NEW YORK STATE BAR EXAMINATION
FEBRUARY 2003 QUESTIONS AND ANSWERS

Question-One
Dressco, Inc., ("Dressco") a manufacturer of dresses, is a closely held New York corporation. Until March 2002, Major, Min, and Dan were Dressco's only directors and shareholders. Major, the owner of 100 shares, was responsible for sales and business operations, while Min, who owned 50 shares, was in charge of designing the Dressco collections. Dan, the owner of the remaining 50 shares, was not involved in the day to day operations of Dressco but attended regularly scheduled director and shareholder meetings.

On January 2, 1990, Dressco, Major, Min and Dan signed a written agreement that provided in pertinent part:

Upon the written request of any shareholder, Dressco shall, within sixty days of receipt of such request, purchase the shares of the requesting shareholder for $1,000 per share.

In March 2002, Dan decided to move to Florida and made a written request on Dressco for Dressco to purchase his 50 shares pursuant to the agreement. Major then reminded Dan that at the time the agreement was signed, the parties had orally agreed that the buy back provision would only apply if the corporation was making a profit on the date of the shareholder's request. As of March 2002, Dressco had not made a profit for the preceding three years. For this reason, Major told Dan that the corporation would not buy his shares.

Dan duly commenced an action against Dressco for breach of contract, seeking to recover $50, 000 for his shares. At trial, Al, Dan's attorney, objected when Major and Min sought to testify about the oral agreement limiting the buy back provision. The court overruled the objection and permitted the testimony. After hearing their testimony, Al decided that it would be in Dan's best interest to settle the case. Although Dan was not present in court and Al was not able to reach Dan to discuss the settlement, Al entered into a written stipulation with Dressco's attorney, settling the case for $7,000.

In October, Major started to neglect Dressco's business, wrote company checks to pay his personal expenses, and stopped paying Dressco's rent and electric bills. When Min questioned Major about his actions, Major told Min that Dressco belonged to him and that he could do whatever he wanted with the business. Since that time Major has refused to discuss company business with Min, to give Min any financial statements, or to hold any director or shareholder meetings. On February 3, 2003, Min filed a petition alleging the foregoing facts and seeking (a) a preliminary injunction preventing Major from wasting any corporate assets, and (b) the dissolution of Dressco.

(1) Was the court's ruling allowing the testimony of Major and Min concerning the oral agreement correct?

(2) Is Dan bound by the stipulation of settlement?

(3) Is Min entitled to:

(a) the preliminary injunction she seeks?

(b) the grant of her petition for dissolution of Dressco?

ANSWER TO QUESTION 1
1. The court’ s ruling allowing the testimony of Major and Min was incorrect concerning the oral agreement. The issue presented is the admissibility of oral statements made prior to or

contemporaneous with a written contract, which statements contradict or supplement the written terms. The issue relates to the Parol Evidence Rule.

Parol Evidence includes statements made orally either at the time of the written contract or prior thereto. Here, Major and Min sought to testify in the breach of contract action about an oral agreement that modifies or limits the written buy back provision. Under contract law, the terms of the written contract are generally controlling, and parol evidence will be barred from being introduced into evidence to contradict or supplement the terms of the writing. Here, the oral agreement relates clearly to a written term. The parol evidence relating to the buy back provision seeks to limit the written term in that the oral evidence would show that the buy back provision would only apply if the corporation was making a profit. In determining whether the oral modification should be included as an exception or outside the scope of the Parol Evidence Rule, the court should look to several factors, such as whether the written contract was fully integrated. A fully integrated contract is one that embodies all the terms of the agreement. Here, it would be expected that a limitation of the buy back provision would be included in the contract because the contract terms explicitly address the issue. In addition, the court would look to other similar contracts to determine if such modification or additions are typically included in similar contracts. The court would determine that similar contracts do normally contain such limitations, and because of this reasoning, conclude that the Parol Evidence Rule should bar the testimony of Major and Min regarding the additional oral agreement. Therefore, the court's ruling was incorrect.

2. Dan is bound by the stipulation of settlement. The issue is whether Al was an agent for Dan (the principal), and if Al had authority to bind Dan as Dan's agent, and if a third party may then hold Dan liable.

An agent relationship exists when three elements are present. 1) The agent must be under the control of the principal. Control consists of the ability of the principal to direct the actions of the agent. Here, through the relationship of Al being Dan's attorney, Al is under the control of Dan because Dan can direct Al's actions on Dan's behalf.

2) The agent must act for the benefit of the principal. The agent must be working with the goals of the principal in mind. Because Dan hired Al as his attorney, Al is acting for Dan's benefit and thus this element is satisfied. 3) There must be authority for the agent to act. Authority may be inherent, implied, lingering or actual. Actual authority is express authority granted through words, it is a clear expression of authority to act in a certain way on behalf of the principal. The facts here do not indicate that Dan gave Al the actual authority to enter into a settlement agreement on his behalf, and thus there probably is no actual authority present. However, Al appears to have inherent authority to act on Dan's behalf. Inherent authority is reasonably implied authority that is present because of the way the agent and principal conduct themselves and how the agent is held out to the public. In this case, Al is Dan's attorney, and as such has inherent authority to act on his behalf concerning the legal matters he was hired for. Dressco's attorney relied on that authority, and Al held himself out as having that authority in the settlement negotiations and as such, due to this inherent authority, Dan will be liable on the settlement contract. The principal may be bound on contracts entered into by the agent while acting under authority and thus Dan will be bound.

3. a. Min is entitled to a preliminary injunction. At issue is whether the wasting of corporate assets will produce irreparable harm such that equity will issue a preliminary injunction.

A preliminary injunction is equitable relief granted in equity. To obtain a preliminary injunction, the party seeking such must demonstrate irreparable harm and that legal or monetary damages would not be sufficient. Here, the facts indicate that Major is wasting corporate assets by using the assets to pay personal expenses and is neglecting the business in general. Min may show that

without an injunction issued, the corporation will suffer irreparable harm prior to the potential resolution of the issues on the merits. The preliminary injunction purpose is to maintain the status quo while the issues are being decided on the merits. Here, Min can show that if an injunction is not afforded, the corporate assets may be continued to be wasted such that on a finding in her favor for the dissolution of Dressco, there will be no assets left. Min also must show a likelihood of success on the merits. The facts here clearly show that Major has excluded Min from the discussion of company business, has neglected the company, refuses to hold shareholder meetings, etc. Min has a strong case for dissolution of the corporation, and thus can show a likelihood of success on the merits to dissolve the corporation and distribute the assets, and thus given the showing of irreparable harm, that monetary damages would not be sufficient and a likelihood on the merits, Min is entitled to the preliminary injunction. It should be noted that she may require to post an undertaking; i.e., a bond.

b. Min should be awarded the grant of her petition for dissolution of Dressco. At issue is the ability of the shareholder to request dissolution of a corporation. Under New York Corporate Law, a shareholder may request dissolution of a corporation if that shareholder holds at least 20% of the shares of the corporation and in a close corporation shows that the directors or controlling shareholders are acting in a way that suppresses the minority. Here, Major is both a controlling shareholder and a director, and the facts show that his actions of wasting corporate assets, ignoring corporate formalities and ignoring the reasonable requests of the minority shareholders are having the effect of suppressing the minority shareholders. Min is an owner of a least 20% of the shares, since she owns 50 shares, and there are 200 shares issued and outstanding. Thus, she owns 25% of the shares and meets this threshold. It should be noted that the court may rather than dissolution, require that Dressco "buy her out". The court could require the company to buy out the complaining shareholder in a close corporation since there is no public market for the shares, because they are not traded on an exchange. In any case, Min has satisfied the requirements for judicial dissolution.

ANSWER TO QUESTION 1

1. The court’s ruling was incorrect. The issue is whether the Parol Evidence Rule (PER) renders the testimony inadmissible. The PER renders inadmissible any testimony of contemporaneous oral statements to a written contract that is offered to establish inconsistent terms to the contract. The PER applies here because there is an integration – an agreement considered complete and final by the court. Major, Min and Dan entered the written agreement. Also, there is testimony about alleged contemporaneous statements that are inconsistent with the written contract because Major and Min seek to testify about a limitation on the terms of the buy back agreement, but no such limitation appears in the agreement itself. Therefore, under the PER, this testimony is inadmissible.

None of the exceptions apply. The PER permits consideration of oral statements when the written agreement is ambiguous, but this agreement is not ambiguous on its face. Also, the PER permits consideration of oral statements that would naturally and normally be in a separate agreement; but here the alleged limitation goes to the heart of the written agreement. Finally, there is no allegation by Major and Min of fraud by Dan in the inducement of the contract that would justify looking beyond the four corners of the written agreement.

2. Dan is not bound by the stipulation. The issue is whether an attorney may bind a client to a settlement agreement without notice to the client and approval by the client. As a rule under the New York Code of Professional Responsibility, an attorney has an ethical obligation to keep the client informed regarding important occurrences in any proceedings, such as settlement offers by the opposing party. Further, an attorney has an ethical obligation to seek client approval before settling any matter – whether civil or criminal. Here, Al was Dan’s attorney, and he therefore owed ethical obligations to Dan to notify him that Dressco had offered to settle the case for $7,

000 and to seek Dan's approval before entering any stipulation with Dressco. Al breached these obligations by failing to notify Dan and failing to seek his approval. The facts that Dan was not in court or could not be reached are irrelevant because Al had a duty to contact Dan. Further, the fact that Al thought the deal (a $7,000 settlement of a $50,000 claim) was in Dan's best interest is irrelevant. Al may advise Dan of such, but he may not make that judgment for Dan without Dan's approval. Since Dan was not notified and did not approve the deal, he is not bound. It should be noted that nothing in the facts suggests that Dan expressly authorized Al, as an agent, to settle the claim on Dan's behalf. In addition to avoiding the settlement with Dressco, Dan may also have grounds to sue Al for malpractice to the extent Dan can prove damages. At the very least, Dan may terminate the attorney/client relationship by firing Al.

3. a. Min is not entitled to a preliminary injunction. The issue is whether Min has satisfied the required showings for a preliminary injunction (PI). To secure a PI, a party must duly commence an action seeking a permanent injunction and make the required showings for such relief: a wrong by defendant, a protected interest in plaintiff, an enforceable remedy, a balance of hardships that favors plaintiff and no adequate remedy at law. It should be noted that Min's action for dissolution qualifies as an action for equitable relief, but it is not seeking a permanent injunction. Therefore, if fails to satisfy the first condition. Min can show a wrong by Major to his protected interest because Major has breached his duty of loyalty (by wasting corporate assets) to Dressco and its shareholders. A negative injunction to stop such waste would be enforceable by contempt. However, Min has an adequate remedy at law because Min (as both shareholder and director) can sue Major on behalf of the corporation. Such a suit would allow Dressco to recover any damages, disgorge any of Major's wrongful profits and even remove Major. (Note: Min would have no problem pleading demand futility with particularity on these facts.)

To secure a PI, a party must also show a threat of irreparable harm and post a bond. Min can show a threat of harm based on Major's wasteful conduct and statements. Presumably, a PI could also post the necessary undertaking. However, given judicial reluctance to afford PIs and equitable relief, Min is not entitled to a PI because he has an adequate remedy of law.

b. Min is entitled to have the petition for dissolution granted. The issue is whether a minority shareholder may petition for voluntary dissolution of a corporation. As a rule under the New York BCL, a 20% shareholder may petition for voluntary dissolution based on a showing that the majority shareholder has oppressed the minority shareholder or wasted corporate assets. Min has a 20% share because he owns more than 20% of the outstanding shares (he has 50 of 200). Also, Min can show that Major has both oppressed him by refusing to hold meetings or to accept his input in management and wasted corporate assets. Therefore, Min is entitled to dissolution. However, the court may attempt to avoid dissolution, if unnecessary to protect the minority shareholder. For example, a majority shareholder may offer to buy back minority shares at a fair price, giving minority shareholders a fair return and opportunity to exit. If Major makes such an offer, the court may require Min to accept it rather than dissolve Dressco. It should be noted in closing the corporate elements of this question are governed by New York BCL.

Question-Two

Duke purchased a motor boat from Earl for $10,000. When the boat was delivered, Duke paid for it by giving Earl a $10,000 check drawn on his personal account at B Bank. At the time Duke gave Earl the check, Duke knew he had only $7,000 in his account, but he hoped to be paid on an outstanding insurance claim in time to cover the check. Earl immediately deposited the check in Earl's account at C Bank, and several days later was advised by C Bank that the check was being dishonored and returned for insufficient funds. Earl complained to Duke, and Duke explained that some funds he had expected had not arrived, but that he could make the check good in two weeks. Earl agreed to wait for two weeks before redepositing the check.

Duke was employed as an accounts payable clerk in the bookkeeping department at Acme Corp. Within a week after Duke assured Earl that he would make the check good, Duke prepared an Acme Corp. check drawn on its account at B Bank payable to Duke Corp., a non-existent entity, in the amount of $3,000. Because Duke did not have check signing authority, he obtained by deception the signature of Acme's treasurer on the check. Duke took the check, endorsed it payable to the order of Duke, signed the endorsement, "Duke Corp., by Duke, President," and deposited the check in his personal account at B Bank.

Duke then realized that other checks he had written might clear before the check he had given to Earl so that the $3,000 deposit would not be sufficient. Duke prepared another Acme Corp. check drawn on its account at B Bank payable to Duke in the amount of $2,000. This time Duke signed the name of Acme's treasurer to the check. Duke endorsed the check and deposited it in his personal account at B Bank.

After waiting the agreed two weeks, Earl redeposited Duke's check and it cleared.

(a) Based on proof of the foregoing facts, may Duke properly be convicted

of the crimes of (1) issuing a bad check, (2) larceny, and (3) forgery?

(b) May B Bank be held liable to Acme Corp for paying (1) the $3,000 check and (2) the $2,000 check?

ANSWER TO QUESTION 2
A. 1. Issuing a bad check

Duke may be convicted of issuing a bad check for the check he wrote to Earl. The issue is whether he had the requisite state of mind to be guilty of this crime.

The elements of any crime are an act , or actus reus; the requisite mental state, or mens rea; the concurrence of the two and harm. In this case, the actus reus is present because Duke issued a bad check. As for the mens rea in this case, the requisite intent for issuing a bad check is specific intent. Specific intent indicates that the defendant had the intent to achieve the prohibited behavior, which in this case, is issuing a check which is not covered by sufficient funds. It is enough that Duke knew there were insufficient funds in the account when he wrote the check to Earl. Duke intended to write the check and knew, while that at the time it was written, there were not sufficient funds to cover it. Merely hoping that he would have enough money to cover it by the time Earl cashed it does not undermine the intent he exhibited by knowingly writing a check on an account that did contain adequate funds. Because he actually wrote the check and knew that there was not enough money to do so when he issued it to Earl, Duke is convicted of issuing a bad check.

2. Larceny

Duke will be convicted of larceny unless he had possession of the funds in his position as an accounts payable clerk. The issue is whether he had possession of the funds at the time he took them.

The elements of larceny are the taking and carrying away the property of another with intent to permanently deprive. Duke’ s actions seem to fulfill this test through his fraudulent actions. He took away the money of the bank with an intent to permanently deprive. However, for the crime

of larceny, the crucial factor regarding whether larceny has been committed is possession of the property not ownership. An individual guilty of larceny need only take the property from someone else who has possession and the guilty individual must not be entitled to possession himself. In this case, Duke may have had possession of the funds he diverted. As an accounts payable clerk in the bookkeeping department, he may have already had legal possession over the funds through the duties of his employment. If this is the case, then he is guilty of embezzlement, not larceny, because he is guilty of converting to his own use property of which he already had legal custody. However, although the facts are unclear, they seem to indicate that perhaps Duke did not have the amount of control and custody over the goods required for embezzlement. The facts state that Duke did not have check signing authority. This may indicate that he did not have possession over the money through his employment at Acme.

3. Forgery

Duke is guilty of forgery for the $2,000 check but not the $3,000 check. The issue is whether Duke wrote someone else's signature so that he might fraudulently obtain property.

Forgery occurs when an individual signs someone else's name in order to commit a fraud. In this case, Duke signed someone else's name - Acme's treasurer – when he wrote the $3,000 check. As for the $2,000 check, by signing his own name under the guise of being the president of a fictitious company, Duke was not guilty of committing forgery. Therefore, the requisite act of signing another's name occurred with the $2,000 check but not the $3,000 check, and so Duke may only be convicted of forgery for the $2,000 check.

B. 1. $3,000 check

B Bank is not liable to Acme Corporation for the $3,000 check. A check is a type of negotiable instrument known as a draft. To be negotiable, a check must be written, signed by the drawer, made out for a specific amount and evidence an unconditional promise to pay to order or to the bearer at a specified time or to order. A negotiable instrument must then be negotiated to a holder. This occurs when it is delivered in the case of bearer paper (the draft is made payable to the bearer) or when it is delivered and endorsed in the case of order paper (the draft is made payable to the order of a designated person). When a holder presents a bank with a properly negotiated instrument, the bank must pay the holder according to the terms of the instrument. The $3,000 check that Duke wrote met all of these requirements. The check was written, indicated that B Bank was the drawee (the drawee is the individual or institution that is required to pay the draft), and was signed by the drawer, Acme's treasurer on behalf of Acme, was made out for $3,000 and was payable to the order of a specified payee, Duke Corp. The fact that Acme's treasurer was fraudulently induced to sign the check or that Duke Corp. was fictitious is not relevant to B Bank's liability in this instance. B Bank could not know, nor is it required to know, either of these facts. Duke then endorsed the check to himself and the endorsement appeared proper, so it appeared to B Bank that the check was properly negotiated to Duke and B Bank rightly deposited it. As discussed above, no forgery occurred, and B Bank is not liable to Acme Corp for the $3, 000 check. Acme should seek to recover from Duke instead.

2. $2,000 check

B Bank is liable to Acme Corp. for the $2,000 check. In this instance, although the check appears to comply with the requirements of negotiation and negotiability as described above, Duke forged the name of Acme's treasurer on the check this time. Liability is imposed on a drawee who disburses funds to a payee on a forged instrument. The bank is required to recognize the signature of the drawer who holds an account with it and is therefore liable to the drawer if it pays out funds on a forged instrument. As a result, B Bank is liable to Acme Corp for the $2,000 check because the name of Acme's treasurer was forged on the check.

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ANSWER TO QUESTION 2

A. 1. Duke may properly be convicted of the crime of issuing a bad check. The issue is whether writing a check knowing that it will not clear constitutes the crime of issuing a bad check. Under New York criminal law, issuing a bad check consists of knowingly issuing a check when there are insufficient funds to cover it. Here, Duke paid Earl by writing a personal check from his account knowing that his balance was only $7,000, not $10,000. Even though he hoped to have money from an insurance claim deposited into his account before the check cleared, Duke still knew he did not have enough money in his account to cover the $10,000 check to Earl. Duke can therefore be convicted of the crime of issuing a bad check.

2. Duke may also properly be convicted of larceny. The issue is whether taking money from another's bank account by means of preparing false checks to a non-existent entity to use for personal use constitutes larceny. Under New York criminal law, larceny is the taking away of the personal property of another with the intent to permanently deprive them of that property. In New York, embezzlement, which is the taking of property of another by a person with lawful possession in a position of trust as a fiduciary, is a form of larceny. Here, Duke was employed as an accounts payable clerk at Acme Corp. and used that position to falsely obtain money belonging to Acme Corp. for his own personal use. Duke improperly prepared two checks made payable to a non-existing entity with the intention of using the money for his own benefit. He actually took the money of Acme Corp. by depositing it into his own bank account. Duke committed larceny since he took Acme Corp.'s money (property) with the intent to deprive Acme Corp. of it and he therefore can be convicted.

3. Duke can also be properly convicted of forgery. The issue is whether a person is guilty of forgery when they falsely endorse the check of another by signing the name of another with authority to endorse. In New York, forgery constitutes the false signing of another's signature with the intent to misrepresent. Here, Duke was an employee of Acme Corp. who did not have check signing authority. He prepared a false check and endorsed the check signing it as Acme's treasurer and payable to a non-existent entity. Duke committed forgery.

The issue is also whether a person who falsely prepares a check and obtains a valid signature by deception can be convicted of forgery. Forgery in New York criminal law, constitutes the false signing of another's signature with the intent to misrepresent. Duke did not sign the check here himself. He falsely prepared a check but obtained the treasurer's signature by deception. The treasurer had check-signing authority. Even though the check was falsely prepared, Duke cannot be convicted of forgery since he obtained a lawful signature, even though the treasurer was deceived. Duke can therefore be convicted of forgery for falsely preparing and signing the second check for $2,000 but not for the first check for $3,000.

B. 1. B Bank cannot be held liable for paying the $3,000 check. The issue is whether a bank is liable for paying an unauthorized check which is falsely prepared and made payable to a fictitious payee but is signed by an authorized signature. Under the UCC, a bank is not liable to the maker of the check when the bank makes payment on a check which was duly presented for payment and appeared valid on its face with an authorized signature. Here, although the check was unauthorized because it was made payable to a non-existing entity, it was validly signed by a representative of Acme Corp. with check-signing authority. The fact that Duke falsely prepared it and misrepresented to the treasurer about what the check was for does not make B Bank liable for paying the check. B Bank is not liable for the $3,000 check.

2. B Bank may be held liable to Acme Corp. for paying the $2,000 check. The issue is whether a bank is liable for payment on a check which was invalidly written, signed and endorsed by someone without authority. Under the UCC, a bank is liable when it makes payment on a check

that is duly presented for payment but which is signed by forgery of the maker's signature. Here, Duke falsely make the check out to a non-existent entity for his own benefit and then signed the treasurer's signature on the check before endorsing and depositing it. The bank is liable for making payment on a badly issued check which contains a forged maker's signature and Acme can collect on the $2,000 check.

Question-Three

On December 1, 1998, in the presence of two attesting witnesses, Ted duly executed a will that contained the following provisions:

(1) I bequeath the sum of $400,000 to my wife, Wendy.

(2) I bequeath my 100 shares of C Corp. to my brother, Bob.

(3) I bequeath my Tiffany lamp to my aunt, Ann.

(4) I give all the residue of my estate to my wife, Wendy.

(5) I appoint my friend, Ed, executor.

Immediately after Ted duly executed his will, he realized that he had inadvertently omitted a $25,000 bequest he intended to make to his mother, Mary. While still in the presence of the witnesses, Ted, in his own handwriting, inserted the bequest to Mary above his signature and above the signed attestation clause of his will.

Ted died on January 1, 2003. Ted was survived by Wendy and his only child, Debra, who was born in 2001. He was also survived by Bob, Ann, Mary, and Ed.

At his death, Ted's net estate consisted of assets worth $800,000, which included a bank account with B Bank titled, "Ted in trust for Debra," in the amount of $75,000. B Bank has paid $75,000 to Debra's duly appointed guardian.

Ted's will of December 1, 1998 was duly admitted to probate and Ed qualified as executor.

At the time of his death, Ted owned 200 shares of C Corp., consisting of 100 shares purchased by Ted in 1995 and 100 shares received by Ted in 2002 as a result of a 2 for 1 stock split. Bob has demanded the 200 shares of C Corp. Ed contends that Bob is entitled to receive only 100 shares.

Debra's guardian has asserted that Debra is entitled to receive her intestate share of Ted's estate, because she was not provided for in her father's will.

At Ted's death, it was discovered that one month earlier, Ted sold the Tiffany lamp to a local art dealer and was paid $50,000. Ann has asserted that, in lieu of the Tiffany lamp, she is entitled to receive $50,000 from Ted's estate. It is undisputed that the Tiffany lamp had a fair market value of $50,000 at Ted's death.

(a) Is Ted's mother, Mary, entitled to receive the $25,000 bequest under Ted's will?

(b) Is Ted's brother, Bob, entitled to receive the 200 shares of C Corp.?

(c) Is Ted's aunt, Ann, entitled to receive $50,000 from Ted's estate?

(d) Is Ted's daughter, Debra, entitled to receive her intestate share of Ted's estate?

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ANSWER TO QUESTION 3

A. Ted's mother Mary is not entitled to receive the $25,000 bequest under Ted's will. The issue is whether a handwritten amendment made after execution of the will has effect. In New York, a will may only be amended by a document that complies with the testamentary executor requirements. This is usually done be codicil. If Ted had made the amendment before signing and having the will published and witnessed, the handwritten amendment giving a bequest to Mary would have been valid. The fact that the amendment is handwritten is not the problem – it is the timing. The amendment was clearly made after execution of the will and is therefore invalid.

Further, the fact that the amendment was made in the presence of the two witnesses does not save the amendment.

B. Bob is entitled to receive the 200 shares of C Corp. The issue is whether a beneficiary of a specific gift of a certain number of shares is entitled to receive shares obtained by the testator in a stock split associated with these shares.

The will provides that Ted bequeathed "my 100 shares of C Corp. to my brother Bob". The use of the personal pronoun "my" indicates this is a specific gift. In New York, a specific gift of shares is treated to include shares obtained as stock splits associated with these shares. Ted received the extra 100 shares as a result of a two for one stock split in 2002. Accordingly, the additional 100 shares should be included in the specific bequest for Bob. This means that Bob is entitled to all 200 shares in C Corp.

C. Ted's Aunt Ann is not entitled to receive $50,000 from Ted's estate. The issue is whether the beneficiary of a specific gift that fails is entitled to receive the equivalent value or the proceeds of sale.

The bequest of the Tiffany lamp to Aunt Ann is a specific gift. The rule is that if the property of a specific gift is not held by the testator at death, the specific gift fails due to the doctrine of ademption. This role is ameliorated in certain circumstances. For example in executor contracts for land that settle after the vendor's death. However, those exceptions do not apply here. Ted sold the lamp before he died. The fact that its value can be determined is irrelevant. Accordingly, Ann is not entitled to receive $50,000 from Ted's estate.

D. Ted's daughter Debra is not entitled to receive her intestate share of Ted's estate. The issue is whether a pretermittent child (a child born after execution of a will), who is not provided for in that will, is entitled to receive an intestate share.

The EPTL provides that if a child is born after a will is executed, and the will does not provide for the child, the child is entitled to share in any gifts made for his/her siblings, or if no gift is made the child is entitled to his/her intestate share. However, this role does not come into effect if the testator has made some other provision for his child. In this case, Ted established a totten trust bank account for Debra - the account for $75,000 in the account titled "Ted in trust for Debra". Upon Ted's death, Debra is entitled to the balance of proceeds in that account. Indeed, B Bank has already paid the $75,000 to Debra's duly appointed guardian.

As Ted has made this provision for Debra, she is not permitted to also claim an intestate share as a pretermittent child. If should be noted that the court will not analyze whether the provision for the child was adequate or not. The provision evidences that the child was considered by the testator and not merely "forgotten" in the will. The analysis being if the testator wanted to provide otherwise he could have amended his will or prepared a new will.

Accordingly, Debra is not entitled to her intestate share of Ted' s estate.

ANSWER TO QUESTION 3
A. Ted' s mother, Mary, is not entitled to receive the $25,000 bequest under Ted' s will. The issue is whether Ted' s handwritten change to the will, witnessed by two witnesses who did not sign the handwritten change, will be given effect. In order to be valid, a codicil to a will must be executed with all the formalities attending execution of the will. It must be signed by the testator, it must be written and it must be published to two witnesses who must sign it within 30 days of one another. Here, Ted attempted to make a codicil to his duly executed will be writing in the $25,000 bequest to Mary, signing it, and publishing it in the presence of two witnesses. However, neither of these witnesses signed the codicil. Accordingly, the codicil was not executed with all necessary formalities and will not be given effect.

B. Ted' s brother, Bob, is entitled to receive the 200 shares of C Corp. The issues are whether the bequest to Bob is a specific bequest and whether a stock split entitles Bob to all 200 shares. First, the bequest to Bob is a specific bequest. A specific bequest is indicated by the language "my 100 shares of C Corp.". By virtue of it being a specific bequest, Bob is only entitled to the shares themselves. If the shares do not exist, Mary will be adeemed. At the time of execution of the will, Ted had 100 shares of C Corp. Another 100 shares of C Corp. were received by Ted in 2002 (after the will was executed) as a result of a two for one stock split. Where a stock split has resulted in additional shares, the holder of the specific bequest to the shares is entitled to them. This would not be true if the stock shares were a form of dividend payment (in which case, they would go to the residuary). Because the additional 100 shares were a result of a stock split, Bob is entitled to the 200 shares.

C. Ted' s Aunt Ann is not entitled to receive $50,000 from the estate. The issues are whether the bequest to Ann of the Tiffany lamp is a specific bequest and what the effect of the lamp having been sold are. Ann' s bequest is a specific bequest because it relates to a specific item and uses the possessive "my" (my Tiffany lamp). As stated previously, where a specific bequest is not present in the testator' s estate, the gift is adeemed and the person to receive the bequest will get nothing. Here, Ted sold the Tiffany lamp one month before his death. Because the lamp is no longer in the estate, Ann will get nothing.

D. Ted' s daughter, Debra, is not entitled to receive her intestate share. The issue is what effect a testamentary substitute has on a pretermitted child not included in the will. Debra is a pretermitted child because she was born (2001) after the will was executed (1998). Under New York law, a pretermitted child is entitled to share in bequests to other children (unless limited) or take an intestate share if there are no other children or they are not provided for unless the pretermitted child is otherwise provided for. The purpose of this statute is to provide for children who may have been omitted from the will by mere oversight. Here, Debra is Ted' s only child and she is not included in the will. Debra has therefore argued that she should be entitled to an intestate share. However, she is only entitled to such a share if she is not provided for in some other way. Here, Debra has been provided for by virtue of a totten trust for $75,000. Because Debra has been provided for, she is not entitled to an intestate share of Ted' s estate.

Question-Four
On April 15, 2000, Nathan sustained internal injuries when the car he was operating collided with a truck operated by Martin. Nathan was speeding at the time of the accident and was not wearing

a seat belt. Martin received a ticket for crossing over the center line of the road, a violation of the New York State Vehicle & Traffic Law. He was found guilty of that violation after trial.

As a result of the accident, on April 20, 2000, Nathan underwent surgery performed by Dr. Scalpel ("Scalpel") for removal of his spleen. Scalpel saw Nathan for several post-surgical office visits, and discharged him on June 20, 2000. Six months later, in December 2000, Scalpel saw Nathan for an outpatient visit, at which time he removed a benign cyst from Nathan's arm which was unrelated to the accident.

In October 2002, Nathan began to experience abdominal pain and went to visit Dr. Smith ("Smith"). Smith made a provisional diagnosis, based on an x-ray, that there was a mass in Nathan's abdomen that should be removed. With Nathan under general anesthesia, Smith performed an exploratory procedure that confirmed his provisional diagnosis and removed a sponge, which had been left there by Scalpel during the April 20, 2000, surgery.

Nathan has contacted the office where you work to explore his legal rights. Yesterday you sat in on the conference with a partner in your office. Following the conference, you are asked by the partner to provide her with a memorandum of law in which you are to focus on the following questions:

1. (a) What are the necessary elements of any causes of action Nathan may assert against Martin?

(b) What are the merits of any affirmative defenses that may reasonably be asserted by Martin?

2. (a) What are the necessary elements of any causes of action Nathan may assert against Scalpel?

(b) What are the merits of any affirmative defenses that may reasonably be asserted by Scalpel?

3. At the trial of a personal injury action by Nathan against Martin, is

Martin's traffic conviction admissible?

ANSWER TO QUESTION 4
1. A. The issue is what causes of action does Nathan have against Martin in an action for personal injury resulting from a car accident. Nathan has a negligence cause of action against Martin. A plaintiff can sue under New York Torts Law under one of three theories: intentional tort, strict liability or negligence. To make out a prima facie case for negligence, the plaintiff must show that the defendant owed a duty to the plaintiff, breached that duty, the breach was the factual and legal cause of the harm, and the plaintiff suffered damages.

In this case, Nathan will need to prove that Martin breached his duty to Nathan. There is a general duty of care to act in such a way as to prevent harm to foreseeable plaintiffs. Thus, Martin had a general duty as a driver to prevent harm to other drivers and passengers and pedestrians. Nathan will need to show that Martin’ s crossing the line breached that duty. Nathan will also need to show that Martin’ s breach was the factual and legal cause of Nathan’ s injuries. He will need to overcome any evidence that Nathan’ s own conduct (speeding) caused the injuries. Finally, Nathan will need to show damages, which should not be a problem because he underwent surgery after the accident.

In addition, Nathan may have a cause of action against Martin for Scalpel’ s negligence because a tortfeasor is liable for any foreseeable damages arising from his actions and a doctor’ s medical malpractice is a foreseeable harm.

Depending on how the negligence between Nathan and Martin is apportioned,

Nathan may be relegated to recovering under no-fault insurance, which is a New York statutory scheme to resolve vehicular accidents. No-fault insurance states that a victim will not go to court, but will recover from their own insurance policy where there is no-fault accident. A victim will recover up to $50,000 and a percentage of work salary lost according to the statutory formula.

B. The issue is does Martin have an affirmative defense against Nathan because of Nathan's speeding and failure to wear a seatbelt. Yes, he does. The general rule is that a tortfeasor can raise any affirmative defenses, which would include contributory negligence on the part of the plaintiff. To succeed in this claim, Martin must show that Nathan owed a duty, breached that duty, that the breach was the legal and factual cause and Nathan suffered damages from that breach. In this case, Nathan's failure to wear a seatbelt may well have been the factual cause of his stomach/internal injuries. In addition, Nathan's speeding may also have been a cause of the injury. New York does not follow a strict contributory negligence scheme, so Nathan may still bring an action even if he was negligent but his recovery from Martin will be reduced ratably by any amount for which he himself is found liable.

Martin will not have a defense against Scalpel's malpractice because a doctor's negligence is a foreseeable injury from an accident. It should be noted that Nathan has a three-year statute of limitations for personal injury suits.

2. A. The issue is how can Nathan recover from Scalpel's malpractice. Nathan can recover under medical malpractice from Scalpel under the theory of negligence. He will need to make out the above-mentioned prima facie case (duty, breach, causation, harm).

In this case, Nathan will be able to prove Scalpel's breach of his physician's duty of care by using res ipsa loquitor. Under res ipsa, a breach is assumed where the harm is so obvious that the plaintiff is relieved from having to prove the defendant breached and where the instrumentality was under the defendant's control. Here, a sponge left in Nathan's body is an obvious breach.

The usual medical malpractice statute of limitations is two and one half years from the date of the procedure but with res ipsa, the statute of limitations is extended and does not begin to run until the plaintiff discovered facts, which caused him to know (or should have known) of the injury. Here, Nathan discovered the sponge in October 2002 when he began experiencing abdominal pain. Thus, his statute of limitations will run from October 2002.

B. Scalpel may try to argue that Nathan's statute of limitations has run and his claim is time-barred but he will not succeed because although October 2002 is more than two and one half years from the surgery of April 2000, as noted above, Nathan's time didn't start to run until he discovered the foreign object inside him in October 2002. In addition, Nathan has the benefit of "continuous treatment" doctrine, which states that where a plaintiff is continuously treated, their statute of limitations runs from the last date of treatment which here was June 20, 2002. Thus, Nathan's claim is not time-barred and Scalpel has no other affirmative defenses.

3. The issue is when is a prior conviction admissible in a PI action. The general rule is that hearsay is excluded as evidence unless it falls under an exception. Hearsay is any out of court statement asserted for the truth of the matter. A prior conviction is generally not admissible to show propensity to commit the act at issue. In this case, Nathan may try to assert that Martin's violation indicates negligence per se. Violation of a statute is only partial evidence of negligence and is not conclusive. Further, the conviction will not be admissible because there may be

differing standards of proof in the two cases to constitute the conviction/liability. The conviction will not be allowed.

ANSWER TO QUESTION 4

1. Our client, Nathan, may have an action for negligence against Martin. Although other jurisdictions would consider Martin's actions negligence per se, as he has violated a statute, New York courts have considered such violations as evidence of negligence not negligence per se. Thus, Nathan would have to prove that Martin owed Nathan a duty, that duty was breached, causing physical injury to Nathan, and that it was a proximate cause of Nathan's injuries.

Here, there is no doubt that Martin owed Nathan a duty, as all drivers on the road owe each other a duty to act (drive) as a reasonably prudent person. He breached this duty by crossing over the centerline and this was the proximate cause of Nathan's injuries.

The only problem with our client's case is that he was also negligent himself in that he was speeding at the time of the accident, in addition to not wearing a seatbelt. Thus, he was contributorily negligent.

New York, however, is a pure comparative negligence state and thus no matter how negligent Nathan was, he will nonetheless be able to recover for any amount of his injuries that were caused by Martin's negligence. Moreover, although some states completely bar a plaintiff's recovery for failing to wear a seatbelt, New York only uses this as evidence to mitigate the damages. As such, although Nathan's own speeding and failure to wear a seatbelt may reduce his recovery, he will not be barred from it.

Finally, Martin may claim that Nathan cannot sue him because his (assuming he is a New York resident) no-fault insurance would cover him. Although this would be true since all New York drivers are mandated to carry no-fault insurance, Nathan may still recover from Martin as he falls under one of the exceptions of "serious injury" because he had to go through surgery. Thus, no-fault will not bar Nathan from commencing an action against Martin.

2. Nathan may have a claim for medical malpractice as well as negligence against Scalpel. As a treating physician, Scalpel owed a duty of care in performing the surgery, which definitely included not leaving any unnecessary "foreign objects" in his patient's body.

The only problem with Nathan asserting a medical malpractice action is that the statute of limitations for medical malpractice is two and one half years, as opposed to all other malpractice actions, which have a three-year statute of limitations. Although the "continuing treatment" theory may have saved Nathan's action from being time-barred since he last saw Scalpel in December 2002, that visit was unrelated to the cause of action we have here.

Under the continuing treatment theory, if a patient continues his treatment with the doctor it would be the last visit (treatment) that would start the running of the statute of limitations against him. However, that treatment must be related to the underlying cause of action, here the surgery.

The last time Nathan saw Scalpel for his spleen was in June 2000 and thus his medical malpractice action would be time-barred.

However, Nathan may nonetheless bring an action under the "foreign objects" exception, which gives a year from its discovery. Thus, as the "foreign object", the sponge, was not discovered until October 2002, his action under this exception is still timely and thus may be asserted against Scalpel.

In addition, Nathan can bring an action in negligence since it is simply negligent to leave an unnecessary/unintended item in a patient's body. As Scalpel owed a duty to Nathan as his physician and breached it by being negligent, this was the cause of his abdominal pains. Moreover, if he went with his negligence theory it will not be time-barred as negligence has a three-year statute of limitations.

3. Martin's traffic conviction will be admissible under the public records exception. Usually, prior convictions are only admissible to impeach a defendant or a witness. And even in such cases, prior traffic violations have been held to be inadmissible as they are only prejudicial and irrelevant as to the credibility or character of the defendant or witness.

However, these exceptions usually pertain to criminal cases, not in civil personal injury cases as we have here. In this case, Martin's traffic violation is the core of the case and thus highly relevant. Relevant evidence is evidence that makes a fact more or less probable. Here, the fact that Martin violated the statute by crossing over the centerline is highly relevant since it was the cause of the accident.

However, the court does have discretion not to admit it if they determine that it is to prejudicial especially given that this is a civil case. Moreover, the fact of Martin's violation can be proved through other means, such as testimony, thus the court may preclude it.

Moreover, even if it were admitted, it should be remembered that any such fault and damages will be mitigated by Nathan's own violation of the speed limit as well as his failure to wear a seatbelt.

Question-Five

Ben and Bonnie were married in Buffalo, New York in 1975. In 1999, Ben took a new job in Albany, and he moved there with Bonnie. Ben purchased Blackacre, a one-family residence in Albany, from Owen for $200,000. Ben paid Owen $50,000 cash and orally agreed to assume the existing mortgage on the property which was held by Mort. Owen had given a note and the mortgage to Mort when Owen purchased the property in 1995. The mortgage was valid in all respects and was duly recorded. The note and mortgage were silent as to any right of Mort to accelerate the balance due upon any default. The deed to Ben, which was signed only by Owen, stated that the conveyance was subject to Mort's mortgage.

Bonnie did not like Albany and, shortly after they moved there, she commenced a course of verbal abuse toward Ben consisting of criticism, mean-spirited remarks, and belittling comments in front of family and friends. This behavior continued until July 2002 when Bonnie moved back to Buffalo, where she has since resided. She has refused Ben's requests that she return to Albany and has advised Ben that she will not live there. Ben's and Bonnie's differences are irreconcilable and irremediable. In December 2002, Ben duly commenced an action against Bonnie for divorce on the ground of cruel and inhuman treatment or, in the alternative, for a separation on the ground of abandonment.

Ben has continued to support Bonnie, and the financial burden of maintaining two households has caused Ben to fall behind in the mortgage payments to Mort. No payment has been made to Mort since July 2002. Owen left New York after selling Blackacre to Ben, and his whereabouts are unknown. Mort duly commenced an action against Ben to foreclose the mortgage. As part of the relief sought in the complaint, Mort is demanding payment of the entire principal balance of the mortgage, alleging that the default had the effect of accelerating the mortgage debt, and that Ben is personally liable on the mortgage, in the event of any deficiency upon the foreclosure sale. No judgment of foreclosure has, as yet, been entered.

(1) Is Ben likely to prevail at trial on (a) his cause of action for divorce based on cruel and inhuman treatment or (b) his cause of action for a separation based on abandonment?

(2) Is Mort correct in alleging (a) that the default had the effect of accelerating the mortgage debt, and (b) that Ben is personally liable on the mortgage in the event of any deficiency upon the foreclosure sale?

ANSWER TO QUESTION 5
1. Domestic Relations

Ben is unlikely to prevail at trial on (a) his cause of action for divorce based on cruel and inhuman treatment and Ben is (b) likely to prevail on his cause of action for a separation based on abandonment.

A. Divorce and Cruel and Inhuman Treatment

New York Domestic Relations law provides for five grounds for divorce: one of these is the so-called "cruel and inhuman treatment". A divorce will be rendered against a spouse whose behavior towards the other spouse is such as to endanger the physical, emotional or mental well-being of the "abused" spouse. In order to determine the existence of the cruel and inhuman treatment, the court will use a subjective test and consider the effect of the defendant's conduct on the particular spouse – alleged victim. Thus, the sensibility, weakness of the victim will be taken into account, as well as her possible "unusual resistance". It is only if the abusive behavior does in effect endanger the well-being that the ground will be effective.

Here, the facts do not indicate in detail the emotional, physical and mental state of Ben as a result of Bonnie's verbal abuse and criticisms. Even if such conduct on Bonnie's part can be called "abusive", the facts only tell us that once Bonnie had left him, Ben repeatedly requested that she return to Albany.

This is strong circumstantial evidence that Ben did not feel endangered by his wife's bad treatment, otherwise he would not want her back. Therefore, in the absence of a showing of, for example, a diagnosis of mental depression as a result of the wife's criticisms, it is unlikely that the court will grant Ben the divorce on such a ground. Ben is unlikely to prevail on his cause of action for divorce based on cruel and inhuman treatment by Bonnie.

B. Separation and Abandonment

Ben is likely to prevail in a separation action on the ground of abandonment.

According to New York Domestic Relations law, there is ground for separation on the ground of abandonment if three elements are present: 1) the abandonment must be voluntary; 2) with no intent to return on the part of the abandoning spouse; and 3) the abandonment must be without justification. In New York, there is no minimum requirement for the ground if the action is for separation (not for divorce, where it must be for a year at least).

Here, Bonnie's departure can be called voluntary because she moved there because she "did not like Albany". Thus the first condition is satisfied. Furthermore, the facts indicate no "intent to return" as Ben's numerous requests remained unheard and she literally told him that she "will not live" in Albany. Finally, the third requirement is fulfilled. The facts do not give us any

evidence of any abusive behavior or adultery that would give Bonnie a valid justification for her abandonment. Thus, Ben is likely to be granted a separation on the basis of abandonment.

2. The Mortgage

A. Mort is wrong in alleging that the default had the effect of accelerating the mortgage debt. The issue is whether, in he absence of an acceleration clause, a default on the part of the debtor has the effect of making the entire principal balance of the mortgage due.

The rule is New York is that, in the absence of an express acceleration clause agreed upon by both parties, the only effect of default is to give the creditor/mortgagee the right to commence an action against the defaulting party to foreclose the mortgage. No acceleration clause is implied.

Here, we are told that prior to the assignment of the mortgage, Owen had given Mort a note and the mortgage (this makes it a legal mortgage) and that these two documents were silent as to any right of Mort to accelerate the balance due upon default. As Ben, once assigned the mortgage to take the mortgage according to the terms of the original conveyance, Mort cannot claim the existence of such an acceleration clause in the mortgage. Therefore, Mort's first allegation is wrong.

B. Mort is also wrong as to his second allegation.

The issue is whether an oral agreement to assume a mortgage is sufficient to make Ben personally liable on the mortgage in the event of any deficiency. The law of mortgages and the Statute of Frauds require an undertaking to assume a mortgage to be put in writing and signed by the person to be charged. An oral agreement would be

invalid. If in writing and signed, such an undertaking to assume would have the effect to make the assignee primarily liable on the debt (and the assignor of the mortgage only secondarily). Here, the agreement is oral between Ben and Owen and violates the Statute of Frauds. Therefore, Ben is not personally liable on the mortgage and only takes the property subject to the mortgage. His only risk is to lose the property through a foreclosure sale. Ben will not be personally liable if the sale proceeds are not sufficient if Mort brings a deficiency action.

ANSWER TO QUESTION 5

1. A. Ben is unlikely to prevail on his cause of action for divorce based on cruel and inhuman treatment. The issue is whether Ben can establish that Bonnie's conduct so endangered his mental and physical well being that it would be improper and unsafe for him to continue to cohabit with her. "Cruel and inhuman treatment" is one of the accepted grounds for divorce in New York and the court must determine the veracity of such a cause of action based on cruel and inhuman treatment upon a review of the surrounding circumstances. The court is unlikely to find that verbal abuse, unless egregious, is tantamount to cruel and inhuman treatment in view of Ben's repeated requests that Bonnie return to live with him in Albany. Thus, Ben will not succeed in his cause of action for divorce based on cruel and inhuman treatment.

B. Ben will succeed on his cause of action for separation based on abandonment. Abandonment is a proper basis for a cause of action for divorce in New York and Ben must prove that Bonnie: 1) voluntarily and willingly departed from their home in Albany; 2) without justification; 3) without the consent of Ben and 4) with the intention not to return.

Bonnie left the common home in July 2002. The requirement that the abandoning spouse be absent for one year before commencing separation proceeding on the grounds of abandonment

does not apply to separations but only to divorce actions based on abandonment and despite Ben's repeated requests for her to return has evinced an intention not to return. Thus, Ben will succeed in his cause of action for separation.

2. A. Mort is not correct in alleging that the default had the effect of accelerating the mortgage debt. The issue is whether the mortgagee (Mort) may succeed in claiming that there exists an implied acceleration term in the mortgage agreement. An acceleration term has the effect of making the entire sum of the debt owed in respect of a mortgage (and debts in general) immediately due and payable upon a mortgagors default in payment. In view of their arrears nature, such terms must be expressly included in a mortgage instrument and agreed to by the parties thereto. Since no such acceleration clause was expressly stated in the mortgage agreement between Mort and Owen no such clause may be implied by operation of law. Thus Mort is incorrect in alleging that the default by Ben in respect of the mortgage payments had the effect of accelerating the mortgage debt rendering it immediately due and payable.

2. B. Mort is not correct in alleging that Ben is personally liable on the mortgage in the event of any deficiency upon the foreclosure sale. The issue is whether a buyer who takes property subjects to the sellers mortgage is personally liable in respect of the mortgage in the event of a default by the buyer to make mortgage payments. The rule is that a buyer may take property subject to the seller's mortgage, in which case he is not personally liable on the mortgage. However, a duly recorded mortgage remains on the land and the mortgagee may foreclose on the mortgage and sell the burdened property in a foreclosure sale. The buyer may take property and "assume" the sellers mortgage in which case the buyer is primarily liable on the mortgage with the seller remaining secondarily liable.

The oral agreement between Ben and Owen is within the Statute of Frauds and requires a writing containing the names of the parties, the signature of the party against whom it is to be enforced, the terms and conditions of the agreement, the subject matter and consideration provided. No such written agreement exists between Owen and Ben and Ben has a Statutes of Fraud defense against Mort. He attempts to refer to the oral agreement between Ben and Owen as the basis for holding Ben personally liable on the mortgagor in the event of any deficiency upon the foreclosure sale. Ben did take the land subject to Owen's mortgagor and will lose the land as a result of the foreclosure action unless he is able to retain title thereto by paying off the amount due before the foreclosure sale in terms of the doctrine of equitable redemption.

Finally, due to Mort's failure to name Owen as a party to the foreclosure action, he will be unable to obtain a deficiency judgment against Owen either. Thus, Mort was incorrect in alleging that Ben is personally liable on the mortgage in the event of any deficiency upon the foreclosure sale.

MPT

In re Suarez (MPT – 1, February 2003) In this performance test item, applicants' law firm represents Carmen Suarez, who operates a restaurant in a building owned by Elizabeth Murphy. During Suarez's tenancy, the city ordered that existing commercial buildings, including the building housing Suarez's restaurant, undergo mandatory seismic retrofitting as part of the city's earthquake hazard reduction program. Murphy undertook and paid for the retrofitting and now is demanding, via a letter from her attorney, that Suarez reimburse her for the $32,000 she paid to have the retrofitting done. Murphy claims that as the tenant, Suarez is liable for the costs associated with the city-mandated repairs. Applicants' are asked to draft a letter to Murphy's attorney explaining why Suarez is not liable for the cost of the retrofitting and will not reimburse Murphy. The File contains the lease, a commercial lease form entitled "Net Lease," to which the parties made extensive revisions, so that it differs substantially from its original form. The File also includes the city's seismic retrofitting order, a lease renewal letter, Murphy's attorney's

demand letter, and a newspaper article on the city's earthquake hazard reduction initiative. The Library contains two Franklin cases on the subject.

ANSWER TO MPT
John Erbes

O'Neill, Erbes & Crenshaw

1243 Douglas Dr.

Carterville, Franklin 33314

Dear Mr. Erbes:

We represent Ms. Suarez, tenant of your client Elizabeth Murphy. We have received a copy of your February 25, 2003 letter, and we are authorized to inform you that Ms. Suarez does not intend to pay the $32,000 cost of redesign and upgrade of your building at 2906 Sunset Blvd., Carterville.

Ms. Suarez is not liable to you for the costs of these improvements. First, Ms. Suarez's lease is not a "net lease", as you have previously stated, because it does not essentially turn over full ownership of the building to Ms. Suarez. Second, her use of the property did not invite application of the ordinance. Finally, Ms. Suarez is not responsible for the repairs after considering the six factors enumerated in Brown v. Green.

First, you stated that Ms. Suarez has a "net lease". A net lease is an arrangement, usually in relation to a long-term lease, in which it is presumed that the tenant will act as the owner of the building, and the landlord will be absolved from any cost for repair or maintenance. For a net lease, the landlord must essentially turn over control of the entire building to the tenant for a long term. Eight years is not a short time, but it may not be long enough to be counted as a net lease. Also, Ms. Murphy has retained some control by maintaining insurance on the property, and owning all fixtures of the property. Absolute control has not been turned over to Ms. Suarez, and therefore there is no net lease.

Second, the required repairs are not related to Ms. Suarez's use of the premises. The operation of a restaurant is not related to earthquake hazard reduction. In Sewell v. Loverde, the Franklin Supreme Court stated that property owners are generally liable for failure to comply with local regulations, unless the tenant expressly assumes liability under those regulations, or a tenant's use of the land leads to the application of the regulations to the land. Nothing that Ms. Suarez has done during her use of the property has caused this ordinance to be applied to Ms. Murphy's building. All buildings in Carterville are required to be refitted for compliance with this measure. Under Sewell, Ms. Murphy, as the landlord, is required to pay for these improvements to comply with law, unless the lease specifically states that Ms. Suarez will assume this liability.

The lease is silent as to the liability of each party for governmental regulations involving zoning or other building ordinances. There is one clause that may specifically apply, dealing with "Assessments affecting improvements" (Section 9), but this clause has been struck through. It would require the tenant to pay for "all special assessments, levies, or charges made by any municipal or political subdivision for local improvements". The implication of striking through this clause is that the parties do not intend for the tenant to be responsible for such improvements. Section 42, "Compliance with Law", deals only with statutes or regulations as to the use of the property. The ordinance in question is not concerned with the use of the property, and therefore this provision does not apply. Section 12, "Repairs and Destruction of Improvements" deals with

keeping the building in good repair. Here, Ms. Suarez has kept the building in good repair. Section 12 does not require Ms. Suarez to keep the building in line with non-use related government regulations.

Finally, absent an explicit provision as to which party is liable for repairs due to a government ordinance, the court will look to the tenant's use (explained above), or the factors enumerated in Brown v. Green, a case decided by the Franklin Supreme Court. The first factor is the relationship of the cost of the repair to the rent reserved in the lease. In this case, rent for the eight years of the lease is $71,400, and the repairs cost $32,000. That is almost half of the rent that Ms. Suarez would be required to pay. This is large in proportion, and it is therefore assumed that the landlord will get a greater benefit from undertaking the repairs than the tenant would.

The second factor is the term of the lease. A long-term lease will show more benefit to a tenant for making the repairs. This lease was a three-year lease, extended to eight years. This is not an exceptionally long time, and Ms. Murphy will most likely gain more benefit from any repairs.

The third factor is the amount of benefit the tenant will derive as compared to the benefit the landlord will derive. Ms. Suarez would, or course, derive the benefit of being able to continue her business by undertaking the repairs. Ms. Murphy will have the benefit of continuing to rent out a building to tenants for a long term. This lease is in its fourth year, so the benefit to Ms. Suarez is reduced even further, as she may be required to vacate the premises at the end of the term, and would then lose all benefit. Ms. Murphy derives more benefit from any repair.

The fourth factor is whether curative action is structural or nonstructural. Here, the action is structural. Structural cures are assumed to be more of a benefit to the owner of the building, although it still benefits the tenant of the building. Structural improvements are long term improvements, while tenants tend to be more transient and cannot derive as much of a benefit from structural repairs.

The fifth factor is the degree to which the tenant's use of the premises is interfered with during the improvements. Here, Ms. Suarez was not required to leave the building during the time of the improvements. We thank Ms. Murphy for her consideration in making the improvements in such a way as to accommodate Ms. Suarez, but this factor alone does not control who is held responsible for the improvements.

The sixth factor is the likelihood that the parties contemplated the application of the ordinance. Here, the ordinance was enacted in 2000. Ms. Suarez, who does not own any buildings, had no reason to know that such an ordinance would be passed. Ms. Murphy, however, may have had reason to be put on notice, since there was nearly five years of debate regarding this ordinance before it was passed, and two years between when it was passed and when the Earthquake Hazard Reduction Office asked Ms. Murphy to make the repairs. Ms. Murphy likely had some notice as to the possibility of the ordinance, and the importance of her compliance. If the ordinance had passed when it was first debated, Ms. Murphy would have been required to make the improvements then, before Ms. Suarez even signed a lease. Ms. Murphy may have had her "head in the sand", but Ms. Suarez will not be made to pay for her denial of liability.

Ms. Suarez would like to continue her relationship with Ms. Murphy, but she is not liable for the money spent on improvements to Ms. Murphy's building due to the government ordinance. The lease states only that she is liable for keeping the premises in good condition, and that she is liable for repairs resulting from government ordinances that are use related. Here, there is no relationship between the use of the property and the ordinance, nor is the premises in anything other than good repair. This is a major renovation that Ms. Suarez should not have to make, since she is not the property owner, and she does not derive the same benefit from the repairs as the

property owner, Ms. Murphy, does. Brown v. Green affirms this theory, and we are prepared to argue this in court.

Sincerely,

Ruiz and Ruiz

Attorneys at Law

ANSWER TO MPT

John Erbes, Esq.

O' Neill, Erbes & Crenshaw

1243 Douglas Dr.

Carterville, Franklin 33314

Re: Lease of 2906 Sunset Blvd., Carterville, Franklin

Dear Mr. Erbes:

We are in receipt of your letter to Carmen Suarez regarding Ms. Suarez' s lease of the above-referenced property from your client, Elizabeth Murphy. Ms. Suarez has asked us to respond to your letter on her behalf.

Based on the terms of the lease and related materials, as well as the relevant case law, we are writing to advise you that Ms. Suarez is rejecting your demand of $32,000 for the reasons set forth below. For these same reasons, we believe any suit against Ms. Suarez will be unsuccessful.

The case of Brown v. Green, decided by the Franklin Supreme Court in 1994, is most instructive here. That case, like this one, involved a non-use related governmental order. Here, like in Brown (and unlike the Supreme Court' s earlier Sewell v. Loverde case), there is nothing about Ms. Suarez' s use of the property that triggered the city of Carterville' s order of seismic retrofitting at the leased property. Such an order would have been forthcoming no matter what the use of the property.

Because the literal terms of Section 42 of the lease agreement between Ms. Murphy and Ms. Suarez requires compliance with "all applicable statutes, ordinances, rules, regulations, orders and requirements regulating the use of the premises in effect during the term or any part of the term of the lease" (emphasis added), that section alone does not establish how Ms. Murphy and Ms. Suarez intended to allocate the risk of compliance with governmental orders mandating corrective action as to property conditions unrelated to a particular use by Ms. Suarez.

According to Brown, in this situation we must look to the lease as a whole and then consider six specific factors. First, it is clear that despite how this lease is titled, the parties do not intend to treat it as a typical net lease and thus did not intend to transfer from Ms. Murphy to Ms. Suarez the major burdens of ownership of the property over the life of the lease. As you know, a net lease presumes that the landlord will receive a fixed rent, without reduction for repairs, taxes,

insurance or other charges. In this case, however, Ms. Murphy continued to pay taxes and also maintained casualty insurance on the property.

Further evidence of the intent of the parties that Ms. Suarez would not be responsible for non-use related legal compliance such as the order by the city of Carterville may be found by looking toward several of the six factors courts use in determining the allocation of repair and maintenance obligations in commercial leases.

1. The relationship of the cost of the curative action to the rent reserved in the lease. Here the curative action cost is $32,000, which represents a substantial portion (over 66%) of the entire rent due for the five-year term of the lease ($48,000). In cases where the term of the lease is relatively short and the cost of the repair in percentage terms is large in relation to the tenant's rent over the life of the lease, courts will almost universally refuse to give effect to even relatively clear language imposing the repair duty on the tenant, which is not the case here.

2. The term of the lease. In this case, even with the five-year term, it is highly unlikely that Ms. Suarez would have expected to take on ownership obligations for such costly repairs.

3. Finally the likelihood that the parties contemplated the application of the particular order involved. In this case, Ms. Suarez was not an experienced tenant and the condition was unforeseeable to her. However, the condition was foreseeable to an experienced landlord like Ms. Murphy given that the passage of the city's program came after five years of debate and a reasonable landlord would have made specific plans to accommodate it. Ms. Murphy had every opportunity to specifically address this in the lease, but did not.

Ms. Suarez is also generally pleased with her business relationship with Ms. Murphy and would like it to continue. However, Ms. Suarez will not pay Ms. Murphy's demand of $32,000. We hope you see the futility of pursuing this matter at trial.

Please do not hesitate to contact me if you have further inquiries.

Sincerely,

Attorney at Law