

NEW YORK STATE BAR EXAMINATION
JULY 1997 QUESTIONS AND ANSWERS

Question-One

On April 1, 1996 Bob, the owner of a chain of retail shoe stores, entered negotiations with Amy, an architect, to draft plans for a new shoe store to be constructed on land Bob owned in Suffolk County. During a visit to the site, Bob told Amy that the property was adjacent to a protected wetland and that construction might require an environmental impact statement. The written contract, thereafter executed, provided in pertinent part that Amy was to obtain, at her expense, all necessary construction permits. The contract also provided that Amy's fee of \$100,000 was payable when the plans and permits were delivered to Bob.

The next day, Bob ordered 10,000 pair of shoes from Sam, a shoe manufacturer, to be delivered to the new store on or about October 1, 1996, when Bob expected the store to open. The written purchase order called for payment in full upon delivery, and the sale was expressly contingent upon Bob's notification to Sam that the new store was ready to open.

Amy drafted the plans for the new store and submitted them to the appropriate agency for issuance of the necessary construction permit. Shortly thereafter, Amy was notified that before the permit application would be considered, she would have to file an environmental impact statement. After determining that it would cost \$100,000 to hire environmental engineers to conduct a study and prepare the statement, Amy advised Bob that the cost to obtain the permit rendered it impossible for her to perform the contract. She further told Bob that she wanted to rescind the contract and receive payment for the reasonable value of the services she had rendered to date. Bob refused to pay her anything and demanded that she fulfill the terms of the contract. Amy promptly commenced an action in Supreme Court, Suffolk County, seeking to rescind the contract upon the ground of impossibility of performance and to recover the value of the services she had rendered to date. Bob's answer admitted the factual allegations of the complaint, but denied that Amy had any right to rescind the contract or to recover for her services. Amy duly moved for summary judgment. Upon the foregoing pertinent facts, the court denied Amy's motion, but granted summary judgment to Bob dismissing Amy's complaint.

Shortly thereafter, Bob wrote to Sam, telling him that the new store would not be opening as previously expected and therefore he was canceling his order. Sam received Bob's letter, but failed to notify his shipping department of the cancellation. Consequently, on October 1, 1996, 10,000 pair of shoes were delivered to Bob's Suffolk County property. Bob immediately had the shoes placed in a locked construction shed inside his fenced-in property and notified Sam to remove them. Sam told Bob that in three days a truck would arrive to pick up the shoes. The next day the shoes were stolen.

- (1) Was the court's ruling correct?
- (2) What remedies, if any, does Bob have against Amy?
- (3) Is Bob liable to Sam for the loss of the shoes?

ANSWER TO QUESTION 1

The court's ruling that Amy was not entitled to summary judgment and Bob was is proper.

A summary judgment motion asks the court to rule as a matter of law on the pleadings because there are no issues of fact presented. The court can search the record in a summary judgment motion and grant it for a moving or a nonmoving party on any issue raised in the motion. The court also has the power to grant partial summary judgment to a party although that is not necessary here.

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Based on the facts presented the parties (Bob and Amy) entered into a valid personal service contract. The contract is not governed by the Uniform Commercial Code Article 2. The elements of a valid contract (terms, acceptance, consideration and offer) were met and Amy was legally bound to keep her promise of drafting plans for construction and obtaining all necessary permits. Bob bargained for this promise by agreeing to pay Amy \$100,000. When Amy realized the cost of obtaining the permits and environmental statement she sought out of the contract based on impossibility.

Impossibility is a recognized defense to a contract that affords a party recession of the contract, but it is interpreted narrowly by the courts. It occurs when an event occurs after execution of the contract making performance impossible. It is limited to instances of destruction of the subject matter, death of a party in a personal service contract and other instance where the purpose of the contract is frustrated. That is not the case here, however. Instead, performance has become particularly costly for Amy. Courts are extremely reluctant to rescind a contract due to increased cost to a party. This furthers the policy that contracts are explicitly about cost measures and should be drafted accordingly.

Also noteworthy is that Bob informed Amy that an environmental impact statement may be necessary. Further, as an architect, Amy should be on notice of these matters. She could seek a recession based on mistake of the parties, which occurs when parties are mistaken mutually as to a material element of the contract. But the fact that Amy was on notice is likely to present any recovery on the mistake theory.

Amy could also seek recession based on misrepresentations by Bob. A misrepresentation is when a party (even innocently) misrepresents a material part of the contract. There is no evidence of this in the facts but possibly based on Bob's knowledge of an impact statement's need and prior negotiations with another architect. Again, however, Amy's expertise as an architect will be a significant hurdle as will Bob's statements to her. Based on the absence of factual issues, the court should grant summary judgment to Bob.

Bob can recover damages from Amy for lost profits, reliance and can seek but will not likely get specific performance.

Underlying any contract breach is the obligation of the non breaching party to "cover," or obtain substitute performance. Amy will have to get another architect promptly and can then recover for any additional amounts expended by her to have performance completed. Bob must, however, cover immediately or he will be limited to the fair market value of cover on the date of the breach.

Bob can also recover any lost profits due to the store not opening promptly. Referred to as expectation damages, a breaching party must put the non breaching party in the position they would have been in if no breach occurred. This would include lost profits.

Bob can also recover expenses or losses incurred as a result of the breach. Reliance allows recovery for any damages in relying on performance. The cost of inventory or other materials are covered here.

Bob can seek but will not likely recover specific performance. Specific performance would require Amy to complete her promise. Courts allow this when the subject matter is unique and damages are difficult to estimate or ascertain. Further, courts are reluctant to specifically enforce personal service contract because of the enforcement problems. Thus, specific performance will not be granted.

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Bob will not be liable to Sam for the loss of the shoes.

Bob's contract with Sam, governed by UCC Article 2, has a condition attached to it -- completion of the store. A condition in a contract makes performance conditional upon its completion. If a condition fails, no breach has occurred.

That is just the case here. Because of the failed condition (and notification of such by Bob) Bob is not liable for any breach of contract. When Bob received the shoes he held them as a bailment for Sam. There are three types of bailment, each dictating the duty owed by the bailee. A bailment for mutual benefit, a bailment for benefit of bailor, and a bailment for benefit of bailee are the three types. This transaction is a bailment for the benefit of the bailor and Bob has a duty to not act recklessly with regard to Sam's goods. He did precisely that -- immediately notified Sam and locked the shoes inside a "fenced in" shed. The theft was beyond his duty of care and Bob will not be liable. Even if the bailment is considered one for the mutual benefit of bailor and bailee, Bob's duty to act with reasonable care is met. He did precisely what a reasonably prudent person would have done to protect Sam's goods. Under this standard as well Bob would not be liable.

ANSWER TO QUESTION 1

I. The court's denial of summary judgment to Amy and dismissal of her complaint and summary judgment to Bob:

The court was correct in denying Amy's motion for summary judgment. The first issue is whether or not Amy was entitled to revision of the contract because of impossibility of performance. The rule is that contract performance may be excused for impossibility, impracticability and frustration or purpose. Under these facts, clearly it was not impossible for Amy to acquire the permit, although it was commercially unreasonable, because the cost of obtaining the permit was the same as the contract price, and she would make no money for her services were she to obtain the permit. However, impossibility and impracticability are judged in the strictest sense. Only absolute impossibility or impracticability to the extent that Amy will go out of business will excuse contract performance. Here, Amy was fully aware that she would have to obtain a permit. In addition, Amy cannot argue that her contract was really a conditional contract, because she was responsible for the performance of the contingency. The law will not afford protection to the party whose actions prevented the contingency from occurring. Amy's obligation was a contract implied with a covenant. She was responsible for obtaining the necessary permits and cannot claim that her performance was excused by the non-occurrence of a condition. Thus, the court was correct in denying Amy's action to rescind.

The next issue is whether the court was correct in denying Amy's motion for summary judgment to recover for the value of her services already performed. The rule is that a court may award the equitable remedy of quantum Meruit in quasi-contract to prevent unjust enrichment when a party performs services that he reasonably relied on being paid to perform, and the contract is unenforceable, and the other party would be unjustly enriched. Here, there is a valid and enforceable contract between Amy and Bob, and Amy is the breaching party. A court sitting in equity may balance hardships of the parties in affording equitable remedies. Here, the court correctly denied a quasi-contract remedy to Amy. Amy knew that she would have to obtain a permit before she signed the contract. As a professional, the law will expect that she assumes the risk involved in accepting such contract terms. She is assumed to expect that a permit may be expensive, and she cannot be excused from the contract. Amy cannot recover under the contract either, as her payment was contingent on her delivering the plans and permits to Bob, which she did not do.

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The next issue is whether the court correctly granted summary judgment in Bob's favor. The rule is that summary judgment is appropriate when there is no genuine issue of material fact to go to a jury. Here, the court correctly granted summary judgment on the motion in Bob's favor. There was no genuine issue of fact, as Bob admitted all of the factual allegations in Amy's complaint. Therefore, summary judgment was appropriate.

II. Bob's remedies:

The issue is what Bob's remedies are. Specific performance is not an available remedy. A contract for services will not be specifically enforced. Here, the contract was for Amy to perform architectural services. The court will not enforce the contract such that Amy will be obligated to perform.

Bob's remedy is damages because Bob cannot specifically enforce the contract. Bob must seek damages. Bob's damages are the difference between the cost of replacing Amy and Amy's contract price. Thus, Amy must pay Bob the amount that Bob has to pay for the same services, over what he would have paid Amy. This amount should be reduced by the value of services already performed by Amy. Additionally, Bob should be entitled to recover the cost of obtaining a permit, as that was to be paid for by Amy as well, under the contract. Bob should also recover consequential damages and incidental damages. Consequential damages are the damages that resulted from the breach, including lost profits from not being able to open the store on time. However, there was no time component of the contract; Amy was not required to perform by any particular date, so the consequential damages will be difficult to prove. Incidental damages are costs associated with finding a replacement for Amy's services. Bob should be able to recover if he has Amy's expenses from finding a new architect.

III. Bob's liability to Sam.

Bob is not liable to Sam for the loss of the shoes. The first issue is whether or not Bob and Sam had a contract. The contract was "expressly contingent" upon Bob's notification to Sam that the new store was ready to open. This condition never occurred. Bob effectively revoked his offer by canceling the order before sending notification that the store was open. As such, there was no acceptance of Bob's offer when Sam shipped the goods because the offer was terminated. Therefore, there was no contract between Bob and Sam.

The next issue is who has the risk of loss. This contract falls under Art. 2 of the UCC because it's for the sale of goods over \$500. (However, here, there was no contract.) The rule is that risk of loss according to the contract terms, or to the buyer upon tender if the parties are merchants. However, this is only when there is a valid contract. Here, there was no contract because Bob revoked his offer. Sam's own error caused the shoes to be delivered to Bob. Therefore, Bob did not have the risk of loss. At best, Bob was a bailee of the goods once he received them and notified Sam that he would keep them until Sam removed them. Bob, as a bailee, owes Sam the duty of reasonable care. Bob locked the goods up, and therefore, he took reasonable care and should not be liable for loss of the shoes.

Question-Two

Al planned to rob a branch bank located in a shopping mall in Westchester County and recruited Bill, Al's 14-year-old nephew, to act as lookout. The morning of March 15, 1997, Al drove to the mall with Bill and parked near the branch bank. Al instructed Bill to sound the horn loudly if he saw police. Al then took his pistol from the glove compartment, loaded it, left the car and entered the bank. Al pointed his gun at the teller on duty and ordered her to put large bills into the bag he was carrying. The teller complied with Al's demand and stuffed a bundle of bills into the bag. The

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branch manager, out of sight in an adjoining room, heard Al's demand and pressed a button which set off an alarm in a nearby police station.

As Al emerged from the bank carrying the bag of money, several uniformed police officers arrived in patrol cars. With drawn guns, the officers ordered Al to drop his gun and surrender. Instead, Al opened fire on the police and, in the ensuing exchange of gunfire, Cal, a police officer, was killed. Al was then disarmed by the police and arrested. In the confusion, Bill walked away undetected by the police.

Several hours later, the police received information that Al and Bill had been seen together that morning at the mall in Al's car. Police officers then went to the house where Bill resided with his mother and found Bill. The police officers asked Bill to go to the police station with them, "to answer a few questions about what happened at the shopping mall this morning." Bill agreed to be questioned and went to the station with the officers.

Shortly thereafter, Bill's mother, Dot, returned home and learned that Bill had been taken to the police station for questioning. Dot went to the police station and asked to see Bill, saying "He's only 14, you know." The police officer at the desk told Dot she could see him "in a little while." While his mother waited, Bill was informed of his rights, including his right to counsel. Bill responded that he did not want a lawyer but that he did want to talk with his mother. Although the police knew that Dot was at the police station, they told Bill that they "would try" to locate his mother. The police then questioned Bill, following which Bill signed a written confession admitting that he acted as a lookout for Al. The police then allowed Dot to see him.

An autopsy revealed that Cal had died from a single bullet wound to the head. Ballistic tests established that the bullet removed in the course of the autopsy was fired from the gun of one of the other police officers.

Al was indicted for murder in the first degree and robbery in the first degree. Bill was indicted for murder in the second degree and robbery in the first degree.

Bill then duly moved to suppress his confession.

- (1) Should Bill's motion to suppress be granted?
- (2) Upon proof of the foregoing facts, may Al be convicted of the crimes for which he has been indicted?
- (3) Upon proof of the foregoing facts, may Bill be convicted of the crimes for which he has been indicted?

ANSWER TO QUESTION 2

- 1) Bill's motion to suppress should be granted.
 - 2) Al may be guilty of the crimes for which he has been included.
 - 3) Bill may be guilty of the crimes for which he has been indicted.
- 1) Bill's motion to suppress should be granted.

The issue here is whether Bill's confession will be admissible because it was taken outside of the presence of Bill's mother, an attorney and because Bill is only 14 years old.

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In New York a person who commits a crime who is of an infant age gets "special" treatment. If you are between the ages of 16, 17 or 18 and you have never been charged with a crime, misdemeanor or felony the court must assign you YO or youthful offender status. Thus making the longest sentence imposed on you a maximum of 6 months, unless the crime committed is malen se violent crime and then you may be charged as an adult. If you are only 13, 14 or 15 the court treats these offenders as having juvenile delinquent status. Here Bill is 14 years old therefore the court should treat him with juvenile delinquent status.

When Bill was taken to the police station he went voluntarily with full knowledge of what the police wanted (information about the morning's robbery). In New York the 6th amendment right to counsel attaches when an arrest warrant was issued so Bill's 6th amendment right did not yet attach.

Furthermore, when the police had custody of Bill when they did not allow his mother to see him and interrogation began when they began their questioning. Before interrogation began the police properly administered to Bill his Miranda rights. Bill made a knowingly voluntary intelligent waiver of his right to counsel, but Bill did request to see his mother. As an infant in New York he is entitled to be questioned with a parent present at the parent or child's request. In these facts, both Dot's and Bill's requests were denied and the police were aware that Bill was only 14 by Dot's statement at the police station.

Therefore, the motion to suppress the confession should be granted because both Bill and Dot requested to see each other.

2) Upon proof of the foregoing facts, Al may be convicted of the crimes.

Al planned to rob the bank. Robbery is defined as a trespassory, taking, carrying away of another's property with the intent to permanently deprive the person of the property by use of force or an apprehension of harm. In New York there are three degrees of robbery based on the degree of force exerted. Al had the intent to rob the bank and to deprive it of its money and to do so with force or an apprehension of harm, because Al solicited a lookout, went to the bank, informed Bill of his intent and took a gun with him.

Therefore, Al should be found guilty of robbery in the 1st degree because he also used the highest degree of force (a loaded gun), armed robbery, to carry out his intent.

Al should also be found guilty of 1st degree murder.

A felony murder is committed when a defendant commits a burglary, robbery, kidnapping, escape of custody, arson, rape or sodomy or sexual abuse and as a result or a direct consequence of one of these crimes a death arises.

In New York even where the death results from the foreseeable actions of someone other than the defendant or an accomplice the defendant will be held responsible (the statute of limitations in New York for felony is 6 months).

Because the death that occurred was a police officer's, it was foreseeable that if an armed robbery were to take place, a police officer responding to the crime may be shot. In this instance, the police officer, Cal, was killed from a bullet by a fellow officer during the shoot out between the defendant and the police officers. Nevertheless, Al will be held criminally liable in the state of New York for Cal's death. (Note that the jurisdictions are split on this issue.)

A felony murder in New York is considered to be 1st degree murder. Note that there exist several

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kinds of homicides, felony murder, intentional murder, gross reckless murder, and intent to commit serious bodily harm and then there is voluntary and involuntary manslaughter.

3) Bill may be convicted of the crimes for which he has been indicted.

Bill was indicted for murder in the 2nd degree and robbery in the 1st degree.

Bill is considered an accomplice. Al was the principal in the 1st degree. Bill was only there to be a lookout, but he knew full well of Al's intent to rob, with a gun. The gun was removed from the glove compartment when Bill and Al were in the car together. Therefore Bill knew that a gun was involved.

A defense to a felony murder charge is that the defendant was unarmed. Bill was not armed, he did not commit the shooting, Bill did not commit or cause the death and he had the belief that death would not have resulted from the crime. Bill, being of a minor age of 14, may argue that he did not believe a death could have resulted even though he saw Al take the gun. This would be a fact for the jury to decide.

Bill may also be convicted of the crime of robbery in the 1st degree. As defined before, robbery is the trespassory taking, carrying away of another's property with the intent to deprive thereof with the use of force or an apprehension of harm. Although Bill was ``just" a lookout, Bill takes accomplice status or principal in the 2nd degree. Therefore, Bill can be charged with the robbery because his act of being the ``lookout" was a substantial step in the completion of the crime. New York law looks to see if the accomplice's act was a step in furtherance of the completion of the crime and they look for some overt act.

Here Bill was supposed to honk the horn if he saw the police coming (which proves that Al knew that it was probable that police would arrive). Bill never honked the horn (no overt act) nor did he do anything, but nonetheless the jury may still find him guilty because had he carried out his intent, it would have substantially furthered the completion of the crime.

Note that Bill will be tried as a juvenile delinquent.

ANSWER TO QUESTION 2

1. Bill's motion to suppress should be granted.

The issue here is whether the police properly obtained Bill's confession and whether any of Bill's constitutional rights were violated by the police.

Under the 4th amendment, no person may be illegally searched or seized. Here, the police went to Bill's house and asked him to go to the station and answer a few questions. This did not constitute an illegal seizure because Bill went with the police willingly.

Under the 5th amendment, a person has a right not to incriminate himself and must be given his Miranda warnings. Those warnings include the right to remain silent and the right to counsel. Here the police did inform Bill of his rights. The rule is that a person may waive his right to remain silent and right to counsel. This is what Bill did when he conferred.

However, there are situations in which other factors are taken into consideration along with the voluntary confession, such as age. Here, Bill asked to speak to his mother instead of an attorney. A parent or guardian is deemed to be a youth's advisor. The police, knowing that Bill's mother was in the station, lead Bill to believe that they would locate her and bring her to him. The police

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then proceeded to question Bill and thereby obtained a written confession. This is precisely what the 5th amendment was designed to protect. That is, an elicited confession by someone who is in a custodial interrogation setting whom is at a disadvantage.

Though Bill went with the police voluntarily, the place of the police station and questioning gave rise to a custodial interrogation of a 14 year old boy.

The 14 year old requested to speak with his mother, and this should have prohibited the police from further questioning, due to the boy's age. In order to waive one's rights, that person must have capacity to do so. Here, Bill's incapacity was that he was a minor. Further if it was determined that he was a minor who was precocious, he still should not have been questioned by the police because he indicated that he wanted to speak to his mother.

For the foregoing reasons, Bill's constitutional rights were violated and the police illegally elicited a confession from Bill which therefore should be suppressed.

2. Al should be convicted of both murder in the first degree and robbery in the first degree.

The issues here are twofold:

- 1) Did Al's acts constitute robbery in the first degree and
 - 2) Is Al responsible for the murder of the police officer which occurred during the robbery but not by a bullet from Al's gun.
- 1) Al's acts constituted robbery in the first degree.

Robbery is the intentional unlawful taking of property with serious threat of bodily harm or injury.

Here, Al planned to rob the bank. That is he intended to rob the bank. His intent was displayed through his plans of taking the money from the bank. When Al entered the bank and drew his gun at the teller, this threat of serious bodily injury to the teller completed the elements of the crime of robbery. Therefore, Al should be convicted of robbery in the first degree.

2) Al should be convicted of murder in the first degree.

Murder in the first degree occurs when a murder takes place during the commission of one of the following felonies: burglary, arson, rape, robbery, kidnapping or sodomy.

In the instant case, as previously mentioned, a robbery took place and it was Al who was responsible for the robbery.

A murder of a police officer took place during the commission of the robbery. Though it was later revealed by the autopsy that the bullet that killed the police officer was not from Al's gun; Al is not relieved from liability of murder in the first degree.

A person who is in the commission of a felony required for murder in the first degree will be liable for any murder that is a foreseeable result of the felony. Here it was foreseeable that the police would arrive. Further, when Al opened fire on the police, the foreseeability that someone would get hurt was escalated.

Though Al may try to defend that in New York someone must retreat from deadly force before they retaliate with deadly force, there did not seem to be time for the police to retreat. Further,

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this defense would be immaterial in any event because Al would still be guilty of murder in the first degree because he had satisfied the required elements of murder during the commission of one of the enumerated felonies, here robbery, and the murder was a foreseeable result of Al's actions, though the bullet was not from Al's gun.

For the foregoing reasons Al should be convicted of murder in the first degree.

3) Bill may be convicted for the crime of robbery in the first degree but not murder in the second degree. The issue here is whether, under a theory of accomplice liability, Bill will be convicted for the aiding and furtherance of the crimes he was indicted for.

An accomplice is liable in as much as the person who actually commits the crimes and for any crimes foreseeable ensuing thereof.

As previously stated, if Al is guilty of robbery in the first degree, so too will Bill because Bill aided in the crime by acting as a "lookout." It is immaterial under accomplice liability how insignificant the aiding is. The accomplice will still be liable for the crime. Further, though Bill is a minor, he will be indicted for the crime of robbery in the first degree because he is 14 years old. In New York, a 14 year old may be indicted as an adult.

Bill is not guilty of murder in the second degree because murder in the second degree arises from reckless endangerment to human life. This is not what occurred here. As previously mentioned, a murder occurred during the commission of the felony of robbery.

Therefore, murder in the first degree took place, and if Al is convicted of murder in the first degree, so too would be Bill under the theory of accomplice liability, again regardless of his age, because a 14 year old in New York may be tried as an adult and indicted as an accomplice for crimes committed.

For the foregoing reasons Bill will be liable under accomplice liability for robbery in the first degree but not murder in the second degree.

Question-Three

Dad, the owner of Blackacre, a parcel of real property in Rocktown, Albany County, died in that county in June 1996, survived only by Sid, Dad's son. Blackacre contained 160 acres and was divided in half by a public highway.

Dad, for thirty years prior to his death, had operated an extensive and profitable rock quarry on the half of Blackacre lying east of the Highway. Dad had never quarried the western half of Blackacre although the underlying rock was well suited for that purpose, electing to hold that half in reserve until the rock under the eastern portion was exhausted. Until the time of Dad's death, Rocktown had never adopted a zoning ordinance affecting Blackacre.

In May 1996, for a valuable consideration and in anticipation that Dad would devise Blackacre to him, Sid executed and delivered to Len a bond secured by a \$30,000 mortgage on Blackacre. The mortgage contained Sid's warranty of title to Blackacre. Len immediately recorded the mortgage in the Albany County Clerk's Office. Dad's will, duly admitted to probate in Surrogate's Court, Albany County in July 1996, devised Blackacre to Sid.

In August 1996, Sid, in consideration of a loan contemporaneously made to him by Ben, executed and delivered to Ben a bond secured by a \$20,000 mortgage on Blackacre. Ben, who had no

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actual knowledge of the previous mortgage on Blackacre given by Sid to Len, immediately recorded the mortgage in the Albany County Clerk's Office.

In October 1996, Len, for valuable consideration, assigned his \$30,000 bond and mortgage on Blackacre to Chum who did not record the assignment or give Sid notice thereof. In February 1997, Sid, without knowledge of the assignment to Chum and without requiring the production of the original documents or obtaining a written satisfaction, paid Len \$30,000 and accrued interest as full payment of the bond and mortgage.

In March 1997, the Town Board of Rocktown duly enacted a comprehensive zoning ordinance for the entire town under which both halves of Blackacre were placed in a residential zone where quarrying was prohibited. The entire area surrounding Blackacre is picturesque, rocky and hilly terrain and many expensive houses have been built in that area. One of the stated purposes of the ordinance as it related to this part of Rocktown was "to preserve its inherent esthetic values." After the adoption of the ordinance, Rocktown directed Sid to cease all quarrying on Blackacre. Each half of Blackacre is worth considerably more for quarrying than for residential use.

Sid now challenges the constitutionality of Rocktown's zoning ordinance and the Town Order, contending that:

- (1) He cannot be prohibited from quarrying the eastern half of Blackacre;
 - (2) He has a vested right to quarry the western half of Blackacre;
 - (3) The western half of Blackacre is now zoned for use to which it is not economically suited;
 - (4) The ordinance is invalid because it is partly based on esthetic considerations.
- (a) What are the respective rights and obligations of the parties:
- (i) In relation to the two mortgages?
 - (ii) In relation to the \$30,000 payment?
- (b) Which, if any, of Sid's numbered contentions are correct?

ANSWER TO QUESTION 3

a) I) Mortgage to Len:

Len has a lien on Blackacre in the amount of \$30,000.

The issue is whether Sid had the power to use Blackacre as a security interest for a loan where he only had an expectancy interest in ownership of Blackacre.

Generally, a security interest in land owned is given to a creditor to create a mortgage. However, the warranty of title and valuable consideration given does create a valid mortgage on Blackacre. When title to Blackacre is vested in Sid, upon his father's death where he devised Blackacre to Sid, Sid will be estopped from denying that Len has a lien on Blackacre.

Mortgage to Ben:

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Ben has a mortgage (lien) on Blackacre for \$20,000 that is junior to Len's mortgage. The issue is whether Ben's mortgage is senior or junior to Sid's mortgage. As a general rule, the party to record their interest first presumptively has priority. However, New York is a race notice jurisdiction, thus, the person who has no notice of the prior interest takes priority if he also records first. Notice can be had in three ways: 1) actual notice, 2) record notice or 3) inquiry notice. Record notice is a form of constructive notice where a person is held to notice any interests recorded in the chain of title, including prior mortgage liens as long as all interests are recorded (not necessarily in order). Here since Len recorded his interest in Blackacre prior to Ben, Ben is on record notice of Len's interest. Thus, Len's mortgage takes priority over Ben's mortgage on Blackacre.

a) II) Sid is still liable to Chum on the bond and mortgage.

The issue is whether Sid satisfied his mortgage to Len by paying him the entire amount due plus interest after the mortgage had been assigned to Chum.

A mortgagee (Len) may assign his interest to another. The mortgage follows the assignment of the note (or bond in this case). The assignee then takes all the rights of the assignor. Thus, Chum, upon proper assignment, is the mortgagee to whom Sid is indebted. However, the mortgagee must have notice of the assignment. Here, Chum did not record the assignment, nor did he notify Sid of it. Thus, Sid did not have actual or record notice of the assignment. Regardless, Sid is still liable to Chum for the mortgage. Sid should have obtained a written satisfaction or documentation from Len. Sid will be responsible to pay Chum unless he can assert a lack of notice or payment defense. If not, Sid's remedy may be to try and get the money back from Len. Thus, Chum may seek payment from Sid or foreclose on Blackacre upon default.

b) I) Sid cannot be prevented from quarrying the Eastern half of Blackacre. The issue is whether Dad's prior, existing use of Blackacre east will be affected by the zoning law. The doctrine of non-conforming use allows a landowner to continue to use his/her land in violation of a later enacted zoning law. Where the prior use of the land was legal and in conformity with any and all zoning laws, the subsequent enacting of a zoning law will not bar the continued use of that land as it was legally used before the enactment of the zoning law. Thus, since Dad used the Eastern part of Blackacre as a rock quarry for 30 years, the subsequent ordinance will not bar such use under the "non-conforming use" doctrine.

II) Sid does not have a vested right to use the Western part of Blackacre in violation of the ordinance because it was never used as a rock quarry in the past. Thus, the "non-conforming use" doctrine is not applicable to the Western half.

III) A zoning ordinance could be invalidated if it constitutes an impermissible taking under the takings clause of the United States Constitution. However, to be a "taking" the zoning ordinance must not leave the landowner with any economically viable use of his land. Here, although the ordinance leaves Blackacre with a less economically viable use of its land, because the land is best fit for rock quarrying, it does however still leave a viable economic use. Thus, it is not a correct contention that Blackacre is zoned for a use that it is not economically suited.

It should be noted that zoning ordinances have and may be based on aesthetic considerations.

ANSWER TO QUESTION 3

a) I) The mortgages

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The Sid-to-Len-to-Chum mortgage has priority over the Sid to Ben mortgage. However, Blackacre is subject to both mortgages and Len is liable on the notes.

Len does have a valid mortgage on Blackacre, and Sid is liable on the note. The issue is whether estoppel by deed will work to validate the Sid to Len mortgage even though it was given before Sid received title to Blackacre.

Estoppel by deed is a concept whereby if a person conveys an interest by warranty deed before they own the property, as soon as title is acquired it vests in the party who received the conveyance. A mortgage is an interest in real property and therefore the principles apply as if it were a conveyance in fee.

Here, the mortgage to Len was conveyed before Sid received title. However, upon receipt the mortgage interest vested to Len through the operation of the warranties and Sid will be estopped to deny Len's interest.

The next issue is whether Ben's mortgage took priority under the application of the recording act. Ben will not have priority under the recording act.

New York is a race notice jurisdiction, which means that its recording act protects subsequent purchasers for value who took without notice of a prior interest and recorded first. The recording act, if applicable, would reverse the general rule of priority -- first in time, first in right. Mortgages are interests in land and thus the recording acts are applicable.

The facts show that Ben did record his mortgage. However, he took with notice. Although Ben had no actual notice of Len's interest, he does have record notice.

The issue is whether an interest recorded out of order is effective record notice. In New York, a party is deemed to have record notice of all interests in their chain of title, whether recorded in order or not.

Here, although Len's interest was out of order, it was properly recorded. Therefore Ben had record notice and will not take priority under the recording acts. Len's interest still has priority. Note, because this is not a purchase money security interest, it may not take priority that way either. A PMSI is secured to purchase the property in question.

Another related issue is whether Len has priority over Chum. Chum takes his priority from the assignment from Len. The recording acts are inapplicable even though he did not record.

Both mortgages are valid and Blackacre is subject to both. The first mortgage will merely have priority in foreclosure. Len is still liable on the notes.

a) II) Sid is liable to pay the note to Chum, and Blackacre is still subject to that mortgages. However, Sid may recover from Len.

The first issue is whether the \$30,000 payment ended Sid's obligation on that note and mortgage. It did not.

The law in New York is that a note follows a mortgage when it is properly assigned, even without notice to the mortgagor. If the mortgagor pays the assignor, the mortgagor is still liable to the assignee.

Here, even though Sid had no notice or knowledge of the assignment as it was unrecorded, he

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must still pay Chum, the holder and assignee. Chum may sue on the validly negotiated note, or may hold Blackacre subject to foreclosure if Sid is in default.

Sid may recover his \$30,000 payment from Len because Len had no right to it. Sid should sue in conversion.

b) The only argument which has merit under Sid's suit is #1.

Preliminarily, the State of New York has the right to zone under the state police power for the public health, safety and welfare and has delegated that right to the municipalities.

b) #1 -- The issue is whether Sid may be prohibited from quarrying the eastern half of Blackacre. He has a good argument but will likely not prevail.

When a zoning ordinance is adopted or changed, the previous uses are deemed non-conforming. They are generally allowed to remain because the owner has a vested right in their operation. However, the state may completely abrogate the use immediately if the use is such that it constitutes a public nuisance.

Here, the quarry has been operating for 30 years. However, the area is becoming residential. A municipal decision that the use must be abrogated will likely prevail for the public health, safety and welfare.

#2 Sid has no vested right to quarry the western portion. The issue is whether a vested right exists where no activity has taken place.

A vested right does not exist where the operation has not been carried on. Here, even if Sid is found to have a vested right in the eastern portion, since the western portion has never been quarried, he has no vested right as to it.

#3 Sid will not prevail in this argument. The issue is whether there is a taking of his property because the property is not suited for residential use.

The 5th amendment guarantees that the government may not take personal property without just compensation. When a regulatory -- or non-physical -- taking is at issue, the party contesting the regulation must show that the government has deprived them of all economically viable use of the land.

Here, the surrounding residences show that Blackacre can be used residentially. Although it is not the "highest and best use," it does not constitute a total taking in violation of the 5th amendment.

#4 The ordinance is not invalid because it considers esthetics. Case law specifically provides that in zoning for the public health, safety and welfare, a municipality may consider esthetics.

Here, the picturesque landscape and residential opportunities have been deemed important by the municipality. That will not be overturned as arbitrary and capricious, which is the standard for such a proceeding.

Sid will likely not prevail on any of his contentions.

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Question-Four

GC, a general contractor, entered into a contract with Toy, Inc, a manufacturer of toys, for the construction of a large warehouse. Among other things, the contract provided that GC would supply Toy with audited financial statements from independent certified public accountants establishing that GC had a net worth of at least \$5 million.

GC provided Toy with audited financial statements certified by an independent accounting firm, CPA. The statements, indicating that GC had a net worth of more than \$5 million, had been prepared two months before GC entered into its agreement with Toy. CPA was not aware that GC intended to supply the audited statements to Toy.

After the roof was installed, but before the building was completed, GC became insolvent and was unable to complete the job. Toy hired another general contractor, GC2, to complete the work at substantially greater expense.

While the work was continuing, Hue, an employee of GC2 who was working on the Toy building, climbed a ladder supplied by GC2 to reach the roof. Hue had been told specifically by his supervisor not to use the ladder because it was broken. The ladder collapsed, and Hue was severely injured. The contract between Toy and GC2 contained no provisions relating to liability for claims arising out of the work or indemnification between them for any such liability.

Toy did not lock the building while it was under construction. One night, Lou, who knew the building was unlocked, accosted Ann, dragged her into the building, and brutally attacked her.

Toy has determined that the financial statements supplied to it were grossly inaccurate because in arriving at GC's net worth, CPA had negligently failed to determine that GC's equipment inventory was grossly overstated. In fact, GC's net worth was less than \$1 million as of the date of the certification.

The foregoing facts are undisputed.

- (1) Toy has brought an action against CPA for negligent misrepresentation in certifying an inaccurate financial statement to recover the additional cost of completing the building. CPA has moved to dismiss the complaint against it for failure to state a cause of action.
- (2) Hue has brought an action against Toy for damages for the injuries he suffered in falling from the ladder. Toy has moved to dismiss the complaint against it for failure to state a cause of action.
- (3) In the action brought by Hue against Toy, Toy has joined GC2 as a party and asserted a cross claim against it for indemnification for any liability Toy may have to Hue. GC2 has moved to dismiss the cross-claim on the ground that Toy is not entitled to indemnification from GC2.
- (4) Ann has brought an action against Toy, alleging that Toy's failure to lock the building provided Lou with a place where he could assault Ann unnoticed. Toy has moved to dismiss the complaint on the ground that it fails to state a cause of action.

How should each of the four numbered motions be decided?

ANSWER TO QUESTION 4

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1) CPA's motion for dismissal should be granted. Four elements must be present for a tort: A duty, a breach, causation, and damages. Here, CPA has breached its duty to GC by its gross negligence in preparing these financial statements. The duty to prepare these statements correctly was owed by CPA to GC and all foreseeable parties. Unless it was the regular industry practice to distribute these confidential financial statements, CPA could not foresee that Toy, Inc. would rely on them and therefore would owe no duty to Toy, Inc. As such, the motion for dismissal should be granted. (In the event that this was a foreseeable act by GC, CPA would be liable to Toy, Inc. for the additional cost of completing the building.)

2) Toy's motion to dismiss Hue's complaint should be denied. The issue is whether Toy, Inc. is liable under a statutory duty to Hue. Under a traditional tort action, Toy, Inc. would not be liable to Hue. It neither intentionally nor negligently allowed Hue to use the broken ladder. The ladder supplied by GC2 was outside of Toy's control, and Toy, Inc. did not owe any duty to Hue. However New York statutory law provides special, strict liability, protection for construction workers. As such, Toy, Inc. is liable for any injury that construction workers suffer while working on the warehouse without regard to fault. As such, the motion should be denied and Hue's claims may proceed.

3) The cross-claim against GC2 should probably be dismissed. Generally, a defendant can implead and assert cross-claims against any third-party defendant that has contributed to or aggravated the damages that the defendant owes to the plaintiff. Here, however, Toy, Inc. is asserting a claim for indemnification, instead of contribution. Indemnification is available where the defendant is a passive tort-feasor and seeks to assert its claim against an active one. This describes this situation, since Toy, Inc. through liable, did not engage in any wrongdoing. Indemnification is available in situations of vicarious liability, and when provided for by contract. There is no contractual provision in the contract between Toy, Inc. and GC2. In any event, Toy's claim is barred by the Workmen's Compensation Statute. Under the Workmen's Compensation requirement, employees receive set benefits for injury but cannot sue their employers in tort. As a corollary, the employer cannot be impleaded by other parties sued by the worker, unless the worker suffered grave injuries (e.g. loss of a limb, paralyzation, etc.). The facts here state only that Hue was severely, not gravely, injured. As a result, Toy, Inc. is prohibited by statute from asserting Hue's cross-claim against GC2 and it should be dismissed.

In any event, the fact that Hue had been specifically told not to use the ladder doesn't affect this analysis since assumption of the risk is not a bar, but only a factor to be contemplated in setting comparative negligence (which is itself unimportant to the strict liability claim against Toy). This is true unless Hue intentionally injured himself, in which case he would no longer be covered by Workman's Comp.

4) Toy's motion to dismiss Ann's cause of action should be granted. Toy owes a duty to trespassers based on the reasonability and foreseeability under the totality of the circumstances. So, Toy, Inc. might owe a duty to lock its premises if they were unreasonably dangerous. In this case, however, the issue is whether Toy's failure to lock its premises was the legal and factual cause of Ann's injury. Lou's brutal attack constitutes an intervening, superseding cause which relieves Toy of liability. While it might have been foreseeable that Toy's failure to lock its premises would result in injury to trespassers due to dangerous construction equipment, it is not foreseeable that this failure would result in a brutal attack. It is also unclear if factual ("but for") causation exists here since Lou might have been undeterred from his crime even if the factory were locked.

ANSWER TO QUESTION 4

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1) CPA's motion to dismiss Toy, Inc.'s complaint should be granted. The issue for the court is whether Toy's complaint states a prima facie case of negligent misrepresentation.

When deciding a motion to dismiss the complaint for failure to state a cause of action, the court must take the allegations in the complaint in the light most favorable to the plaintiff and determine whether any claim is stated under the law. In order to state a prima facie case of negligent misrepresentation, plaintiff must show I) a duty to provide particular information to plaintiff, II) defendant must know that plaintiff will reasonably be relying on the representation, III) a breach of that duty, IV) causation, and V) pecuniary damages.

CPA had no duty to Toy, Inc. CPA did not prepare the statement for Toy, Inc.'s use since CPA completed the statement two months prior to the Toy and GC contract. Although plaintiff would be considered "foreseeable," as a party entering into contract with GC, negligent misrepresentation in New York requires that a duty be owed to the particular plaintiff suing. CPA is not liable to every party who relies on its statement. CPA did not know that Toy would be relying on its statement and, therefore, the complaint also fails on the second prong of the prima facie requirements. Although Toy did suffer pecuniary damages, CPA was not aware that GC intended to supply the statement to Toy. If Toy had showed a duty and knowledge of Toy's reliance, Toy must also show that but for CPA's grossly inaccurate report, Toy would not have entered into the contact with GC and that CPA's negligence was the proximate cause of Toy's pecuniary damages. Since Toy fails to show that CPA had a duty to Toy or that CPA was aware of Toy's purported reliance, Toy fails to state a cause of action and the complaint should be dismissed. (Toy's suit should be against GC except it would be futile since GC is insolvent.)

2) Toy's motion to dismiss for failure to state a cause of action should be granted.

The issue is whether a landowner is liable in tort for the injuries of an independent contractor's employee.

The court must decide on a motion to dismiss for failure to state a cause of action whether the complaint states a prima facie case for any cause of action. If the court finds that a prima facie case is stated, the motion should be denied.

A prima facie case for negligence is proven by showing: I) a duty to a foreseeable plaintiff; II) breach of that duty; III) actual ("but for") and proximate causation; IV) damages.

A duty can arise via statute, a relationship or under the common law general duty to act as would a reasonably prudent person under the circumstances. Although an employee cannot sue its employer under the New York statutory Worker's Compensation Scheme for on the job injuries, an employee is permitted to sue third parties, including landowners. The landowners may owe a duty to an independent contractor's employee under the New York Labor Law Statutory Scheme or via the duty owed to foreseeable plaintiffs by the ordinarily prudent person under the circumstances. In the latter case, the extent of the duty is viewed by determining how the reasonably prudent person would act in the circumstances surrounding the action.

Plaintiff must also show, as part of its prima facie case, the exact act the defendant did to breach the duty. If an exact act cannot be shown, the plaintiff may invoke the use of *res ipsa loquitur* where the event would not happen in the absence of negligence and the instrumentality that caused the action was under defendant's complete control.

Plaintiff must also show that but for defendant's negligence, the injury would not have occurred and the injury was proximately caused by the risk presented by defendant's conduct.

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Here, the landowner, Toy, had a duty to act as a reasonably prudent landowner under the circumstances. Plaintiff does not give any evidence of a breach of that duty or claim the landowner has done anything specifically wrong. Plaintiff cannot invoke *res ipsa loquitur* in this case because the instrumentality that caused the harm, namely the ladder, was not under defendant's control. Therefore, the motion to dismiss should be granted.

3) GC2's motion to dismiss the cross claim should be granted. The issue is whether a third party can assert a claim for indemnification against an employer for the employee's injuries.

New York's Worker's Compensation law was amended in 1996 to prohibit a third party from seeking indemnification or contribution from an employer for an employee's on the job injury unless the employee suffered "grave injury" as defined under the statute. Grave injury includes loss of an arm, leg, blindness, permanent brain damage, among other severe injuries.

Although Hue suffered "severe injuries," we are not told specifically the extent of the injuries. If the injury was not grave and did not fit into one of the categories named in the statute, the motion must be granted and the claim dismissed.

4) Toy's motion to dismiss should be granted. The issue is whether a complaint that fails to state a duty and breach should withstand a motion to dismiss.

As previously indicated, to withstand a motion to dismiss for failure to state a cause of action, plaintiff must plead the *prima facie* elements of the tort in the complaint. In order to plead a *prima facie* case for negligence, plaintiff must show I) a duty to a foreseeable plaintiff, II) breach of the duty, III) causation, and IV) damages.

Toy has the duty to act as a reasonably prudent landowner under the circumstances to foreseeable plaintiffs. Ann may or may not be a foreseeable plaintiff in this case. If Toy could foresee that danger of the type Ann suffered would result by not locking the building, Toy has a duty to Ann. To be a foreseeable plaintiff, Ann must be in the "zone of danger" of foreseeable harm resulting from the defendant's negligent act. If Toy knew of crime in the area or that the area was frequented by trespassers, he could be found to have breached a duty to Ann. If this is the case, they would have breached the duty of ordinary care to make his premises safe and protect against foreseeable harm on his property. The assault on Ann at Toy's premises would not have happened but for Toy's failure to keep the building locked. Proximate cause exists only if the harm was foreseeable and the result was within the risk caused by the defendant's failure to lock the building.

Toy's motion should be granted, however, because Ann fails to present evidence of foreseeability of her presence and the risk to create a duty and proximate causation. The complaint fails to allege facts to give rise to a duty on behalf of Toy. In order to withstand a motion to dismiss, a complaint must clearly show facts giving rise to each element. Although Ann shows the breach, she fails to show how the duty arises.

Question-Five

Senior, a partner in the law firm in which you are an associate, has just completed a conference with Rob, one of the firm's clients, and has addressed a memorandum to you which reads as follows:

Rob's father, Sam, died last week. Sam is survived by his former wife, Sally, from whom he was divorced in 1996; by Rob, who is Sam's son by a prior marriage; and by Ann, who is Sally's daughter by a prior marriage.

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Shortly before Sam and Sally were married in 1985, they duly signed a contract in which they agreed to execute reciprocal and irrevocable wills pursuant to which the first to die would leave his or her entire estate to the survivor, and the survivor would leave his or her entire estate to Rob and Ann equally. In relevant part, Sam's will, duly executed in 1986, provides:

I hereby revoke the trust account which I have established in Big Bank for my son, Rob, and I leave the proceeds thereof to my wife, Sally.

I hereby revoke the joint account which I have established in Big Bank for my son, Rob, and I leave the proceeds thereof to my wife, Sally.

I hereby leave my entire estate to my wife, Sally. If Sally predeceases me, I leave my entire estate to my son, Rob, and to Sally's daughter, Ann, equally.

I appoint my son, Rob, as the executor of this will.

In accordance with their agreement, in 1986 Sally duly executed a will leaving her entire estate to Sam if he survived her, and to Rob and Ann equally if Sam predeceased Sally.

In 1993, Sam and Sally began to live separately, and in 1994, Sam and Sally duly executed a separation agreement, which provided in pertinent part:

General Release: Each party hereto releases and relinquishes all claims or rights which may now exist by reason of the marriage between the parties with respect to any property belonging to such other party and, without limiting the foregoing, each party waives and releases all right to share in any of the property or estate of the other party which has arisen or may hereafter arise by operation of law or otherwise, and all rights to share in the estate of the other party under the laws of this or any other jurisdiction, including the right of election to take against the Last Will and Testament of the other party, whether executed prior or subsequent to the execution of this Agreement.

In 1996, Sam and Sally were duly divorced. At the time of Sam's death in June 1997, he had not executed a new will.

Prepare a memorandum for Senior (i) identifying the issues, and (ii) indicating how Sam's estate should be distributed.

ANSWER TO QUESTION 5

To: Senior

From: Associate

Re: Sam's Estate

Date: July 29, 1997

a) TOTTEN TRUST ISSUE

- Sam validly terminated the TOTTEN TRUST in his will.

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- The issue is whether the trust in Big Bank for Rob's benefit can be validly terminated via will.

- A totten trust is revokable at any time by the maker up until the date of death of the maker. The maker is the owner of the money and can w/d or deposit at will. Under New York law a Totten trust can be effectively revoked in a will if the will states the name on the account and the bank where it was located (sufficient identification of the account is necessary). In this case, Sam specifically noted the trust account for his son Rob at Big Bank, therefore the revocation was effective.

b) Revocation of joint account

Sam's revocation of the joint account in his will was ineffective.

The issue is whether Sam's revocation of the joint account with Rob was effective.

The joint account has a right of survivorship attached to it which cannot be revoked in a will. As owners of the account jointly, both Sam and Rob have equal rights to the account and have rights of survivorship. At the time of Sam's death, the money in the account goes to Rob under the right of survivorship. Sam cannot bequeath the property to Sally, therefore, Sam's attempted revocation is ineffective.

c) General Release -- effective revocation?

The general release in the separation agreement did not serve as an effective revocation of the joint wills.

The issue is whether the general release in the separation agreement served as an effective revocation of the joint wills.

Recent case law in New York has established that general releases in separation agreements such as the one used in these facts must be extremely precise in revoking irrevocable joint will contracts and concurrently the joint wills themselves. The law states that there must be a specific reference to the contract upon which the joint wills are based and there must be specific, express intent that the parties desire the contract and wills to be no longer valid and enforceable.

Although the general release in these facts seems to be extremely comprehensive, it does not meet the requirements to validly revoke the joint wills because it doesn't specifically refer to the contract or the wills. Therefore, because there were no subsequent revocations by destruction or another will by Sam, the joint wills are still valid and should be admitted to probate.

d) Distribution of Sam's Assets

Sam's estate should be distributed as if Sally predeceased him and the estate should be divided equally between Rob and Ann with the exception of the money in the joint account.

The issue is whether Sally is entitled to take under Sam's will even though they were divorced prior to his death.

Under New York law, upon the divorce of a couple, all gifts/distributions to the divorced spouse will automatically be revoked by operation of law. This does not include provisions regarding child custody. The gifts to the divorced spouse fail and go into the residuary. In this case, because the joint wills are still effective, the court will treat Sally as if she predeceased Sam and the estate will be distributed equally among Rob and Ann as agreed.

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Sally has no right of election against Sam's estate because they were not married at the time of Sam's death.

ANSWER TO QUESTION 5

1) The first issue is whether the contract to create reciprocal wills was valid. New York recognizes such contracts as valid. Wills executed in violation of such agreements will nevertheless be admitted to probate. The aggrieved party's remedy is to sue for breach. In this case, however, as demonstrated below, the contract has little practical significance.

2) The next issue is Sally's right to take an elective share of Sam's estate. Sally cannot take an elective share. To prevent spouses from disinheriting each other, New York permits a surviving spouse to take an elective share equal to the greater of \$50,000 or 1/3 of the deceased spouse's net estate (plus testamentary substitutes), provided that the surviving spouse was not left that much in outright dispositions. Divorce ends all right to take an elective share in your former spouse's estate. Regardless of the effect of the separation agreement, Sally lost all right to take an elective share upon the 1996 divorce. (It should be noted, however, that a spouse may waive his or her elective share rights in a separation agreement, as Sally did here.)

3) The next issue is Sally's right to any gifts made to her in the will. Sally can take nothing under the will. Upon divorce, a former spouse loses any right to claim any gifts left him or her by the deceased if those gifts were made before the divorce. The will is read as though the surviving former spouse predeceased the testator. Because the will was executed before Sam and Sally were divorced in 1996, Sam's will should be read as though his ex-wife predeceased him.

4) The next issue is the effect of a beneficiary's predeceasing the testator. When a will beneficiary predeceases the testator (as the law pretends Sally did), all gifts to that beneficiary "lapse," meaning they fall into the residuary estate. If an ultimate residuary gift lapses, a partial intestacy results. If, however, the predeceased beneficiary was the testator's sibling or issue and is survived by issue himself, then the "anti-lapse statute" provides that the gift go to that beneficiary's issue.

Here, Sally's gifts lapse. Any valid gifts to her fall into the residuary estate by reason of the divorce. The anti-lapse statute does not operate to benefit Ann, because Sally was not Sam's issue or sibling. Therefore, her gifts lapse.

5) The next issue is the validity of the purported revocation of the Totten trust bank account. The revocation was valid. Trust accounts may be revoked in a will only if the will names the institution in which the account is kept and the trust account's beneficiary. Here, Sam's will meets the requirements for revocation. It names Big Bank (the institution) and Rob (the beneficiary). The Totten trust was validly revoked by Sam's will.

6) The next issue is the validity of purported revocation of the joint account. The revocation was invalid. Joint accounts are accounts with a right of survivorship. Money passing by operation of this right of survivorship is a nonprobate transfer, which cannot be affected by a will. All money placed in such an account is deemed to be a gift of one-half the deposit to the other account holder.

Because joint accounts cannot be revoked by will (regardless of the specificity of the revocation), the attempted revocation in Sam's will is void.

7) The next issue is whether Sally's divorce from Sam affected Ann's rights under the will. Ann's

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rights were unaffected. Although divorce causes gifts to a former spouse to lapse (as explained above), no other gifts are affected by divorce. Sally's divorce has no effect on Ann's rights.

8) The last issue is whether the separation agreement revoked any gifts in the will. The separation agreement had no effect on Sam's will. In New York, there are only two means of revoking a will: 1) by subsequent testamentary document executed with full formalities, or 2) by physical act.

The separation agreement does not satisfy either method. It was not executed with the full formalities necessary to be a revoking instrument (signed by the testator at the end thereof, in the presence of [or having acknowledged his signature to] two witnesses to whom he has "published" the will (made known that it is a will they are witnessing), if the witnesses sign within 30 days of each other. It is obviously not a physical act. Therefore, the separation agreement does not affect Sam's will.

II) Pursuant to the resolution of the issues explained above:

-- Sally takes nothing;

-- Rob takes the proceeds of the joint account;

-- Rob and Ann split the residuary estate equally (including the proceeds of the trust account).

Question-Six

Marvin was a wealthy businessman and the sole incorporator and shareholder of Money, Inc, a New York business corporation. Initially, Money's sole asset was a bank account funded by Marvin for the purpose of making investments. Money kept no corporate records and observed none of the usual corporate formalities. Money's board of directors consisted of Jean, Mary and Beth, Marvin's three adult daughters, who were also the corporate officers, and, with Marvin, authorized signatories on the corporate bank account.

In 1990, at Marvin's direction, Jean retained Makeover, a professional investment manager, to manage Money's investments. Makeover's only contact with Money was through Jean, but Marvin made all the decisions concerning the investments suggested by Makeover.

In December 1993, Beth decided that she wanted to purchase a luxury car. Without seeking Marvin's consent, Jean and Mary, with Beth abstaining, voted to use Money's funds to make a \$50,000 loan to Beth. The loan was to be repaid by September 1997, at an interest rate of nine per cent.

Beginning in early 1994, Money's investments began to lose money. Angered by the losses, Marvin accused Makeover of negligently managing the Money account. At that time Money owed Makeover \$30,000 in unpaid commissions. On May 15, 1994, knowing that the commissions were due, Marvin liquidated the investments and withdrew all of the funds from the Money bank account, leaving Money with no assets. That same day, Marvin instructed Jean to terminate Money's relationship with Makeover.

On May 12, 1997, Makeover commenced an action against Money in Supreme Court, New York County, to recover the commissions owed. Money timely answered Makeover's complaint on June 1, 1997. In its answer, Money included a counterclaim seeking damages for Makeover's alleged negligent management of Money's funds in 1994. Makeover moved to dismiss Money's

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counterclaim on the grounds that it was barred by the applicable statute of limitations. The court denied the motion.

During discovery, Makeover learned of the foregoing facts with respect to Money's corporate structure and assets. Makeover would like to add Marvin as a defendant in the action and hold him personally liable for the commissions owed, but has been advised by its attorney that it can do neither.

Marvin recently became aware of the \$50,000 loan to Beth. Marvin claims that the loan is unlawful and has demanded that the loan be repaid to the corporation immediately.

- (1) Was the court's ruling correct?
- (2) Was the attorney's advice correct?
- (3) What liability, if any, do Jean, Mary and Beth have to Money as the result of the loan?

ANSWER TO QUESTION 6

1) The Court correctly denied Makeover's motion. The issue is whether on a counterclaim the defendant may relate back to the date of the original claims for statute of limitation purposes. Under the CPLR, the rule is that mandatory counterclaims by a defendant relate back to the date filed by the plaintiffs for statute of limitations purposes. Because negligence actions require three years, Money would have had to file by May 15, 1997, to be timely. That is three years from the end of the business relationship. However, Money can use Makeover's May 12 date because the counterclaim rises from the same transaction or occurrence. Therefore money may use Makeover's May 12 date, under which the action was timely. Because Money may relate back to May 12, the court properly dismissed the action.

2a)

The Attorney's advice that Marvin can be called as a defendant.

The attorney incorrectly advised Makeover. The issue is whether a plaintiff may permissively join a third party after discovery. The rule is that parties may join other parties after discovery. If the issues arise out of the same transaction or occurrence, a plaintiff may add another defendant. Because discovery has begun does not dismiss the plaintiff's action.

The plaintiff needs to receive permission from the court. The issue is whether the later learning of facts is sufficient reason to allow a party to join a third party. The rule is that a court should permit joinder unless there would be undue prejudice. Because Marvin knew about the suit and was already defending through Money, there would be no unfair prejudice in adding the claim after discovery. Therefore the attorney gave improper advice.

2b)

The Attorney's advice on Marvin's personal liability.

The attorney incorrectly advised Makeover that Marvin cannot be held personally liable. The issue is whether the court would pierce the corporate veil and hold Marvin personally liable. Courts normally do not hold shareholders personally liable. However the court will pierce the corporate veil. The corporation has no will of its own or it is severely undercapitalized and fraud has occurred. The court will also rely heavily on whether corporate formalities have been

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followed. Because Money kept no records and observed no formalities; because Marvin so dominated Money and "made all the decisions concerning the investment"; and because Marvin liquidated the account knowing the commissions were due, the court will likely pierce the corporate veil and hold Marvin personally liable.

While courts are reluctant to pierce the corporate veil, they will do so under circumstances such as Marvin's and thus the Attorney's advice was incorrect.

3)

Liability of Jean, Beth and Mary on the loan.

The loan is void. Beth must repay the loan and all three directors will be personally liable.

Loans to directors must be approved by shareholders. The issue is who may approve loans to the directors. The rule is that under the BCL, only shareholders could approve the loan. Because only the directors approved the loan to the director, the loan is void. It is irrelevant that the interest rate may have been fair or that a majority or disinterested directors passed the resolution.

The loan is void. The issue is what effect does Board approval have on actions which have to be approved by shareholders. Under the BCL, the rule is that such transactions are void. Because the transaction is void, the money must be returned to Marvin on his demand.

Jean, Mary and Beth may be held personally liable. The issue is whether they have breached a fiduciary duty to hold them liable to the corporation. The rule is that all directors owe the duty of care a reasonably prudent person of ordinary skill and training would have. A reasonably prudent director would not have approved an invalid \$50,000 loan to a director. Because they breached the duty they will be liable.

Beth will not be saved because she did not vote for the loan. The issue is how may a director prevent liability for illegal transactions. The rule is the director must abstain and write a letter to the secretary voicing her disapproval. Because Beth did not disapprove correctly and because she received the money she will be liable.

The directors may not seek indemnification. The issue is whether a director may seek indemnification when the corporation is seeking the money. The rule is that a corporation may not indemnify directors when the corporation seeks recovery of the money or damages. Because the money is to be paid to Money, they cannot go seek indemnification from Money. Therefore they will be held personally liable.

ANSWER TO QUESTION 6

1) The court was correct in denying the motion. The issue is the applicable statute of limitations for a negligence claim when it is made as a counterclaim.

Under CPLR, a negligence claim will be earned after three years from accrual if the statute of limitations is asserted as an affirmative defense. The date that satisfies the statute of limitations is normally the date of filing of process in the Supreme Court of New York. (This assumes that the other requirements such as service of process and filing of proof of service are met.) There are a few statutory exceptions to the date a claim is deemed interposed. One exception occurs within the third-party practice regime and is known as the "relation back" doctrine. If a claim that would otherwise be barred is brought against a party when it would have been timely had it been brought when the other party's claim was brought, the counterclaim will be timely as long as it

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arises out of the same events as the original claim such that the party should have been aware that the claim was likely to be brought. Here, Money wants to bring a negligence claim against Makeover. The claim would be barred after three years from accrual. In this case we do not have a perfect sense of accrual but selecting the date May 15, 1994 seems reasonable, since that was the time Marvin liquidated the investments. (If the negligence should be considered to have occurred earlier -- early 1994 -- the claim will be barred despite the relation lack doctrine). Therefore, a claim brought on June 1, 1997 would normally be time-barred. However, on May 12, 1997, Makeover commenced an action against money that arises from the same events as Money's counterclaim. There is sufficient overlap in issues that Makeover should expect a counterclaim to be brought against her. Therefore, Money's June 1 counterclaim is deemed interposed on May 12 rendering it timely by three days. So, the court was correct in denying Makeover's motion.

2) The attorney's advice was incorrect. The issue is whether Makeover can amend her complaint to include Marvin as a defendant and whether Marvin, a shareholder of Money, can be held liable to Makeover.

A party is given one opportunity to amend her complaint as a matter of right. The amendment must be made within a certain time period and can be done if the claim could have been included in the original complaint. Even if not allowed as a matter of right, courts have discretion to allow amendments as long as it would not be unfair to the other party.

Here, the court would likely allow Makeover to amend her complaint even if not timely because there is no indication of any prejudice to the defendants and the information just became available during discovery. Courts give lots of leeway to changes owing to new information attained during discovery. In addition, it would not be unfair to Marvin because he should expect to be joined as a defendant given his active role in the corporation.

The second issue here is whether Marvin can be held personally liable. Generally, a shareholder is not personally liable for the debts of a corporation. However, if there has been fraud, illegality or such complete domination of the corporation by a shareholder such that it cannot be said that the corporation is acting independently, the courts may "pierce the corporate veil" and allow recovery against the shareholders. New York courts have traditionally been very reluctant to pierce the veil in the absence of gross misconduct.

It is likely that this situation meets the level that would convince a court to pierce Money's corporate veil. First, Money did not follow corporate formalities and it kept no corporate records. More critically, Marvin liquidated the investments and withdrew all the funds from the Money bank account leaving Money with no assets. This indicates that Marvin did not act as a simple shareholder -- he exerted such control over the corporation that a court would likely conclude that he dominated the corporation.

Therefore, it is possible that a court would pierce the corporate veil in this situation and Makeover's attorney should have advised her of such a possibility.

3) All three sisters are liable to the corporation for the \$50,000. The issue is whether loan was properly made.

A loan to an interested director is the type of transaction that must be approved by the majority of the shares entitled to vote. Barring such approval, any director who participated in the improper loan situation will be liable to the corporation for the amount of the loan. It is irrelevant whether the terms of the loan are fair.

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A director may absolve himself or herself from liability if he/she abstains from the vote or votes against the action and records his/her objection in writing with the corporate secretary or in the corporate minutes. Without this action, even an abstaining director will be liable.

Here, Beth asked Money to loan her \$50,000 for the purchase of a luxury car. This is clearly a personal use and not for the benefit of the corporation. She therefore, needs to get shareholder, not director, approval. Beth only got approval from the two disinterested directors and did not get Marvin's approval (the sole shareholder). The loan was therefore invalid and the directors who participated in the loan arrangement can be held liable.

Jean and Mary are clearly liable since they approved the loan. Beth is also liable even though she abstained because she did not register her dissent (this would have been silly since she sought the loan). So, she too can be held liable.

Therefore, the three sisters can be held jointly and severally liable for the loan (each is liable for the full amount).

In addition, they will not be able to be indemnified by the corporation since they will be liable to the corporation.