duty, and nothing to indicate a restriction to his power of attorney. He therefore had authority to enter a contract for the sale of the comic book collection.

Question 3: Father's property should not be distributed in accordance with the document found in his desk drawer

New York law does not recognize incorporation by reference in wills. To constitute a valid gift, the gift must be contained within a duly executed will, which includes a number of formalities including the requirement that the will - and any amendments - be signed by the testator, dated, published to two witnesses who sign acknowledging the testator's signature, and must identify itself as a will. The document in Father's desk drawer does not fulfil any of these formalities. It is instead an invalid attempt to incorporate by reference. The instructions should therefore do not constitute a part of the will and should not be followed. Unless there are other provisions of the will, the personal property therefore lapses and is distributed according to the residual estate.

Question 4: The residuary gift to the trust is an effective pour-over gift

A will may validly leave a "pour-over" gift, which is a contribution to an existing trust. In this case, the Smith Family Trust is a valid and operating trust, and it is sufficiently definite and identifiable based. A gift to this trust is therefore valid.

Question 5: Chuck is not entitled to participate in the class gift to the issue of his biological mother

The trust in question gives a life interest to the mother, with a remainder subject to open to any issue at the time of her death. In such a case, membership in the class is

determined at the time that the interest vests - namely, when no new members can be added or removed from the class. Membership in the class is therefore determined at the date of the mother's death. The default position, when determining the membership of a class defined by "issue" or the testator or of another, is that an adopted-out child does not receive a share in the gift absent contrary provisions, such as a provision identifying the adopted-out child by name. In this case, membership of the class is determined at the time of Chuck's biological mother's death, not at the time of his birth or adoption-out. Absent a contrary provision, therefore, at the time the interest vests he is not a member of the class defined in the trust and he is not entitled to participate in the class gift to the issue of his mother.

ANSWER TO MPT

MEMORANDUM

TO: David Lawrence
FROM: Examinee
DATE: February 23, 2016
RE: Worker's Compensation Claim

Per your request I have prepared a memorandum addressing whether Greer would be considered an employee of Anderson under applicable statutory provisions and case law. There are three main issues. First is whether the right of control test is met. Second, is a balancing of the Doyle factors. Third is a public policy analysis based on the remedial nature of workers' compensation laws. All three of these things will be considered and it appears no one by itself is conclusive in determining if an independent contractor relationship existed.

Where an injured person was an independent contractor or where there is proof that an injured person was performing service for the alleged employee, that will constitute an affirmative defense and the employer will not liable to that person for workers' compensation benefits. The burden of proof falls on the employer, which in this case would be our client Ms. Anderson.

Right of Control Test

The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. Franklin Labor Code 253. Per Raleigh v. Juneau Enterprises, quoted in Robbins v. Workers' Compensation Appeals Board, the existence of such right of control, not the extend of its exercise, gives rise to the employer-employee relationship. A court

will find an employer/employee relationship where all meaningful aspects of the relationship are controlled by the hiring party so that the hiring party has pervasive control over the operation as a whole. The court will look to see if they performing party had independence from the hiring party as a result of superior skill.

Per Harris v. Workers' Compensation Appeals Board, a person who engages an independent contractor to perform a job may retain broad general power of supervision and control as to the results of the work for the purpose of ensuring satisfactory performance of the contract. This includes the right to inspect the work, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe Alterations or deviations in the work all without changing the nature of the independent contractor relationship or the duties that arise out of that relationship. In Ms. Anderson's case, it appears she had some control over the work Mr. Greer did but that her control was limited to general supervision as the results in order to ensure satisfactory performance and to make recommendations about how the work was to be completed. This was a services contract and one in which the quality of performance was important to Ms. Anderson because she wanted her rental properties to be maintained in quality condition and appearance. While she could control minor things like the color of paint and what type of fixtures to install, i.e. aesthetic decisions, Ms. Anderson did not control the manner in which Mr. Greer painted or how he installed the fixtures. She relied on his expertise to do those things. While Ms. Anderson asked for three coats of paint, this is a preference and has impact on the long-lasting ability of the paint. Ms. Anderson did provide a checklist to Mr. Greer which may appear to be a way to control his behavior as to those inspections. Ms. Anderson had the amount of control needed to the limited extend to ensure quality.

Doyle Factors

In addition to a consideration of the right of control test, in making a determination of whether an employer/employee or independent contractor relationship existed, the court will consider the Doyle factors. The process of distinguishing employees from independent contractors is fact specific and qualitative rather than quantitative.

First, the court will consider whether the worker is engaged in a distinct occupation of an independently established business. Mr. Greer had his own business named "Greer's Fix-Its" which he paid to advertise for in the Yellow Pages. He solicited business independently. This factor suggests an independent contractor relationship. Like the worker in Robbins, Greer advertised and had other clients who were able to serve as references for Ms. Anderson.

Second, the court will consider whether the worker of the principal supplies the tools or instrumentalities used in the work, other than those commonly provided by

employees. Mr. Greer provided the ladder he was standing on when he fell. By supplying this instrument, he was in the best position to ensure its safety, rather than Ms. Anderson. Further, Mr. Greer provided most of his own equipment including many tools that he kept in his truck as well as tools and items he needed that he would go buy himself and then be reimbursed for, rather than having Ms. Anderson buy. While Ms. Anderson occasionally bought some specific aesthetic items such as paint and fixtures, that appeared to be in the minority of instances and only for specific purposes. Further, she never bought all of the supplies, i.e. the brackets to install the fixtures or paint brushes. Greer obtained his own products for repairs and cleaning, which was a substantial portion of his work. This factor suggests an independent contractor relationship.

Third, the court will consider whether the method of payment was by time or by job. Here, the method of payment was both by time and job depending on the task. This is a similar outcome to the application of this factor in Robbins, where the employee charged both by job and by the hour. This factor may be neutral.

Fourth, the court will consider whether the work was part of the regular business of the principal. It appears the work was in Ms. Anderson's regular business because she stated it was constant because of the high number of rental properties she had. However, it was ancillary to the main purpose of her business which is to collect rent from tenants. This factor may be neutral.

Fifth, the court will consider whether the worker has a substantial investment in the worker's business other than personal services. Mr. Greer advertised his personal business and had a truck that contained many tools, all owned by him. This factor suggests an independent contractor relationship.

Sixth, the court will consider whether the worker hires employees to assist him. There is no evidence Mr. Greer hired workers to help him. This factor may be neutral.

Seventh, the court will consider whether the parties believed they were creating an employer-employee relationship. Ms. Anderson clearly stated she did not consider Mr. Greer as an employee and was very surprised to get his request for employee workers' compensation benefits. She never withheld taxes from his payment nor did she obtain insurance to cover his work. We cannot be sure of Mr. Greer's belief but the fact that he filed a workers' compensation claim suggests he presently thinks an employer relationship existed.

Eight and finally the court will consider the degree of permanence of the working relationship. Mr. Greer was paid $250 per month to ensure his availability but there is no evidence as to how long this agreement was to last. It appears it could have been stopped at any time by either party. This factor suggests an independent contractor relationship. As held in Robbins, no one factor alone will be determinative but the court will weigh all

factors. Taken together, it appears from all the factors Ms. Anderson and Greer had an independent contractor relationship.

Policy Considerations

Due to the fact that the Workers' Compensation Act is meant to be remedial, courts will consider public policy in determining whether an individual is entitled to workers' compensation benefits. Robbins. Specifically, courts will consider the remedial purpose of workers' compensation laws, the class or persons intended to be protected, and the relative bargaining power of the parties. The policy underlying Franklin's workers' compensation law indicates that the exclusion of independent contracts from the law's benefit should apply only to those situations where the worker had control both (i) over how the work was done and (ii) over work safety and the power to distribute the risk and cost of injury as an expense of his own business. Per statute, the provisions in the Workers' Compensation Act should be liberally construed, however, courts will not extend protection to independent contractors.

Mr. Greer was in a strong bargaining position and was not at a disadvantage to Ms. Anderson. He was clear what his price would be in their initial email correspondence and did not hesitate to require more money for certain jobs, such as painting very large rooms or high ceilings. The parties negotiated payment at the beginning of each job, suggesting there was mutual bargaining power. While Greer took a monthly payment to stay available, there is no evidence he could not stop this agreement at any time. Further, Greer had the power to distribute the risk and cost of injury because he set the amount he was to be paid and provided the tools used, including the ladder he was on when he fell, therefore he was in the best position to account for the safety and working condition of those items, rather than Ms. Anderson.

ANSWER TO MPT

Memorandum

To: David Lawrence
From: Examinee
Date: February 23, 2016
Re: Worker's Compensation Claim

I. Introduction

You tasked me with analyzing whether Rick Greer would be considered an employee of our client, Nicole Anderson, for purposes of the Franklin Workers

Compensation Law. This analysis is necessary to determine Anderson's potential substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide insurance coverage. Under Franklin law, an employer must provide workers compensation coverage for employees, who are defined as every person in the service of an employer under any appointment or contract of hire, whether express or implied, oral or written. On the other hand, an employer will not be required to maintain coverage for independent contractors, who are defined as any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished. Importantly, whether a plaintiff is an independent contractor rather than an employee is an affirmative defense to a workers compensation claim and, therefore, the burden is on employer to prove that an injured person claiming to be an employee was an independent contractor.

The analysis of whether a plaintiff is an employee or independent contractor is three-fold. First, a court will look at whether the plaintiff is under the control of the defendant as to the result of his work only or as to the means by which the result is accomplished. This is referred to as the Right of Control Test. Next, the court will balance a variety of factors that were enumerated in the Doyle case by the Franklin Court of Appeals. Finally, before a determination is made, the court will weigh the public policy considerations of saddling the plaintiff with providing his own coverage versus the equity of requiring the defendant to do so. This memo proceeds according to this three-fold analysis, and comes to the conclusion that it is likely, but not certain, that a court would consider Greer to be an independent contractor rather than an employee for purposes of the workers compensation law.

II. Right of Control Test

The principal test of an employment relationship is whether the person to whom service is rendered has the "right to control" the manner and means of accomplishing the result desired. The existence of such right to control, not the extent of its exercise, gives rise to the employer-employee relationship. For example, in Doyle, unskilled harvesters who worked for a grower were found to be employees where all the meaningful aspects of employment, such as the price, crop cultivation, fertilization, payment, and dealings with buyers, were controlled by the defendant grower. It was the pervasive control that the defendant had over the entire operation that led the court to find the harvesters were employees. Similarly, in Harris, the court found that a golf caddie was the employee of a country club where the club exercised control over the caddie's dress, behavior, types of services rendered, and administration of payment. In contract, in Robbins, the court held that the plaintiff, who was hired to trim bushes for the defendant, was an independent contractor because the defendant had no power to control the manner or means of accomplishing the trimming. Instead, the plaintiff was hired to produce a result of trimming the bushes in whatever manner he chose.

Here, Anderson is not likely to be found to have a right to control the manner and means of Greer's work. Anderson hired Greer to help her with the general repair and maintenance projects at her rental properties. They did not enter into any kind of formal agreement but, instead, Anderson agreed to inform Greer of when his services were needed and Greer would make sure to get out whatever property the project was at and complete the job. In other words, Anderson would contact Greer to clear or repair a rental house, and the work would be accomplished. This is similar to the bush trimmer in Robbins, where the plaintiff was hired to produce the result of trimming, with little discussion of how it would get done.

On the other hand, she does require him to inspect the exterior of each of the properties months, using a checklist she provides him. In addition, although Anderson does not always give him detailed instructions, the incident where Greer was injured Anderson was telling him how she wanted the house painted. In particular, she wanted to make sure he masked the windows, use a narrow brush to paint the trim, and use three coats of paint. She also stated that she gets involved in this way so the project turns out the way she wants it to. Greer could argue that these acts by Anderson are similar to Harris in that Anderson is supervising how he renders the services he provides. However, the argument will be unavailing because a court is more likely to find that, unlike Harris, Anderson is not micromanaging Greer's work, such as supervising his dress or behavior, but rather exercising the broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance

Therefore, the Right of Control Test appears to weigh in favor of our client.

III. Doyle Factors

The Right to Control Test is not exclusive, and the Doyle factors must also be considered to determine one's status as an employee or an independent contractor. The factors include : 1. whether the worker is engaged in a distinct occupation or an independently established business; 2. whether the worker or the principal supplies the tools or instrumentalities used in the work, other than those customarily supplied by employees; 3. the method of payment, whether by time or by the job; 4. whether the work is part of the regular business of the principal; 5. whether the worker has substantial investment in the worker's business other than personal services; 6. whether the worker hires employees to assist him; 7. whether the parties believe they are creating an employee-employer relationship; and 8. the degree of permanence of the working relationship. These factors are not applied mathematically, but in a fact-specific inquiry that is qualitative rather than quantitative.

For example, in Robbins, the court determined that the Doyle factors weighed in support of finding the plaintiff bush trimmer to be an independent contractor where six of the factors tended towards that finding. Specifically, the plaintiff performed the services

pursuant to his own gardening operation, he used his own equipment, he charged by the hour on a job-to-job basis, his work was unrelated to the defendants restaurant business, he had invested in his equipment substantially, and he would be contacted only when services were needed. On the other hand, in Harris, the court found that the Doyle factors weighed in favor of finding a golf caddie at a country club an employee rather than an independent contractor. In Harris, the court noted that caddying was an integral part of the defendant country club's business, the plaintiff provided services that benefited the club - and employment is presumed in such circumstances, and, finally, the plaintiff did not have his own business and the club provided the caddies with equipment and a locker room.

Here, the Doyle factors weigh in both directions, but ultimately go in favor of finding Greer an independent contractor. Similar to the bush trimmer in Robbins, Greer has his own distinct handyman service called "Greer's Fix-Its"; Greer uses mostly his own tools, such as ladders and a large tool box in the bed of his truck, the method of payment is mostly by the job or by the hour per job, Anderson has stated that she was surprised that Greer would consider her his employer, and the working relationship was based upon Anderson contacting Greer when a job was needed. Furthermore, Greer also appears to have a rather substantial investment in his business, as he does not exclusively work for Anderson and, in fact, only works for her about 10 hours a month. On the other hand, like the caddie in Harris, the work that Greer does is directly related to Anderson's property management because he provides for the upkeep of her properties, Greer does not hire other employees to assist him, and he apparently believed that they had formed an employer-employee relationship by filing for a worker's compensation claim.

Therefore, although there is room for Greer to argue that the Doyle factors weigh in his favor, it appears that this situation is more similar to the bush trimmer in Robbins than the caddie in Harris and, accordingly, a court would lean towards a finding that Greer was an independent contractor.

IV. Policy Considerations

The last factor that must be considered in making a thorough analysis of whether Greer was an employee of Anderson is public policy. The Robbins court noted that the remedial purpose of the worker's compensation law, the class of persons intended to be protected, and the relative bargaining power of the parties must be considered. Specifically, in Doyle, the court had noted that if the harvesters were not covered by the defendant grower, then they and the public at large would be responsible for such coverage. This would be inequitable because the harvesters, according to the Doyle factors and the Right of Control Test, were in the class of persons the workers' compensation law was meant to protect. To the contrary, the situation in Robbins was deemed distinctly different because the plaintiff was able to accept or reject jobs at his whim, and controlled a strong bargaining position because of this. Thus, public policy did not weigh in favor of having the law cover the plaintiff in such a situation.

The situation in this case more closely resembles that of Robbins than that of Doyle. Specifically, Greer does not fall squarely within the class of persons meant to be protected by the workers compensation law. Although he does provide services that ultimately benefits Anderson's property management business and, in such a case, the status of employee is presumed; the Doyle factors and Right to Control test weigh in favor of finding Greer an independent contractor. Furthermore, although, unlike Robbins, Greer is not necessarily free to accept and reject jobs from Anderson, he is also not completely dependent upon Anderson for employment - as the harvester's in Doyle were - and appears to have a relatively even bargaining position with Anderson based upon their negotiable fee arrangement.

Accordingly, it would not be inequitable to hold Greer responsible for his own coverage, as he does not primarily work for Anderson, and is on relatively even footing with her to negotiate his fees.

V. Conclusion

After consideration of the Right of Control Test, the Doyle factors, and the policy considerations, a court is likely to find that Greer is an independent contractor rather than an employee. However, it is important to note that the court will liberally construe the workers compensation statute with the purpose of extending benefits for the protection of persons injured in the course of their employment. Therefore, the arguments that Greer has in his favor as enumerated in this memo cannot easily be disregarded when discussing the situation with our client.