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Essay Questions
and
Selected Answers

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This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 1

Larry leased in writing to Tanya a four-room office suite at a rent of \$500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of \$500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss

Answer A to Question 1

Larry v. Tanya

In the lawsuit between Larry and Tanya regarding their lease of the office building that commenced on July 1, 2006, the following are the salient points that Larry will assert and Tanya will defend.

First, the lease was a tenancy for years. Second, there were no Breach of Covenants to give rise to a right of termination. Third, the termination was ineffective because it was not in writing.

Each of these points and defenses are addressed in detail.

I. The Tenancy

The first issue is to determine the tenancy created.

Tenancy by Years

Under this type of tenancy there is a fixed date of termination with no notice required to end the arrangement. It expires at a specified time.

In this case, the lease between Larry and Tanya simply stated that a rent was to be paid monthly in advance. There is no mention of a fixed date of termination.

Therefore, a tenancy by years was not created.

Periodic Tenancy

A periodic tenancy is one that continues for a specific period – week/week; month/month – until it is effectively terminated.

Termination requires written notice of at least one month prior in case of a month-month lease and the lease must end at a natural lease period.

In this case, a periodic tenancy was created since the lease called for payment of a monthly rent of \$500 in advance and did not have a fixed termination date.

Therefore, the lease is a periodic tenancy.

II. Termination

The next issue is to determine whether the termination of the lease by Tanya was effective on February 28. If it was then she will not be liable for rent for March and April.

Tanya can assert termination based on 1.) Valid notice, 2.) Breach of Covenants, 3.) Constructive eviction.

Valid Notice

To terminate a month-month lease valid notice of at least one month is required in writing. The lease must also end at a natural lease period.

In this case, Tanya orally told Larry she was terminating her lease on February 28. She did this on December 12. While the length of the notice was sufficient because it was given at least a month prior to the termination, Larry will argue that it was effective since it was not given in writing.

As such, Larry will argue that since the notice was ineffective to terminate the lease Tanya could not have moved out on February 28 and remains liable for the rent of March and April.

In conclusion, there was no valid notice.

Surrender

Surrender occurs when a tenant abandons the tenancy and the landlord takes possession and control of the premises.

However, a landlord may move in and attempt to relet the premises on behalf of the tenant, which will not result in a surrender.

In this case, Tanya will argue that Larry accepted surrender due to his delayed attempt in finding a substitute tenant. Larry did not move in and try to relet the premises immediately, but let six weeks elapse, after which he decided to relet.

However, Larry will argue that he did nothing to accept surrender since he did not exercise control enough and was simply reletting on Tanya's behalf.

In conclusion, surrender will not likely work.

Constructive Eviction

Constructive eviction occurs when:

1. there is a condition on the premise that makes it uninhabitable.
2. the landlord knows or should have known about the condition.
3. the landlord fails to remedy the condition.
4. the tenant moves out within a reasonable time.

Conditions

In this case, Tanya will point out to the following conditions that made habiting the premises unreasonable.

First, interruption of water. This is an essential service that Larry agreed to provide that was interrupted frequently. This happened once in November and during the week between December 5 and December 12 the interruption lasted for one entire week.

Second, interruption of elevator service. Tanya is on the 12th floor of a 20 story office building which makes the elevator service essential to the lease since trekking twelve floors is an unreasonable condition in a commercial building.

Third, interruption of heat and electricity. These services were interrupted frequently and once for as long as one whole week.

These constant interruptions of services made it impossible for Tanya to conduct her business.

Larry's Knowledge

Additionally, Tanya informed Larry immediately about the conditions and he admitted he was aware about them and doing everything he could to repair.

Larry Remedied the Situation?

However, Larry will argue that he fixed the problems and therefore Tanya no longer had a claim to constructive eviction. Ever since December 12 up to February 28, for an entire six weeks there were no longer any problems in the leased premises.

Did Tanya move out in a reasonable amount of time?

Furthermore, Larry will point out that Tanya did not move out within a reasonable time since she waited six weeks.

She gave herself this amount of time to give herself ample opportunity to locate alternative office space.

This behavior is contrary to the contention that the premises were in such bad condition and that Tanya moved out within a reasonable time.

Implied Warranty of Habitability

This doctrine only applies to residential leases. Under this doctrine a landlord warrants that the premises are suitable for human habitation.

However, the lease between Tanya and Larry is for an office suite, which is commercial in nature, and as such this doctrine is inapplicable.

Breach of Covenants – Right to Termination of Lease

Tanya could also possibly terminate the lease if the breach of any covenants gives her the right to do so under the terms of the lease.

Usually, the covenants between the landlord and tenant are independent, making the breach by one giving rise simply to damages, and not a right to terminate.

However, in this case, Larry breached his covenant to provide essential services, by failing to supply running water, heat, electricity for a period as long as one week. Therefore, under the terms of the lease Tanya may have a right to terminate.

III. Damages

Finally, if Tanya is unsuccessful in arguing that she had a right to terminate the lease she will try and lessen her damages by pointing that Larry did not mitigate his damages.

A landlord has a duty to mitigate damages by promptly reletting the premises.

In this case, Larry knew that Tanya was going to be gone by February 28. However, he did nothing to relet the premises until April 15, which is a duration of six weeks.

It only took Larry two weeks to find a new tenant when he decided to relet.

If he had done so earlier he could have relet the premises for April.

Therefore, Tanya should not be liable for rent for April.

Answer B to Question 1

1. Larry's claim against Tanya for March and April rent

Rental Agreement

Larry and Tanya entered into a written lease agreement. A periodic tenancy is a lease agreement in which the tenancy is for periods of time as determined by the cycle of payments. A periodic tenancy can be created expressly, by written agreement, or by implication. Moreover, a periodic tenancy can be terminated by providing the landlord with notice of intent to terminate the lease, in which the notice is given to the landlord at least one period in advance.

Here, Larry and Tanya entered into a lease agreement for a month-to-month lease, with rent payable at \$500 monthly. Moreover, although the landlord need not assume general repairs for the tenancy space, here Larry agreed to provide essential services to Tanya's suite. This lease agreement is valid.

Tanya's proper termination?

To terminate a periodic tenancy, the tenant must provide a reasonable period of notice, at least one period in advance. The termination notice must be in writing. Larry argues that Tanya's attempt to terminate the lease was improper because she orally terminated the lease, rather than provided written notice of her intent to terminate the lease. As a result, if the termination notice should have been in writing, Tanya's termination was improper.

Failure to pay rent – Abandonment

Larry will argue that he is entitled to the rent. A tenant has a duty to pay rent. Where a tenant fails to pay rent and abandons the premises, a landlord may treat the abandonment as a subrent, relet and sue the tenant for damages, and in some minority jurisdictions can ignore the abandonment and sue for damages without attempting to relet the apartment. Here, Tanya failed to pay the rent for the months of March and April. Therefore, Larry will claim that Tanya breached the lease agreement.

2. Tanya's Defenses

Implied warranty of habitability

Tanya may first attempt to argue that the landlord has breached the implied warranty of habitability. The implied warranty of habitability warrants that the premises are suitable for human habitation and basic needs. Where this warranty has been breached, the tenant can choose to move out, repair and deduct the rent from future payments, remain on the premises and sue for damages, or reduce the rent payments. However, the implied warranty of habitability has been held to apply only to residential leaseholds. Here, Tanya is renting a four-room office suite on a 20-story office building. As a result,

because this is clearly not a residential lease but instead a commercial lease, this defense will not resonate with the courts.

Implied warranty of quiet enjoyment

Constructive Eviction

Tanya will argue that Larry breached the implied warranty of quiet enjoyment. The implied warranty of quiet enjoyment is an implied warranty that the landlord will not interfere unreasonably with the tenant's use and possession of the premises. This warranty can be breached by both an actual and a constructive eviction. To make a claim for a constructive eviction, and for this warranty to be breached, there must be substantial interference caused by the landlord (or of which the landlord had noticed but failed to act), the tenant must provide notice of the interference and problems, and then the tenant must move out immediately. Where this warranty is breached and a constructive eviction has occurred, the tenant may leave immediately and terminate all future payments of rent.

Here, Larry's failure likely reached the level of substantial interference with Tanya's use. Tanya for many days did not have running water, clearly an essential service. In fact, this occurred at least more than once and occurred for periods of up to one week. Moreover, Tanya was deprived of heat during the winter months of November and December, making it difficult to use the premises without Tanya making substantial sacrifices for warmth. The electrical services were interrupted on three occasions, sometimes lasting for a week: in a commercial office building, failure to have electrical services clearly makes running an office or other commercial space difficult. She would likely have been unable to run the computers, printers, and other important office equipment necessary for the functioning of a viable office environment. As a result, it is likely that there was substantial interference with Tanya's use and possession. Larry may attempt to point out that Tanya did not leave the apartment until months after these problems, suggesting that Tanya was okay with the interference and that it did not disrupt her business substantially. Nevertheless, on this prong, it is clear that weeks without heat and services are clearly substantial interference.

Here also Tanya made complaints to Larry. They were timely: she made them immediately. And she made them in each instance after each particular problem. Larry was clearly on notice. Although Larry will attempt to claim that he "was doing all he could to repair them," and that he was therefore not responsible for the failures, the facts nevertheless suggest (as in the paragraph before) that Larry's failure to take action or improve the situation resulted in a substantial interference.

As mentioned above, the tenant must move out immediately. Here, Larry may attempt to claim that Tanya did not move out within a fast enough period of time. Tanya was apparently fed up with the failures to provide essential services on December 12, yet she failed to leave her office suite until February 28, 2007. This suggests that perhaps the interference was not that substantial. Moreover, it also suggests that there was not indeed a constructive eviction. However, Tanya will point to the need to find alternative office

space. She will argue that, although there was substantial interference with her ability to use her commercial space, still having some space was better than not having any at all. Nevertheless, Larry may have a good claim that this was not indeed a constructive eviction because this element was not met. Tanya did not leave her apartment immediately, and therefore cannot claim a constructive eviction.

As a result, given Tanya's failure to move out immediately, a court may find that Tanya cannot defend that she was constructively evicted.

Breach of Contract

Tanya will claim that by failing to provide essential services, Larry breached his lease agreement, which is a breach of contract. A landlord and his tenant are in contractual privity. Although a landlord at common law did not have duty to repair the leased office space, a landlord can specifically contract to provide such repairs. Where the landlord provides such repairs, he will be liable for any unreasonable failures to do so. Where the express promise to repair does not occur, the failure will be deemed a breach, especially where the tenant to receive her benefit of the bargain.

Here, Larry contractually agreed in the lease agreement to provide essential services to Tanya's suite. Larry failed to provide essential services as required. Given that Tanya was on the 12th floor of the office building, clearly elevator service would be essential to running an office in a commercial space. Moreover, heat (especially in the winter months of December and November) and running water are essential services, as they are necessary for mere basic human habitation. These failures occurred regularly and for extensive periods of time. As a result, Tanya will be able to claim a breach of the contract.

Independent Conditions?

However, promises in the lease agreement are deemed to be independent. As a result, a breach of one condition generally does not relieve the tenant or landlord of the other obligations in the rental agreement. Here, Larry will argue that although he may have failed to provide some of the essential services, this does not in and of itself relieve Tanya of her obligation to pay rent. Instead, Larry will argue, Tanya had a responsibility to continue to pay rent and sue for any damages she may have suffered.

If Larry is successful on this argument, and indeed Tanya should have continued to pay rent, then Tanya will claim that Larry failed to mitigate his damages.

Failure to Mitigate

Tanya will claim that, even if she had a duty to continue to pay rent, Larry failed to mitigate his damages. Damages for failure to pay rent will be awarded where the damages are foreseeable, causal, unavoidable, and certain. Unavoidable requires that the non-breaching party take reasonable steps to mitigate any losses he may have suffered. Where a person has abandoned the premises and fails to pay rent, the landlord must

attempt to relet the apartment. Then, it will be appropriate for the landlord to sue for the difference between the initial lease payments and the payments made by the reletter, as well as any incidental damages.

Here, Tanya will claim that Larry failed to take reasonable steps to mitigate. Although Larry was aware on December 12 that he would need to find a new tenant on February 28 – more than a month and a half away – Larry still failed to attempt to relet Tanya's vacant suite until mid-April. Therefore, although Larry had substantial lead-time, he waited more than a month after Tanya vacated to even attempt to find someone else. Moreover, the second he attempted to find someone else, he was able to, as evidenced by the fact that between April 15 and May 1, he had already found a new occupant. Given the immediacy with which he was able to find a new tenant, and given the fact that he also had a month and a half of lead time before Tanya moved out, Tanya will win on her claim that Larry failed to mitigate his damages.

As a result, even if Tanya is liable for some of the rent on the arguments above, Tanya will not be required to pay the full rental price.

Question 2

Manufacturer designed and manufactured a “Cold Drink Blender,” which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer’s brochure that came with the Cold Drink Blender states that it is “perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas,” and cautioned, “Do not fill beyond 2 inches of the top.”

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

- (1) Consumer’s injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.
- (2) Consumer’s injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.
- (3) The design of the Cold Drink Blender was not defective since It complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

- (4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Answer A to Question 2

Strict Liability Claim

A strict liability claim requires: (1) the defendant to be a merchant, (2) the product was not altered since leaving the defendant's control, (3) the product has a defect, (4) the plaintiff was making foreseeable use of the product, and (5) the defect caused the injuries and damages.

Merchant:

A defendant is a merchant if he is in the regular business of producing or selling the product sold.

In this case, the Manufacturer is in the business of producing and selling the blenders in question. The Retailer is in the business of selling the blenders. Thus, both the Manufacturer and the Retailer are merchants.

Not Altered:

There is no evidence to indicate that the blender was altered or tampered with since leaving either the Manufacturer's control or the Retailer's control.

Defect:

There are three types of defects: manufacturing defect, design defect, or failure to warn.

A manufacturing defect is a defect that makes the particular unit defective compared to all other produced units. In this case, there is no evidence that Consumer's unit is any different from other units.

A design defect is a defect that is inherent in the design of the product. It can be shown through the existence of an alternative design that can be implemented effectively to reduce the risk without adding too much cost to the product.

In this case, Consumer has shown that there is a design for a locking mechanism on the cover that can prevent the injuries here. Thus, unless the cost of producing the locking mechanism is prohibitively high, Consumer has established a design defect.

Failure to warn is a defect that occurs when a merchant knows of a defect, but fails to warn of it.

In this case, Manufacturer can argue that it has provided warning in the instructions to not fill the blender to within 2 inches of the top. However, Consumer can argue that the warning is not conspicuous such that a reasonable person would be able to see it. Further, the warning is not adequate to warn of the consequences of the action. Lastly,

while the manufacturer knows that the design is unsafe for hot content, it did not warn specifically against hot content. There, there is a good case for failure to warn also.

Foreseeable Use:

The plaintiff must be using the product in a foreseeable fashion, but need not be using the product in a manner as the producer intended to be used.

In this case, while Manufacturer intended to produce the blender for cold drinks only, Consumer can argue that it is entirely foreseeable that someone may use it for hot contents as well.

Causation:

Causation requires both factual causation and proximate cause.

There is factual causation for injuries based on the defects. Consumer can argue that “but-for” the lack of adequate warning or the lack of a hatch on the cover, Consumer would not be injured.

As for the proximate cause, Manufacturer can argue that the causation was not liable because Consumer was not making foreseeable use of the product. Therefore, Consumer’s own negligence is an unforeseeable intervening cause.

On the other hand, Consumer can argue that it is entirely foreseeable that a consumer may want to use the blender for hot contents, or that the consumer may fill the blender to near the top. Most other blenders on the market are designed for use with both hot and cold content, so it is foreseeable that someone would use it that way even if it was not intended to be used that way.

Because Consumer’s use is foreseeable, there is proximate causation also.

Damages:

Consumer showed that he has suffered damages in being severely burned.

Negligence:

Negligence requires: (1) duty, (2) breach of duty, (3) causation, and (4) damages.

Duty:

Under the majority Cardozo (“zone of danger”) theory, duty is owed to all who may be foreseeably injured. Under the minority Andrews theory, duty is owed to everyone in the world.

In this case, by producing the blender and selling the blender, it is foreseeable that a consumer could be injured. Therefore, Manufacturer and Retailer owe a duty to Consumer under either theory.

Breach:

The standard of care is that of a reasonably prudent person. In cases where a reasonable person has superior knowledge of a fact not known by others, that person is held to the standard of a reasonable prudent person with the superior knowledge.

In this case, Manufacturer has the knowledge that the blender may cause danger if filled too close to the top. Therefore, Manufacturer is held to the standard of a prudent person with this special knowledge.

Retailer is held to the standard of a reasonably prudent person, assuming that he has no special knowledge.

Causation and breach are similar to those above for strict liability and not repeated here.

Manufacturer's Motions:

Typically, for a motion to dismiss, the evidence is viewed in the light most favorable to the non-moving party. With this principle in mind, and the general elements for strict liability and negligence in mind, I will analyze each of Manufacturer's motions.

(1) Motion to dismiss because of the Consumer's misuse:

For the strict liability claim – as discussed above in the elements for the strict liability claim, strict liability is attached when the defendant is making foreseeable use of the product. As discussed above, Consumer's use of the blender – filling it to the top and using hot contents – is foreseeable even if it is not intended by Manufacturer. Since consumers of blenders typically use it for both hot and cold contents, and some models allow contents to be filled to the top, it should be foreseeable that Consumer would use it that way. Therefore, Consumer's misuse does not relieve Manufacturer of the strict liability claim.

For the negligence claim: Duty is owed to all those who may be injured. Therefore, Consumer's misuse of the product does not relieve Manufacturer for its duty towards Consumers. As discussed above, the injury was caused by the blender and the injury was foreseeable. Therefore, the causation element is satisfied as well. Hence, as discussed above, whether Manufacturer is liable depends on if breached its duty towards Consumer, judged by the reasonable person standard with similar specialized knowledge. Hence, Consumer's misuse by itself does not relieve of the negligence claim.

Defense of Contributory Negligence:

In jurisdictions following the contributory negligence rule, any negligence on the plaintiff's part relieves the defendant of liability. If the case is tried in such a jurisdiction, Manufacturer could argue that Consumer was negligent in using a blender for cold drinks, as implied by its name, for hot soup. Thus, if the jury finds the consumer to be negligent, this would relieve Manufacturer of liability.

It is noted that Manufacturer is moving for dismissal here. Hence, Consumer's contributory negligence is a question of fact to be tried. Consumer is not negligent per se for using a blender with a name implied for cold drinks for hot soup. Therefore, even if they are in a contributory negligence jurisdiction, Manufacturer is still not entitled to dismissal.

It is also noted that this is only a defense for the negligence claim. The strict liability claim is strict liability, thus is not open to contributory negligence defenses.

Assumption of Risk:

The manufacturer can argue that consumer assumed the risk by operating the blender in a dangerous fashion, in contrary to common sense and the instruction. Therefore, the consumer assumed the risk of injury, and this relieves Manufacturer of liability.

In this case, while the Manufacturer implied that the blender is good for cold drinks by naming it the "Cold Drink Blender" and specifying that it is "perfect for cold drinks", Manufacturer has not warned that the blender could cause injuries if used for hot drinks. Further, while Manufacturer said it is perfect for cold drinks, it did not specify it cannot be used for hot drinks.

Therefore, Consumer can argue that since there is no warning of the risk while using the blender for hot drinks, and the warning is not apparent to a reasonable person, Consumer has not assumed the risk by using the blender for hot soup.

Defenses of Comparative Negligence:

In a comparative negligence regime, the liability of the defendant is reduced through the relative negligence of the plaintiff.

In this case, even if the plaintiff is negligent, this would only amount to a reduction of damages. This defense does not entitle Manufacturer to dismiss the claim.

(2) Motion to dismiss because of the Consumer lack of care:

Consumer's lack of care would amount to evidences used to establish that Consumer was negligent in operating the Blender.

For the strict liability claim: Under the strict liability claim, Manufacturer is strictly liable if all the elements are proven. (See elements above). Thus, Consumer's own lack of care, amounting to negligence on the consumer's part, is irrelevant to Manufacturer's liability under the strict liability theory. The assumption of risk doctrine is applicable, but fails here. (See discussion above.)

For the negligence claim: See discussion above for contributory negligence, comparative negligence, and assumption of risk. As discussed above, none of these theories allow Manufacturer to dismiss the claim.

(3) Motion to dismiss because there is no defect:

For the strict liability claim: As discussed above in the elements for strict liability, there is evidence that could lead a jury to believe there is a design defect or a failure to warn defect.

In this case, while evidence that Manufacturer's design complied with regulations could be evidence towards proving there are no defects in the locking mechanism, it does not establish conclusively there is no defect. Further, this does not resolve the question over the failure to warn defect (whether the warning was conspicuous enough).

As discussed above, in a motion to dismiss, the evidence is viewed in light most favorable to the non-moving party. Thus, because there is some evidence of defect, and the evidence of compliance with regulation is not conclusive on the question of defect, the motion to dismiss should be denied.

For the negligence claim: As discussed above, the standard of care is measured by a reasonably prudent person with similar specialized knowledge. Therefore, compliance with regulation does not relieve Manufacturer of either the duty or the standard of care.

It is noted that if the regulation is violated, Manufacturer could be held as negligent per se. However, the inverse is not true. Therefore, motion to dismiss for the negligence claim should be denied also.

(4) Retailer's Claim:

For strict liability: As discussed above (see above), the claim of strict liability just requires Retailer to be a merchant that put the article in the stream of commerce. There is no requirement for the Retailer to take part in designing or manufacturing. Thus, the motion to dismiss should be denied.

It is noted that Retailer could get indemnification from Manufacturer if they are held jointly liable, and Manufacturer is the negligent party.

For negligence: As discussed above, the standard of care for Retailer is that of a reasonably prudent person. Thus, under this standard, whether or not Retailer took part

in the design, whether it is negligent or not depends on what other reasonably prudent persons would have done (such as inspection and testing). Thus, the fact that Retailer took no part in the design or manufacturing does not relieve it of its negligence claim. Therefore, motion to dismiss should be denied also.

Answer B to Question 2

Strict Products Liability

Consumer's lawsuit against Manufacturer seeks to recover on a strict products liability theory. In order to establish such a claim, the consumer must demonstrate that (1) the defendant is a merchant, (2) there was either a design or manufacturing defect in the product, (3) the product was not altered after leaving the merchant, (4) the product caused the plaintiff's injury, and (5) the customer was using the product in a foreseeable manner.

In this case, the Manufacturer was a merchant because it was the company that designed and manufactured the product at issue. It then sold this product to retail stores. The Retailer was also a merchant because it presumably made its business by selling these types of appliances to consumers. There is nothing in the facts that indicate that the retailer was not a merchant of similar products in the course of its business.

Consumer must also assert that this product had a defect. A design defect is a flaw in the design of a product that makes it unreasonably unsafe. If there is a way to reasonably make the product more safe without lessening the utility of the product or prohibitively raising costs, then it may have a design defect. Additionally, the presence of the design defect must be the cause of the plaintiff's injury. Here, Consumer argues that there was a design defect because the blender did not include a locking cover. The absence of this safety feature was the cause of her injury, because if it had been in place, the top would not have come off and she would not have been burned by the hot soup. Consumer must demonstrate that installing such a lock would have been reasonably feasible, and would not impinge on the utility or costs of the blender. She could point to other blenders that have similar safety devices or the development of such devices in similar small appliances. Since installing a small lock would not be unduly costly and is generally available on blenders, then the product was defective because it lacked this reasonable safety feature. Additionally, the causation element is met because but for the omission of this feature on the blender, Consumer would not have been injured in this way. The lock would have prevented her injury.

Consumer must also demonstrate that the product was not altered once it reached her in the chain of commerce. There is nothing in the facts to indicate that upon leaving the manufacturer or the retailer, the blender was changed in any way, thereby satisfying this element.

Consumer will have the most difficulty in proving that she was using the product in a foreseeable manner. A plaintiff may recover if she can demonstrate that her use was foreseeable, even if it was not the use intended by the manufacturer. The defendants in this case will argue that they should not be liable because Consumer's use of liquefying vegetables for a hot soup was not foreseeable. The product was clearly called the "Cold Drink Blender" and marketed itself as a tool for making cold drinks and crushing ice. Consumer will counter this by pointing out that although the regular use of all blenders may be to crush ice or make daiquiris, it is certainly foreseeable that a person may also

decide to make other uses of the blender. There is no reason why a person would think that the blender was not fit to handle hot soups, and so she should not then be deemed to be using the product outside of its foreseeable use.

Under the above analysis, the Consumer can properly allege a prima facie case of strict products liability against both the Manufacturer and Retailer. The specific items in each motion to dismiss will be further discussed below.

Negligence

Under a negligence action based on products liability, a plaintiff must allege that there was a (1) duty of care, (2) that was breached, (3) the breach was the actual and proximate cause, of (4) harm suffered.

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions. Consumer will argue that the defendants breached this duty because it was unreasonable to manufacture and then sell a blender that did not have a locking feature. She will try to point out that a reasonably prudent manufacturer would not create a blender that did not have a lock, relying on evidence of commonly-held expectations of the marketplace when people make, sell, and buy blenders.

In order to show actual cause, the Consumer must show that but for the defendants' breach of duty, she would not have suffered her injury. She will argue that if they had not breached their duty and had included a lock, she would not have been burned. Additionally, she must show that the breach was the proximate cause of her injury. A breach is the proximate cause of an injury when a person is in the zone of danger created by the breach. It was foreseeable to the manufacturer or retailer that upon buying a blender without a safety lock, the top could fly off and a person could be injured. Consumer was in the zone of danger since it was foreseeable that her injury would be caused in this manner due to the lack of the safety device.

Finally, Consumer must show that she suffered damages as a result of the defendants' negligent act. Here, Consumer was severely burned by the hot soup. She suffered a personal injury.

Under the above analysis, the Consumer can likely establish a prima facie case of negligence. Specific defenses and the issues of each motion to dismiss are addressed below.

Manufacturer's Motion to Dismiss

1. Consumer's Injury Caused by Her Own Misuse

The manufacturer argues that it should not be liable because the Consumer herself misused the product. This argument goes to the prong of strict products liability requiring that a consumer's use be foreseeable. Under the above discussion, it was

foreseeable that a person who buys a blender would use it for many different blending purposes, not solely mixing cold drinks. Simply because you purchase an item that is labeled as a cold drink blender would not make a reasonable person believe that they could only use the product to blend cold items. Blenders are multi-purpose appliances and generally used to mix and blend a variety of products, including vegetables for a hot soup. Accordingly, it would be foreseeable that the Consumer would use the product in this way, and so the Manufacturer cannot rely on her misuse to avoid liability. Under the same analysis, the manufacturer would not prevail if it claimed that its breach was not the proximate cause of her injury because the injury was unforeseeable. It would be foreseeable that a person would use this blender for hot and cold products, so a person being burned by the contents leaking out when the top flies off would not be so unforeseeable as to defeat a finding of proximate cause.

The Manufacturer will also argue that the misuse of the product was negligent by the consumer. Under the traditional rule, contributory negligence could serve as an absolute bar to recovery on a negligence of products liability action. If the plaintiff herself was even slightly negligent, then all recovery could be barred. Under the modern rule of comparative negligence, recovery can be reduced proportionally according to the amount of negligence on the part of each party. If it was negligent for Consumer to use the product with hot soup, then Consumer's recovery may be limited. It will point out that even if it is foreseeable to use the blender for things other than cold drinks, pouring in hot soup that had the ability to severely burn a person was itself an unreasonable act.

Under the modern rule, this argument could successfully limit the amount of damages recovered by Consumer. However, the court should deny the motion to dismiss based on this ground because it does not negate the elements of strict products liability, negligence, or serve as an affirmative complete defense.

2. Consumer's Injury Caused by Her Own Lack of Care

The Manufacturer also asserts that consumer was negligent in that she overfilled the blender and then operated it at a high speed. The blender came with a warning cautioning a user not to fill beyond two inches of the top. The manufacturer will argue that by failing to observe this warning, the consumer was herself not making a foreseeable use of the product and was herself negligent.

A warning on a product cannot completely shield a manufacturer from a products liability claim. It would be foreseeable that despite this warning, a user would fill a blender close beyond two inches from the top, and then use it at the highest speed set on the machine. Such a use is likely common, and therefore should have been foreseen by the manufacturer. Accordingly, the Manufacturer cannot discharge all of its liability by claiming that the warning shielded it from an injury caused by this use. It was foreseeable that a consumer would use the product in this way, meaning that this use does not discharge the elements of a products liability or negligence action.

Again, the Consumer's lack of care may limit the amount of damages recovered on a

comparative negligence theory. Under the discussion above, since it was likely unreasonable for the Consumer to fill the blender to the brink with hot soup, then under the modern rule, her recovery should be proportionately reduced due to her negligent actions. The court should deny a motion to dismiss on this ground.

3. Design Not Defective

The Manufacturer finally asserts that the design was not defective since it complied with federal regulations. Compliance with government regulations is evidence of lack of a defect, but it is not conclusive. A manufacturer may still be liable for a design defect or negligence even if it comports with regulations. Even though the Consumer Products Safety Commission may not at this point require any locking mechanism, it may be unreasonable for the Manufacturer not to include the lock, on the basis of the current knowledge in the industry. A manufacturer cannot hide behind official regulations to avoid liability. If it was minimally costly to include the lock and did not effect the utility, then the lack of a lock can be deemed a design defect. Also, if it was a breach of duty to consumers not to include the lock, then its failure to provide one may be a negligent act by the Manufacturer.

Accordingly, the court should deny a motion to dismiss on this ground.

Retailer's Motion to Dismiss – No Part in Manufacture

The Retailer asserts that it should not be liable to the Consumer because it was not the party who manufactured the blender. In a strict products liability action, any link in the distribution chain may be liable. The fact that the Retailer did not design or make the blender will not shield it in this action. The Consumer need only establish the elements of a strict products liability are met and the Retailer may be held equally as liable as the Manufacturer.

Here, the Retailer was a merchant because it regularly dealt in the sale of these kinds of goods. The design was defective, under the analysis above. The machine was not altered once it left the Retailer's premises. Finally, the Consumer's use of the product was foreseeable. Accordingly, the court should not dismiss the strict products liability suit against the Retailer.

If the Retailer is held liable in the strict liability suit, it may seek indemnification from the Manufacturer. Indemnification is available when a party is held liable for injuries suffered by a plaintiff, but another party's actions are actually the cause of the injury. Since the Retailer was not responsible for the design defect and the Manufacturer was responsible, the Retailer should be able to recover any amount of damages it owes to the Consumer from the Manufacturer.

Retailer must also argue that it was not negligent, so that claim should be dismissed. Consumer may argue that Retailer breached its duty by not inspecting the item and discovering its defect, that failure to inspect was unreasonable, and that it caused her injuries. This is a more attenuated theory than the negligence action against the

Manufacturer. A Retailer should not be held responsible for inspecting every product that is properly packaged and labeled for sale in its own store. Although it may be held liable on a strict liability theory, there was likely no actionable negligence by the Retailer. Accordingly, the claim of negligence against the Retailer should be dismissed.

Question 3

Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

(1) Mechanic commented to Helper, “Dave had better get these brakes fixed. They look bad to me.”

(2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: “Inspected brakes — repair?”, which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.

(3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, “I think your brakes are bad. You’d better get them fixed.”

(4) Dave responded, “I am not surprised. They’ve felt a little funny lately.”

(5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: “The sports car ran the red light and ran into the truck.”

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly’s complaint alleged that the accident was caused by the sports car running the red light because the sports car’s brakes failed. Polly’s theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items (1) through (5) above, and she also offered into evidence the work order referred to in item number (2). Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers (1) through (5), including the work order referred to in item number (2)? Discuss.

Answer A to Question 3

Polly v. Dave

(1) “Dave had better get these brakes fixed”

Logical Relevance

Only relevant evidence is admissible. Evidence is logically relevant when the evidence has some tendency to make a fact of consequence to the litigation more or less probable than it would be without the evidence.

Here, Polly alleges that her accident with Dave was caused by his car’s brake failure. Thus, a statement that the brakes looked bad would be relevant for purposes of establishing that the brakes were bad. However, because Polly’s theory of liability is negligence, and that Dave knew or should have known that the brakes were bad, anything that Mechanic said to Helper is irrelevant for showing that Dave had knowledge. Thus, the logical relevance of the statement is minimal.

Legal Relevance

Otherwise legal evidence may be inadmissible where the probative value of the evidence is substantially outweighed by the risk of unfair prejudice to the defendant, confusion of the jury or the issues, or waste of time.

Nothing about this evidence would be prejudicial. However, it may confuse the jury, again because Polly’s claim is in negligence and thus any statement that Dave did not hear would have no bearing on his knowledge of the defect of the brakes.

Personal Knowledge

A witness can only testify about that which they have personal knowledge. This is true for the testifying witness, as well as for the declarant in any hearsay statement.

Here, Mechanic had personal knowledge of the condition of Dave’s brakes, because he was conducting the inspection. Further, Helper heard Mechanic’s comment, and so had personal knowledge of what Mechanic said.

Hearsay

Hearsay is an out-of-court statement, admitted for purposes of the proving the truth of the matter asserted. Hearsay is inadmissible unless exempt or unless an exception applies.

Mechanic’s comment to Helper was made out of court, and is being introduced for purposes of showing that the brakes were bad. Thus, the statement is hearsay.

Present Sense Impression

A statement made concerning one's observations or impressions, made while or immediately after the observation or impression, is admissible as a hearsay exception.

Here, Mechanic made the statement while servicing Dave's sport car. Thus, the "They look bad to me" statement, which concerned his impressions of Dave's brakes, was made simultaneous to his visual inspection and thus admissible as a present sense impression.

State of Mind

A statement made concerning one's then present state of mind is admissible as a hearsay exception.

Here, because Mechanic was a mechanic, he was aware of the dangers posed by faulty brakes. Thus, when he said that "Dave had better get these brakes fixed, "he likely had the mental thought that they posed a risk to Dave and other drivers, and was speaking as to his knowledge that Dave needed to get the brakes fixed.

Thus, the statement should probably not be admitted, because the probative value is low because the statement has nothing to do with Dave's knowledge or lack thereof of the condition of his brakes.

(2) Work Order – "Inspected brakes – repair?"

Logical and Legal Relevance

Assuming that Dave received the work order, the "Inspected brakes – repair?" language would have a great tendency to make it more relevant that Dave had knowledge of the defective brakes than it would be without the work order. There is no risk of unfair prejudice to Dave, because there is nothing prejudicial about a work order. Further, given the highly probative value of the statement, there is no risk of confusing the jury or wasting judicial resources.

Totem Pole Hearsay

Where a piece of hearsay evidence contains other pieces of hearsay evidence, each statement must fall within an exception in order to be admissible. Here, because both the work order and Mechanic's statement to helper, which was recorded on the order, were made out of court and are being admitted for their truth, they are hearsay. If either statement is inadmissible, the whole piece of evidence is inadmissible.

Business Record Exceptions / Work Order

Information recorded in a business record is admissible under a hearsay exception where the information was recorded by somebody under a duty to record or report such

information, by somebody with personal knowledge of the information, and when the record was kept in the ordinary course of business (that is, the record may not be prepared in anticipation of litigation).

Here, Helper was assisting Mechanic, and Mechanic instructed Helper to write on the work order, “Inspected brakes – repair?,” and Helper did. Thus, Helper was under a duty to record such information. Given that this was a mechanic shop, preparing work orders is likely a part of the ordinary course of business. Further, Helper had personal knowledge of Mechanic’s statement, because he heard Mechanic say it himself and did himself record it in the work order.

Thus, if Mechanic’s statement meets an exception, the whole piece of evidence will be admissible.

Present Sense Impression / “Inspected Brakes – Repair?”

Because Mechanic made the statement as or immediately after his inspection of the brakes, it would fall under the present sense impression, because his impression was that the brakes needed repair.

State of Mind / “Inspected Brakes – Repair?”

Additionally, Mechanic would have been speaking as to his knowledge that the condition of Dave’s brakes was bad and that they required repair.

Recorded Recollection

A writing that was prepared by one with personal knowledge of the events contained in the writing, or at the instruction of the person with personal knowledge and adopted by them, and made soon after the event occurred and that was a true and accurate depiction of the events that transpired, is admissible as a recorded recollection.

Here, because Helper prepared the work order the same time as he heard Mechanic speak, the work order was likely a true and accurate record of what was said, and thus the writing will be admissible as a recorded recollection.

Best Evidence Rule

Where a witness is testifying as to the contents of a writing, and those contents are in fact at issue, the best evidence rule requires that the writing be admitted into evidence unless it has been lost or destroyed not due to any intentional misconduct of the party seeking to introduce the evidence.

Here, because Helper is testifying as to the contents of the work order, if the work order is available it should be admitted into evidence as the best evidence. If the work order that was provided to Dave is being introduced for purposes of showing that he knew or should have known that his brakes were bad, the best evidence rule is definitely

implicated. However, if it is unavailable, Helper would be permitted to testify as to the contents of the work order, if he remembered the words that were written (which he does not here remember).

Refreshing Recollection

If a witness did before have personal knowledge about something, and is simply unable to recall the specifics while on the stand, anything may be shown to the witness for the purposes of refreshing their recollection. Once the witness's memory is refreshed, the item that was shown to them must be taken away, and the witness must then testify from their refreshed memory. The item shown must be provided to the other party at their request.

Here, if the work order is available, it may be shown to Helper for purposes of refreshing his recollection as to the words that he wrote on the work order.

Thus, the work order should be admitted. Helper's testimony as to what Mechanic said should not be admitted, because it is not relevant for purposes of showing that Dave did or should have known of the condition of his brakes.

(3) "I think your brakes are bad."

Logical and Legal Relevance

Information that Mechanic told Dave that his brakes were bad would be extremely probative for purposes of establishing that Dave knew or should have known that his brakes were bad, which is the basis for Polly's complaint against Dave. Whether or not Dave had actual notice is very much a fact of consequence, because Polly's entire negligence claim will turn on Dave's knowledge of the conditions of his brakes. Thus, given the highly probative value, there is no likelihood of confusing the jury or wasting judicial resources.

Personal Knowledge

Because Helper heard the statement to Dave, he has personal knowledge of the contents of the statement.

Hearsay

Mechanic's statement to Dave is being admitted for purposes of establishing its truth, that Dave's brakes were bad. Thus, the statement is hearsay.

Effect on Hearer

One non-hearsay use for out-of-court statement is to show effect on the hearer – the statements are thus not admitted for the truth of the matter asserted. Here, even if

Mechanic's statement were not being admitted for its truth, it would be admissible as non-hearsay for purposes of demonstrating its effect on the hearer, or the effect on Dave, to show that he had been told that his brakes may be bad.

Thus, this statement should be admitted.

"I am not surprised. They've felt a little funny lately."

Logical and Legal Relevance

Against, because Polly's claim against Dave is in negligence, any evidence that Dave knew or should have known that his brakes were defective is highly probative of establishing that Dave was negligent, as the ordinary reasonable prudent person would either have their brakes inspected by another mechanic, have their brakes repaired, or cease driving the vehicle upon learning that their brakes were bad. Further, that Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the brakes felt funny himself, he had actual knowledge that they may be bad and thus any statement from Dave that they were bad should only have made it more apparent to Dave that he needed to have them repaired.

Although this statement is extremely bad evidence for Dave's position and extremely good for Polly, the mere fact that evidence is bad for one's case does not make the evidence unfairly prejudicial.

Personal Knowledge

Because Helper heard Dave's statement to Mechanic, he had knowledge of its contents.

Hearsay

The statement is hearsay because it is being admitted for its truth. If Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the breaks felt funny, he had actual knowledge that they were bad.

Admission of a Party Opponent

An admission is a statement made by a party to the litigation being admitted into evidence against the speaker, by the opposing party to the litigation. It is non-hearsay as an exemption under the Federal rules of evidence.

Here, because Dave is a party to the litigation, and because his adversary in the litigation, Polly, is admitting the statement against him, it is an admission of a party opponent.

Circumstantial Evidence of State of Mind

Circumstantial evidence of the speaker's state of mind, such as knowledge of circumstances, is non-hearsay under the Federal rules.

Here, the statement shows that Dave had knowledge that his brakes were or may be bad. Thus, the evidence is admissible for purposes of demonstrating Dave's state of mind at the time he made the statement to Mechanic.

Thus, this statement should be admitted.

(5) "The sports car ran the red light and ran into the truck."

Logical and Legal Relevance

That Dave ran the red light and crashed into Polly's truck is extremely probative for purposes of establishing that Dave was at fault in the accident. The evidence is extremely probative for that purpose. However, it does not appear to be a very important fact of consequence that Dave ran through the red light or crashed into Polly, because in fact it seems that these facts have been established. As the real issue here is Dave's negligence, and particularly whether he knew or did not know that his brakes were bad, it may confuse the jury to introduce evidence as to the cause of the accident.

Personal Knowledge

Because Helper heard the bystander's exclamation, he has personal knowledge of its contents.

Further, based on the contents of bystander's exclamation, it is apparent that he had personal knowledge of the facts exclaimed to.

Hearsay

Because of the bystander's exclamation is being admitted for purposes of showing that Dave ran through a red light and crashed into Polly's truck, it is hearsay.

Excited Utterance

A statement made while or immediately after an exciting event, while the declarant is still under the stress of the exciting event, is admissible under a hearsay exception.

Here, witnessing an accident is an exciting event, because it is extremely loud; whenever a person hears an automobile accident, they jump up to see if there is anything that they need to do to help those involved in the accident. As the statement was made immediately after Helper heard the sound of the collision, the declarant was likely under the stress of the event and thus is admissible as an excited utterance.

Present Sense Impression

Additionally, the bystander was attesting as to what he had visually witnessed moments before his exclamation, and the statement would be admissible as a present sense impression because it related to something that the bystander had just moments before witnessed.

Thus, this statement should be admitted, because although there is a chance of confusing the jury, Polly is entitled to prove that Dave did run into her with his car and not simply litigate the matter of his negligence with regard to the brakes.

Answer B to Question 3

Polly v. Dave

Proposition 8 is a Victim's Bill of Rights that is incorporated into the California Constitution. Therefore, in all criminal cases, all relevant evidence will be admitted, subject to a few exceptions. Here, because this is a civil case, the rules of Proposition 8 are inapplicable.

1. Mechanic's comment to Helper, "Dave had better get these brakes fixed. They look bad to me."

Relevance

In order for evidence to be admitted, it must be logically and legally relevant to the case.

Logical Relevance

Under the FRE, evidence is logically relevant if it tends to make any fact of consequence more or less probable than without the evidence. Thus, Mechanic's comment to Helper is logically relevant because it tends to show that the brakes were defective. Under CA rules, evidence is logically relevant if it tends to prove or disprove any fact in dispute. Here, it is unclear whether or not Dave disputes that the brakes were defective. If Dave does dispute that the brakes were defective, then Mechanic's comment to Helper does tend to prove that the brakes were defective. However, if Dave admits that the brakes were defective, but rather is arguing only that he did not know they were defective, then under California rules, this statement would not be logically relevant because it does not prove or disprove a disputed fact.

Legal Relevance

Evidence is legally relevant if its probative value outweighs undue prejudice or undue delay. Here, this evidence is probative to showing that the brakes were broken. And it outweighs any undue prejudice because, even if the brakes were defective, Dave may still argue that he did not know they were defective.

Lay Testimony

Here, Helper's testimony is being introduced as lay testimony rather than expert testimony, because he is testifying to what he heard, not to any observations or work he did on the brakes. Lay testimony must be helpful and based on personal observations. Here, this testimony is helpful to showing that the brakes were broken and Helper did personally hear Mechanic's comments. However, in order to admit this testimony, Helper must take an oath, and in California, this requires Helper to know that he has a legal duty to tell the truth.

Hearsay

Dave will argue that this is hearsay, not admissible under any exception. Hearsay is any

out-of-court statement offered for the truth of the matter asserted. This is hearsay because it is an out-of-court statement made from mechanic to helper, offered to prove that the brakes were broken.

Not for Truth of Matter Asserted

Out-of-court statements are not offered for the truth of the matter asserted, and thus admissible, when they are offered to show: a) effect on the hearer; b) the declarant's state of mind; c) impeach; d) legally operative language; or e) to refresh recollection. Here, there is no indication that Polly is introducing the evidence for any of these purposes.

Offered for Truth of Matter Asserted, but Hearsay Exception

Additionally, out-of-court statements may be offered for the truth of the matter, but be exempt hearsay (in California, all of these are hearsay exceptions, not exemptions): a) prior inconsistent statement, under oath; b) prior consistent statement; c) prior identification; or d) admission by party opponent. Here, none of these are applicable.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Furthermore, hearsay may be admissible if it falls into one of the many hearsay exceptions. One category of exceptions is when the out-of-court declarant is unavailable. "Unavailable" means that the out-of-court declarant (Mechanic) is a) beyond the subpoena power of the court; b) invokes privilege; or c) is dead. Under the FRE, there are two additional times when an out-of-court declarant is considered "unavailable": a) lack of memory; and b) refusal to respond to subpoena. Here, there is no indication that Mechanic is "unavailable", thus, these hearsay exceptions do not apply.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, there are categories of hearsay exceptions regardless of whether an out-of-court declarant is available. Here, Polly may argue that Mechanic's statement should be admitted as a present sense impression.

Present Sense Impression

An out-of-court statement is hearsay within an exception when it is a present sense impression. A present sense impression is a statement describing an event contemporaneously or immediately thereafter. In California, this exception is narrowly construed to only statements made by someone "engaging in" the activity. Here, Mechanic is not describing any event that he is engaging in or observing. Rather, he is making a comment regarding the state of Dave's brakes. Thus, it is not hearsay within any exception.

2. Mechanic's Instruction to Helper to write on work order: "inspected brakes – repair?"

Relevance

Here, the work order is logically relevant because it tends to show that the brakes were broken. Again, if this was in dispute, then in California this would also be logically

relevant. For the same reasons discussed above under section 1, this is also legally relevant.

Best Evidence

Here the best evidence is arguably the work order. This is especially true since Helper is having difficulty remembering what words he wrote on the work order.

Hearsay

Here, this is hearsay within hearsay because 1) Helper did not himself observe the brakes and therefore he was simply writing down what he was instructed to do; and 2) Helper's statement in the work order is an out-of-court statement.

Mechanic's instruction to helper

Again, there is no evidence that Mechanic was unavailable to testify.

Present Sense Impression

Polly may argue that this was a present sense impression. If this was made immediately following Mechanic's inspection of the brakes, they may qualify as a present sense impression. However, in California, they would not because this comment was not made while Mechanic was engaged in fixing the brakes.

Helper's writing in the work order

Helper's writing in the work order "Inspected brakes – repair?" is hearsay within hearsay.

Past Recollection Refreshed

Polly may be able to introduce this as past recollection refreshed. Parties can use anything to refresh the recollection of witnesses. Here, Polly could show Helper the work order to refresh Helper's memory. However, the work order could not be read into evidence. If Helper's memory is refreshed from looking at the work order, then he can testify independently and that will be introduced. However, if Helper's memory is not refreshed by looking at the work order, Polly's counsel may look to past recollection recorded.

Past Recollection Recorded

Past recollection recorded may be admitted if it was made at or near the time of the event while the event was still fresh. Here, it appears that the work order was made immediately after Mechanic inspected the brakes, and Helper immediately wrote it in the work order, and thus it was at or near the time of the event. Therefore, the work order can be read into evidence, but not introduced as evidence.

Business Record

If Polly's attorney wants to actually introduce the work order into evidence, the best way to do so is as a business record. A business record may be introduced if it is made by one with a business duty, it is recorded in the regular course/practice of business, at or near the time of the event, by someone with knowledge, and it is trustworthy. Here, this record was made by Helper, who has a business duty. Additionally, it is likely that these

work orders are made in the regular course and practice of the business. This work order was not made in anticipation of litigation. Helper made the work order per Mechanic's instructions, and therefore it was made by one with knowledge. And there is an overall element of trustworthiness, since neither Helper nor Mechanic were the negligent party.

Therefore, the work order should be admitted as a business record.

3. Mechanic to Dave, "I think your brakes are bad. You'd better get them fixed."

Relevance

Here, Mechanic's statement to Dave is relevant because it tends to prove that Dave knew about his defective brakes. And in California, it would be admitted because it is in dispute whether or not Dave was aware of his bad brakes. Additionally, this is legally relevant because its probative value is very high (it shows that Dave knew his brakes were bad) and its chance for undue prejudice or delay are low.

Lay Opinion

Here, Helper may testify regarding this because this is helpful to the jury and because Helper was present and contemporaneously overheard Mechanic make this comment to Dave.

Hearsay: Effect on Hearer

Here, Dave will argue that this is hearsay not within any exception. However, Polly will counter argue that this is not hearsay at all. Rather, Polly will argue that this is not offered to prove the truth of the matter asserted (that the brakes were in fact bad and that Dave should get them fixed). Rather, this is offered to show the effect on the hearer (Dave). Polly will argue that this is offered to prove that Dave knew (or should have known) that his brakes were defective, and was negligent in driving his car without fixing the problem. Thus, this testimony is not hearsay and should be admitted.

4. Dave to Mechanic, "I'm not surprised. They've felt a little funny lately."

Relevance

This comment is relevant because it tends to show that Dave knew that his brakes were defective and was therefore negligent in driving the car. Additionally, this is logically relevant in California, because it is likely disputed whether or not Dave knew his brakes were defective. Additionally, it is legally relevant because its probative value outweighs any prejudice.

Hearsay

Not for Truth of Matter Asserted

First, Polly will argue that this is not offered for the truth of the matter asserted, but rather to show the declarant's state of mind (that Dave knew that the brakes were defective). Additionally, Polly may want to introduce this later on as impeachment evidence against

Dave if he testifies that he did not have any idea that his brakes were defective.

Offered for Truth of Matter Asserted, but Hearsay Exemption/Exception

Additionally, Polly may try to argue that this is within a hearsay exemption (FRE)/exception (CA) of a) prior inconsistent statement or b) admission by party opponent.

Prior Inconsistent Statement

Here, if Dave testifies that he never knew that his brakes were acting up, Polly may be able to introduce this as a prior inconsistent statement. In California, this would be permitted as a hearsay exception because California does not require that the prior inconsistent statement be made under oath. However, under the FRE, this would not be admitted because it was not made under oath.

Admission by Party Opponent

Here, Polly will try to introduce this as an admission by a party opponent (Dave) that his brakes were defective. As such, it would fall under a hearsay exemption (or exception in California). Here, this is Dave's own admission that he knew that the brakes have been acting oddly, and therefore should be admitted as a hearsay exception.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Additionally, Polly may argue that this is a declaration against interest (against Dave's pecuniary, penal, or social interest (California only)). However, this hearsay exception is only available if the out-of-court declarant is unavailable, and here, Dave is available.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, this may be offered as current state of mind as a hearsay exception.

5. Bystander, "The sports car ran the red light and ran into the truck."

Relevance

Here, this statement is relevant because it shows that Dave was the one that ran the red light and hit Polly. This is likely an issue in dispute, so should also be logically relevant in California. Additionally, this is legally relevant because it has a high probative value that is not outweighed by any undue prejudice.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Present Sense Impression

A present sense impression is one that was made contemporaneously or immediately after an event that describes an event. In California, it is required that the out-of-court declarant be engaged in the event. Here, Bystander made the statement immediately after

the collision and the statement is describing what Bystander saw. However, in California this would not be admissible because the bystander was not engaged in the activity. However, under the FRE, this would be admitted.

Excited Utterance

An excited utterance is one regarding a startling event, relating to the startling event, and made while the out-of-court declarant is still startled. Here, the bystander was discussing a startling event (a car accident), and it was likely made while the bystander was still startled (certainly, it is startling to see a car accident and one would be startled immediately after observing one). Furthermore, the bystander's comments are related to the startling event – the bystander is saying what happened.

Therefore, this statement should be admitted as hearsay within an exception.

Question 4

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: “Listen citizens. Prayer in the schools means government-endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution.”

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.
2. How should the court rule on each ground of Dan’s motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Answer A to Question 4

1. Murder or Any Lesser-Included Offense

Elements of a Crime

The four elements of a crime consist of (i) a guilty act, (ii) a guilty mind, (iii) concurrence, and (iv) causation.

For a person to be found guilty of a crime, the guilty act must be voluntary. Here, Dan appeared to only want to burn the document, not let it go and have it drift away. On the facts, it seems like he only let the document go involuntarily when the heat of the fire burned his hand. So it appears that Dan may not have committed the requisite guilty act. However, if we frame Dan's actions on a broader level, Dan did voluntarily burn the document and set into motion the chain of events leading to the ultimate killing of the pedestrian. The element of a guilty act is satisfied.

As to concurrence and causation, Dan's intentional act of igniting the parchment document set into motion a chain of events: he let go of the burning document, it settled in an open drum of flammable material, and it caused the drum to explode and kill a nearby pedestrian. On the one hand, it appears that there is no proximate causation because it is arguably unforeseeable for someone to die from an explosion as a result of burning a document. On the other hand, courts are generally flexible when it comes to foreseeability, and there is a viable argument that the result was foreseeable because playing with fire is a dangerous activity. A court will probably find causation.

However, what we need to establish is whether Dan possessed the requisite guilty mind. The discussion below addresses this element.

Murder

At common law, murder is the unlawful killing of a human being with malice aforethought, which is established by any one of the following states of mind: (i) intent to kill, (ii) intent to do serious bodily harm, (iii) reckless indifference to an unjustifiably high risk to human life (i.e., depraved heart murder), and (iv) intent to commit a felony underlying the felony-murder rule.

Intent to Kill

From the facts, it does not appear that Dan knew any of the following facts: the nearby presence of the open drum with flammable material, the pedestrian's presence near the drum, or the pedestrian's identity. Therefore, he could not have formed a specific intent to kill the pedestrian. Dan cannot be found guilty of intent to kill murder.

Intent to Do Serious Bodily Harm

On the facts, Dan did not intend to do any harm, let alone serious bodily harm. He was merely burning the document as a form of symbolic speech and probably did not even want to let go of the document.

Reckless Indifference to an Unjustifiably High Risk to Human Life

Dan's act of igniting the document and letting it go did not reflect reckless indifference to an unjustifiably high risk to human life. No reasonable person would think that a burning document could ultimately kill someone. For example, Dan did not carry a dangerous weapon such as a gun and fire it into a crowded room.

Felony Murder

Under the felony-murder rule, a person can be found guilty of a killing that occurs during the commission of an underlying felony that is inherently dangerous, usually burglary, arson, rape, robbery, or kidnapping. Dan did not have the intent to commit any of these felonies.

Lesser Included Offenses

Voluntary Manslaughter

Voluntary manslaughter is an intentional killing committed with adequate provocation causing one to lose self-control. We have already established above that Dan cannot be found guilty of an intentional killing, so we need not determine whether it can be reduced to voluntary manslaughter. In any event, Dan was not even provoked to begin with.

Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing that results either from (i) criminal negligence or (ii) misdemeanor-murder, which is a killing that occurs during the commission of a misdemeanor that is malum in se or inherently dangerous.

Criminal negligence exceeds tort negligence but is less than the reckless indifference of depraved heart murder. Significantly, for a person to be criminally negligent, he must have been aware of the risk. Here, Dan could have been aware of a general risk that results from a fire, which is an accidental burning of another object that occurs from a strong wind carrying the flame. On the other hand, Dan was not aware of the particular risk that an open drum of flammable material was nearby, which could kill someone. Dan cannot be found guilty of criminal negligence.

On the other hand, Dan may be found guilty of misdemeanor-murder, because he committed the misdemeanor of burning or mutilating a copy of the U.S. Constitution, and the commission of the misdemeanor caused the ultimate death of the pedestrian. On the other hand, the misdemeanor was not malum in se and not inherently dangerous. Dan should not be found guilty of involuntary manslaughter.

Conclusion: Dan cannot be found guilty of the crime of murder or any lesser-included offense.

(2) Dan's Motion to Dismiss the Charge of Attempting to Burn a Copy of the U.S. Constitution

(i) What he burned was actually a copy of the Declaration of Independence

Dan is being charged with attempting to burn a copy of the U.S. Constitution, but what he actually burned was the Declaration of Independence. At common law, factual impossibility is not a defense for attempting a crime. For example, if a person intends to shoot another with a gun and the gun happened to be out of bullets, the man is still guilty. However, legal impossibility is a defense to attempt. That is, if what the person was attempting to do was actually not a crime even though he thought it was, then he could not be found guilty of attempt.

Here, Dan's assertion that he actually burned the Declaration of Independence is a claim of factual impossibility. From the facts, we know that he had the specific intent to destroy a copy of the U.S. Constitution, so even though it was factually impossible for him to do it because he was holding the Declaration of Independence, he can still be found guilty of attempting to burn a copy of the U.S. Constitution.

Conclusion: The Court should deny Dan's motion to dismiss based on this ground.

(ii) The state statute on which the charge is based violates his rights under the First Amendment of the Constitution

The First Amendment protects free speech, and it is applicable to the states through the Fourteenth Amendment. The state action requirement is easily met here because it is a state statute making the act of burning or mutilating a copy of the U.S. Constitution a misdemeanor.

Symbolic Speech

Dan's act was a form of symbolic speech. For a regulation of symbolic speech to be valid and not violative of the First Amendment, the law must have a purpose independent of and incidental to the suppression of speech and the restriction on speech must not be greater than necessary to achieve that purpose.

Here, the state statute does not appear to have a purpose independent of and incidental to the suppression of speech. For example, the burning of draft cards was upheld, because it was found that the government has a valid interest in facilitating the draft, and that the suppression of the speech was incidental and no greater than necessary. Here, preventing the burning of the Constitution does not appear to serve any significant government interest other than to prevent people from showing their anger toward the government, which is within their rights under the First Amendment.

Unprotected Speech

The government may attempt to frame Dan's acts as unprotected speech that presents a clear and present danger. Such speech is intended to incite imminent unlawful action and is likely to result in imminent unlawful action, so that the state can regulate it. On the facts, Dan stood on the steps of the state capitol and yelled to a half dozen people entering the front doors while destroying what he thought was a copy of the U.S. Constitution, so arguably, he was trying to incite those people and get them enraged. On the other hand, there was no indication of encouraging harmful acts in his statement and burning a document in and of itself does not promote violence.

Moreover, even if the government can show that what Dan was specifically doing was inciting imminent unlawful speech, the government still cannot show that the state statute at issue is designed to restrain this kind of unprotected speech. The state statute merely bans burning the Constitution, but does not, for example, limit such acts to the steps of the state capitol, where the state might have an argument that doing such acts so close to government activity is dangerous and disruptive. The statute is overbroad and does not strive to only limit unprotected speech that is likely to incite imminent unlawful action.

Conclusion: The Court should grant Dan's motion to dismiss based on this ground.

Answer B to Question 4

Murder Charges Against Dan (“D”)

The first issue is whether Dan may properly be found guilty of murder or any other lesser included offense.

Murder

Murder is defined as the killing of another human being with malice aforethought. In order to be found guilty of murder a Defendant must have committed a voluntary act and must have possessed the requisite mental state at the time of the act. A defendant will be guilty of murder if he committed the act (1) with the intent to kill, (2) with the intent to inflict great bodily injury, (3) if he acted in such a way as to demonstrate a reckless disregard for human life (often termed as having an “abandoned and malignant heart”), (4) or if the murder resulted during the commission of a highly dangerous felony.

Here, D’s act of igniting the document constituted a voluntary act. The fact that the heat of the fire had burned his hand, and caused him to involuntarily let it go does not negate the fact that his act of burning the document in the first place was voluntary. However, an act, in and of itself, is not sufficient to convict D of a crime. The State must also prove that, at the time D committed the act of burning the document, he had the intent to commit murder.

On these facts, it is clear that Dan did not set the document on fire with an intent to kill. While an intent to kill may be inferred in cases where the D uses a deadly, dangerous weapon against a victim (a gun, knife, etc.), that is not the case here. Additionally, D did not act with an intent to inflict great bodily injury on anyone. Instead, his act of burning the paper was done to make a political point to those that were present nearby.

The State may try and argue that Dan’s acts were done with an abandoned and malignant heart because, by igniting the document around individuals, he acted in a way that demonstrated reckless and unjustifiable disregard for human life. The State will not be able to meet their burden of proof under this theory either. Here, D’s act of burning the paper is not the type of act that an individual could expect would lead to someone’s death. The law demands more in order to show a reckless disregard for human life.

Felony Murder Rule

The state may try and argue that D should be convicted of murder based on the Felony Murder Rule (“FMR”). Under this rule, a D is liable for all deaths that occur during the commission of a highly dangerous felony, whether he intended to cause them or not. Instead, the intent is inferred from his intent to commit the underlying felony. In addition, the deaths caused during the commission of the felony must be foreseeable and must result before D has reached a point of temporary safety. Generally, the FMR has been reserved for deaths that occur during highly dangerous felonies, such as rape, arson,

kidnapping, robbery, and burglary.

Here, the issue is whether D can be found guilty of one of these underlying felonies so that the FMR applies. The only one that would be applicable would be the crime of arson. In order to show that D is guilty of arson, the State must prove that D (1) acted with the intent, or was at least reckless, (2) in burning, (3) the dwelling, (4) of another. Here it is clear that D did not intend to burn the nearby construction yard. Instead, the fire resulted because a wind blew the lit paper into an open drum of flammable material. However, the State may try and argue that the act of igniting a document on fire and allowing the wind to carry it away constituted a reckless act. However, the State will also have to prove that D burned a dwelling. Here, the paper did not cause a dwelling to burn, but rather flew into a construction site.

Thus, D could not be convicted of the murder of the Pedestrian based on the Felony Murder Rule because he did not commit a highly dangerous felony.

Voluntary Manslaughter

Voluntary Manslaughter is a killing of another human being while acting under the heat of passion. Voluntary Manslaughter is generally reserved for cases in which the D kills another because of an "adequate provocation". Here, Voluntary Manslaughter does not apply because there was no provocation which would have caused D to act the way that he did.

Involuntary Manslaughter / Misdemeanor Manslaughter

The remaining consideration is whether the State could properly convict D of involuntary manslaughter. Involuntary manslaughter is appropriate where the D is criminally negligent. Criminal negligence is a higher standard than is used in the tort context for negligence cases. In the criminal context, while D may not have been acting with an intent to kill, he nonetheless acted in a way that was so extremely unreasonable that a reasonable person in his shoes would have recognized that such actions are performed with a reckless disregard for the life of others. Here, the State will have to prove that not only was D's act criminally negligent, but also that the Death was caused by D's actions.

The State will likely fail on these facts because D's act of burning a document does not rise to the level of a criminally negligent act. D's conduct was not reckless in the sense that a reasonable person could have contemplated that burning a document could eventually lead to another person's death. Moreover, the State will have a tough time meeting the causation requirement because, while D was the but-for cause in P's death, the death was not foreseeable. Here, the death was caused by the explosion when the paper settled into an open drum of flammable material at the construction site. Thus, D could not, nor could a reasonable person foresee that such an act would result in a death due to such an explosion.

The State may also try and argue for misdemeanor manslaughter, which is appropriate

when a death is caused during the commission of a lesser-included felony or by those specified by state statute. Here, it is highly doubtful that the burning of the Constitution is the type of misdemeanor that would be included under such a rule. As a result, the State will not succeed on these grounds.

2. Dan's Motions to Dismiss

Attempt Charges vs. Dan

In order to prove attempt, the State must show that (1) D intended to commit the crime, and (2) he took a substantial step towards completing the crime. Regardless of the underlying crime, attempt is always a specific intent crime.

Here, the State will be able to show that D's burning of a document that he believed to be the U.S. Constitution demonstrates his intent to commit the crime. Additionally, because he actually ignited the document, the second element is also satisfied. The issue thus is whether D has any valid defenses to the charge.

Mistake of Fact

D's motion to dismiss is based on a mistake of fact defense. Namely, he is arguing that, because he actually burned a copy of the Declaration of Independence, not the U.S. Constitution as he thought, he should not be found guilty for attempt.

D will fail in this defense because mistake of fact is not a good defense to attempt. That is because, here, if the circumstances had been as D believed (to burn the Constitution), he would have been guilty of the misdemeanor. By way of analogy, a thief who attempts to receive stolen goods may not later argue that, because the police had secured the drugs and transferred them to him undercover, he cannot be guilty because the goods were no longer "stolen". The fact remains that, had the circumstances been the way he believed them to be, he would have been guilty of the crime of receipt of stolen goods. Here, D's mistake of fact may be a defense to the actual misdemeanor itself, but will not provide a defense to attempt.

First Amendment

The First Amendment protects an individual's freedom of speech. However, included in the First Amendment is a protection of expressive activities that constitute speech. Here, it is clear that D's act of burning the Constitution was an act of expression as it was intended to convey his political views regarding the problems inherent with government-endorsed religion and the commingling of church and state.

Statutes may limit expressive activity if they are unrelated to the expression that constitutes speech and are narrowly tailored to serve such goals. Here, the State may have a difficult time proving that this act is unrelated to expression because it seems to want to prevent individuals from burning or mutilating the Constitution as a way of

expressing their political views.

The State would likely try and analogize to the U.S. Supreme Court case of O'Brien. There, a statute made it a crime to burn draft cards. When the defendant burned his draft card as a way of protesting against the war, he was prosecuted under the statute. The Court held that the statute was constitutional because it was not aimed solely at curtailing individuals' ability to express their viewpoints. Instead, the County had an interest in the administrative matters of the draft and that draft cards were essential to the country keeping track of its draft members, soldiers, etc. Thus, because this statute was content-neutral, the Court applied intermediate scrutiny and found that the statute was narrowly tailored to a compelling state interest.

However, as noted above, no such interest appears to exist for the state's statute in this case.

D will likely point to the flag burning cases, such as Johnson, where the Court has held that statutes making it a crime to burn the U.S. flag are unconstitutional because they restrict speech under the First Amendment. In the flag burning cases, the Court has noted that these statutes are aimed at curbing an individual's right to express his views and thus warrant strict scrutiny. Because they are not necessary to advance a compelling interest, they are violative of the First Amendment.

The present case seems much closer to Johnson than O'Brien because the statute is aimed at expression rather than activities unrelated to expression. As such, it is unconstitutional because it impermissibly burdens the freedom of speech under the First Amendment. The State will have to meet a very high burden because strict scrutiny would be applied and thus it would have to show that the statute is necessary to advance a compelling state interest. Because no compelling interest appears to exist, the statute will be struck down.

Question 5

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as \$300,000 for it and to pay Paula \$15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for \$200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer \$200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the \$200,000. In the notation line of the check, Sally had written, "Refund on 1st of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

Answer A to Question 5

Applicable Law

The common law governs contracts for the services and the sale of real property. The Uniform Commercial Code (UCC) governs contracts for the sale of goods. Because this contract was for the sale of a painting, it is governed by the UCC. The UCC also has provisions that apply only to merchants. Merchants are those who regularly deal in the goods that are the subject of the contract. Here, Sally is not a merchant because she is a private collector who does not appear to regularly sell her paintings; however, Paula is likely becoming a merchant (she just started).

Specific performance is an equitable remedy and for the court to award it, which requires that (1) The Contract is Valid; (2) The Terms are Certain and Definite; (3) Any Conditions are Satisfied; (4) A Remedy at Law is Inadequate; (5) There is Mutuality in Enforcement; and (6) There are no Defenses.

(1) The Contract is Valid

A contract requires a valid offer, a valid acceptance, consideration, and certain and definite terms, which are discussed below. Assuming the terms are sufficient, a valid contract was formed between Sally and Paula when Sally agreed to sell Paula whichever of the three paintings for \$200,000.

Statute of Frauds

The statute of frauds requires that a contract for the sale of goods of \$500 or more must be in writing. Here, the contract between the parties was only oral, thus the SOF is not satisfied. Thus, Sally will assert the SOF as a defense to the enforcement of the contract.

Exceptions to the SOF

Full Performance

Full performance by one party can also serve as an exception to the SOF. Here, Paula would argue that she performed by selecting the painting she wanted and transferring the money into Sally's account.

However, the UCC has tended to apply full payment when the performance is the delivery of the goods, not just mere payment. The rationale is that if payment alone could satisfy the SOF, then most parties could likely get out of the requirement by making a payment; whereas, delivery of goods is more indicative that a contract actually existed between the parties. Thus, the court would likely not find that full payment by Paula was sufficient to waive the writing requirement.

Judicial Admission

The UCC also recognizes a SOF exception when one party admits the contract in a judicial proceeding or writing. While P may attempt to argue that Sally recognized the contract by writing “Refund on 1st of Monay Pond series,” this writing was merely on a check, not in any judicial proceeding.

Estoppel

Some courts allow estoppel as a valid defense to SOF, which requires that the party detrimentally rely on the other party’s promise. Here, Paula would argue that she relied on Sally’s promise to sell the painting and the reliance was detrimental because she told the museum she could get the painting. More specifically, the reliance was detrimental to Paula because reliability is critical in her line of work; thus Paula would argue that by telling her client that she obtained the painting, then informing them that she no longer could get it, her reliability and career would be damaged.

As Paula is seeking an equitable remedy, a court might be more willing to apply estoppel; however, the contract clearly does not satisfy the SOF and the detriment to Paula requires a series of inferences; thus a court may also decline to apply it.

Merchant’s Confirmatory Memo

The UCC also recognizes an exception to the SOF when one party sends a confirmatory memorandum that is signed. However, this provision only applies to merchants. Thus, because Sally is not a merchant, P could not argue that her writing on the check suffices as a confirmatory memorandum.

(2) The Terms are Certain and Definite

Even more so than with regular contracts, the remedy of specific performance requires that the contract terms be definite and certain. Under the UCC, the contract must specify the quantity. Here, this term is satisfied, because the parties agreed that Paula could select one painting.

Sally would argue that the terms are not definite and certain because the parties did not agree on the actual painting that would be sold and Paula had complete discretion in selecting the painting. However, if the parties have agreed to the price, the UCC allows other terms to be agreed upon and the parties will be expected to do so in good faith. Moreover, because the paintings are part of a series and appear to be equal in value, it does not appear that the lack of specificity as to which painting would be purchased negated the parties from reaching a meeting of the minds.

(3) Any Conditions are Satisfied

A condition is an event, the occurrence or non-occurrence of which must occur, if it occurs at all, for a performance to be done. Conditions are strictly construed and a failure

of a condition does not result in breach, but merely excuses performance. A condition precedent is one which must occur before performance from another party is due.

Here, Paula selecting the painting she wanted was a condition precedent to having to pay. Moreover, Paula's payment of the \$200,000 is a concurrent condition, as the payment and exchange of the painting each would give rise to the other performing.

Paula will argue that she satisfied all of the conditions because she made the payment and she decided which painting she wanted and went to tell Sally. Sally, however, will argue that Sally declined to go through with the sale before Paula told her which painting she wanted because the facts are unambiguous as to whether Paula in fact told Sally (it merely states that "she went to tell Sally which painting she wanted"). However, even if this was the case, Sally cannot assert her own preventing of a condition to assert failure of a condition. Moreover, it appears that Paula did tell Sally because Sally wrote "Refund on 1st of Monay Pond series" on the check. Thus, all of the conditions were satisfied.

(4) A Remedy at Law is Inadequate

Because specific performance is an equitable remedy, the courts require that a remedy at law must be inadequate.

Unique Goods

Normally, a remedy at law is adequate with breach of contract because the parties can seek expectancy damages. However, the courts have held that specific performance is available when it is a contract for real estate or unique goods.

Here, the Monay painting would clearly be considered a unique good because Monay's works are "rare," "held by private collectors," and "none had been on the market in recent years." Thus, specific performance would be proper under these circumstances.

Uncertainty of Damages

Moreover, a remedy at law would be inadequate because, to recover legal damages, a party must prove: 1) foreseeability; 2) certainty; 3) unavailability; and 4) causation. If Paula sought legal damages, she would have an extremely hard time proving certainty because she had just started in the business. Thus, while her failure to perform on a contract after informing her client that she could would invariably affect her future business and relationship with that client, the damages she would suffer are extremely speculative. In this sense, Paula's business is a new business and courts have traditionally held that a new business cannot recover future lost earnings because they are too speculative. For example, Paula might have turned out to be the best acquisition agent or the worst and, while some courts will now allow use of comparable businesses to prove lost future profits, a court would likely be more hesitant when it is a business such as art acquisition, where the success is heavily dependent with the individual agent.

Feasibility of Enforcement

Additionally, the courts will not specifically enforce contracts when the judgment would not be feasible to enforce, such as in personal services contracts. Here, this contract would be simply to enforce and does not require continued oversight because the judgment would require: 1) Sally to deliver the painting to Paula; and 2) Paula to ensure the \$200,000 was delivered or return the refund check if she eventually accepted it.

(5) There is Mutuality in Enforcement

Courts traditionally require that, for a party to seek specific performance, the party they are seeking it against must also be entitled to specific performance. Here, it is less likely that Sally would be able to seek specific performance because her damages would have been her lost profits on the sale. Still, a court will award specific performance despite the mutuality requirement if it is confident the plaintiff will perform. Here, Paula wants to perform, thus the court would likely be confident she will and the court could also require her performance in the judgment.

(5) There are no Defenses

Sally will assert several defenses to enforcement of the contract:

Unclean Hands (UH)

Unclean hands is an equitable defense that applies to equitable remedies when the plaintiff has acted unjustly with regard to the specific transaction, thus resulting in the maxim that the court will not use equity to aid a person with “unclean hands.” Here, Sally will argue that by making Sally believe that Paula was a private buyer when Paula knew Sally did not want to sell to a private buyer, Paula acted unjustly.

Paula will claim that she owed a Duty of Confidentiality to her principal because confidentiality is critical to the business. Whether a court would agree with Paula on this issue is debatable because, unlike lawyers, art agents do not automatically owe a Duty of Confidentiality to their principals. However, agents do owe a Duty of Loyalty to their principals and also must follow the directions of the principal, thus if the museum had made clear that it wanted its identity confidential, then the court would likely determine that Paula was not acting unjustly in following her duty as an agent.

Misrepresentation

A misrepresentation is a negligent statement of material fact or a fraudulent statement of fact that is said to induce an action in the other party, which the other party does actually rely on and suffers damages because of reliance. While Sally will argue that Paula’s silence amounted to a misrepresentation, nondisclosure does not amount to a misrepresentation unless there is a duty to disclose facts. Thus, Paula did not have a duty to correct Sally’s misunderstanding and, therefore, misrepresentation would not be an

adequate defense.

Unilateral Mistake

Unilateral mistake, where one party is materially mistaken about a term of the contract, is usually not a defense; however, it can be a defense when one party is mistaken and the other party knew or had reason to know of that party's mistake. Here, Sally could successfully assert unilateral mistake because Paula knew that Sally only wanted to sell to a private buyer and Paula knew that Sally thought she was selling to a private buyer because Sally expressed "how proud she was that she only sold to private collectors." Paula, however, will argue that this statement was only "offhandedly" and never referred to the actual transaction. Still, especially because Paula is seeking equity, a court would likely find that this means that Paula should have known that Sally thought she was selling to a private buyer because Sally said she only sold to private buyers.

Frustration of Purpose

Lastly, frustration of purpose is a defense where both parties know of the purpose of the contract at the time of the contract and the purpose is frustrated by an unforeseeable event. Sally could assert this, however she did not make it clear that her purpose was to sell to a buyer, thus her better defense is under unilateral mistake because, under that defense, she can argue that Paula "should have known" of her mistake; whereas she cannot argue that Paula "should have known" of her purpose to assert frustration of purpose.

Answer B to Question 5

Specific Performance for Paula

Type of Contract

The UCC applies to the sale of goods, whereas the common law applies to all other contracts. Here, the contract between Sally and Paula was for the sale of a painting, which is an item of tangible or intangible personal property. In other words, a painting is a good. Therefore, the UCC applies.

Standard for Specific Performance

In order for a plaintiff to receive specific performance under a contract, the following elements have to be met: there must be a valid contract, the plaintiff must have performed or be ready to perform any required performance under the contract, the remedy at law must be inadequate, there used to be a requirement of mutuality but it is no longer required, and there must be no valid defenses to enforcement of the contract of specific performance.

Valid Contract – Offer, Acceptance, Consideration

In order to form a valid contract, there must be an offer, an acceptance, and consideration. An offer requires that the offeror communicate to the offeree, the terms of the offer are clear and definite, and a reasonable person in the offeree's position would believe that the offeror intends to be bound if the offeree accepts. Acceptance is a manifestation on the part of the offeree to accept the offer. Under the common law, this required the offeree to accept the offer exactly as is. Under the UCC, additional terms can be mentioned in the acceptance, although where there is at least one non-merchant, the additional terms must be separately accepted.

Here, Sally orally agreed to sell to Paula the first of the three Monay paintings for \$200,000. Sally agreed to sell and Paula agreed to buy, which illustrates an intent by both to be bound. The terms are clear because they agreed that Paula could pick one of the three paintings for the amount of \$200,000. Although the painting was not already picked out, it was Paula's choice when the time came, and Sally will be bound to that provision. Therefore, there has been a valid offer and acceptance between the parties.

There is also valid consideration. Consideration requires bargained-for legal detriment, which can involve both performance and forbearance. Here, both parties are promising to perform. Sally's legal detriment being suffered is giving up the painting, and Paula's legal detriment being suffered is the payment of money. Therefore, there is a valid contract, unless one of the defenses to formation discussed below applies.

All Conditions of Performance Satisfied

Paula must have satisfied any performance that she is required to perform. Or, if she

cannot yet perform or the other party refuses to perform, she must be ready and willing to perform.

Here, Paula has already performed her end of the contract because she transferred \$200,000 to Sally. Sally has tried to return the money, but Paula did not take the money and stated that she wants the picture. This illustrates that Paula wants to continue with the contract and has the money to do so, even if the money is returned to her.

Therefore, this requirement has been met.

Inadequate Remedy at Law

A remedy at law may be inadequate if the item at issue is unique, the damages are too speculative, or there will be a multiplicity of suits. In addition to evaluating the inadequacy of the remedy at law, the courts are also concerned with the feasibility of enforcing the contract. Generally, specific performance is not granted very often in contracts unless it's real estate. In the sale of goods, specific performance will often only be granted if the item is unique or custom made.

Here, the item is a one-of-a-kind Monay painting. The museum informed Paula that most Monay paintings are held by private collectors and are extremely rare. In this case, Paula was looking for one of three paintings that were all held by the same person, which means Paula could not go elsewhere to find them. This is also evidenced by the fact that one of the paintings has been on the market for years. Because the painting is so unique and the original will not be found anywhere else, the court will be willing to grant specific performance. Using its contempt power, it can force Sally to give up the painting.

Since the contract could be feasibly enforced by the court and the item is unique, there is an inadequate remedy at law and Paula could recover by specific performance.

Mutuality

The common law used to require mutuality of performance to ensure that the court could make everyone perform. However, this requirement is no longer needed. Therefore, Paula could recover through specific performance regardless of mutuality.

Defenses

Statute of Frauds

The Statute of Frauds requires any contract for the sale of goods that is \$500 or more to be in writing and signed by the party against whom it is being enforced.

Here, Sally will argue that the contract is not enforceable because it is for the sale of goods worth \$200,000 and there is no writing. Paula would argue that either part performance has satisfied the statute of frauds or that estoppel applies.

In the sale of goods, full performance will always satisfy the Statute of Frauds. However, part performance will usually only satisfy the Statute of Frauds to the extent of the performance. This generally means that there will be an enforceable contract to the extent of any goods delivered. Here, Paula will argue that she transferred \$200,000 to Sally, which means that she has fully performed her portion of the contract. Paula also arrived at Sally's house where she was supposed to pick up the painting. Paula could argue that Sally had satisfied her end of the bargain because once the money was transferred, Sally's delivery obligation had been performed since Paula had to come and pick it up. This is a weak argument, however, because there is no evidence that Sally wanted to give the painting or that the parties had agreed, which is why part performance through delivery of goods generally works. The seller would not have sent the goods if a contract did not exist. Most likely, Paula's part performance argument would not work.

Paula would also argue that estoppel applies and satisfies the Statute of Frauds requirements. Estoppel is the reasonable, foreseeable and detrimental reliance of the representation of the other party. Paula had already informed the Museum that she had obtained the picture and had transferred the money to Sally. If she had known she could not get the picture, she would not have told the Museum. Due to Sally's retraction, Paula's reputation will be tarnished and the Museum will most likely not want her services any longer. The business of art acquisition requires reliability and confidentiality. Specifically, the requirement of reliability will be negated if Paula is not able to enforce the contract, which puts her in a much worse position than if the contract had not been made. Sally would argue that Paula has not changed her position in reliance on the contract in any way because Paula still has the same amount of money that she had before and has not made any preparations for the painting that would amount to detrimental reliance.

Due to Paula's transfer of the money and her representations to the Museum that she had bought the piece, Paula's estoppel argument will most likely be upheld and Paula will be able to overcome the Statute of Frauds.

Misrepresentation

A misrepresentation is any false assertion or intentional concealment of material information. The assertion can be made knowingly or not.

Here, Sally expressed a desire during negotiations only to sell to private collectors. Paula made no reply to this comment and continued with the negotiations. Sally would argue that since Sally had made it clear that she only wanted to sell to private collectors, Paula was knowingly concealing a material assertion underlying the negotiations. On the other hand, Paula would argue that Sally never asked Paula if she was a private collector nor did she make it a term of the contract. Paula did not conceal any information from Sally,

but the parties simply negotiated without ever discussing Sally's desire to only sell to private collectors.

Paula's argument will most likely win and Sally will be unable to void the contract on the grounds of misrepresentation.

Unilateral Mistake

Generally, unilateral mistake by one party does not make a contract unenforceable. However, if the other party knew or should have known of the mistake, the contract is void.

Here, Sally will argue that Paula knew that Sally wanted only a private collector to buy the painting. Because Paula knew Sally's intent, Paula knew that Sally had the mistaken belief that Paula was a private collector. One of the material underlying assumptions of the contract in Sally's mind was that Paula was a private collector. Paula will argue that the mistake was not material to the contract because Sally never made it a part of the contract. In addition, Sally made the comment offhand, which means that Paula did not know that Sally had mistaken Paula for a private collector.

Under the circumstances, the court would most likely find that there was a unilateral mistake that was known by the other party. Therefore, the contract is not enforceable and therefore not specifically enforceable.

Unclean Hands

Sally will also argue that Paula has unclean hands, and therefore, cannot get specific performance. Unclean hands applies when the plaintiff has acted unlawfully or in bad faith in retaliation to the same contract.

Here, Sally would argue that by not asserting that she was there on behalf of the Museum, Paula had acted in bad faith before Sally repudiated the contract. By failing to tell Sally that she was only acting as an agent, Paula misrepresented who she was and the purpose of the contract.

This argument will most likely not win, since once the contract was formed, Paula did nothing to impede the contract. Parties are free to contract for the terms and Sally did not require that Paula be a private collector.

Overall, Paula will be able to get specific performance as long as unilateral mistake does not apply.

Question 6

Husband and Wife married in 1997 in California. Neither of them brought any significant assets to the marriage, and they were both employed. Husband and Wife agreed that Husband should go to law school after they had saved up some money. Husband put his earnings in a savings account in his name alone. Wife deposited her earnings into a joint checking account in both of their names, which was used for their living expenses. Husband had a child support obligation from a previous marriage. Every month, Husband paid his child support by check from the joint checking account.

Husband began law school in 1998. Wife continued to work to support the couple. Husband took out a student loan to pay his tuition. Husband graduated in 2001 and obtained his law degree. He passed the bar exam and got a position with a large law firm.

In 2004 Husband became a partner in the firm. Husband's partnership earnings were substantial. He paid off his student loan using these earnings. Although the actual value of Husband's share of the firm's goodwill was substantially greater, the partnership agreement provided that its value was \$3,000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage.

In 2006, Husband and Wife filed for dissolution of marriage.

1. Is the community entitled to reimbursement for
 - (a) The child support? Discuss.
 - (b) The payments on the student loan? Discuss.

2. Does the community have an interest in
 - (c) Husband's law degree? Discuss.
 - (d) The goodwill in Husband's law firm and, if so, is the community bound by the firm's valuation? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. All amounts earned through the community labor of married California residents are presumptively community property, which means that they are owned together, equally, by the husband and wife (or by the domestic partners). All items earned through gift, bequest or devise to an individual spouse remain that spouse's separate property. Community property continues to accrue until the end of the economic community, which occurs with physical separation and an intent not to resume the marriage. Certain presumptions arise from form of title, and CP may be transferred to separate property and vice versa.

Community's Reimbursement Claims

Child Support

The community remains liable for all credit obligations of each individual spouse, whether acquired before or during the marriage. Thus, Husband's ("H") child support obligations, although they arose before marriage, may still be satisfied from the community property jointly owned by the couple. However, by statute, the community is entitled to reimbursement for child support payments that arise from a prior marriage of one of the spouses, if that spouse's separate property was available at the time to satisfy the obligation. Here, H and W married when neither of them had any significant assets, although they were both employed. If H had no available separate property at the time he made the child support payments, those obligations were legitimately paid out of community funds, and the community has no right to reimbursement. The payments were made from H and W's joint checking account, which is funded entirely with W's earnings. Since W's earnings are CP, the payments on the child support were made with CP (by H writing checks drawing on the joint checking account).

Savings account in H's name alone

The fact that H opened a savings account in his name alone does not defeat the presumption that his earnings remain community property. Title in one spouse's name, if the name on the bank account can be considered title, does not prohibit tracing to the source of the funds. It may, in certain circumstances, be evidence of a gift from the community to that spouse. However, when the spouse takes title in his or her own name, no inference of a gift will arise. Also, it may serve as a bar to the other spouse's premarital creditors, if the non-debtor spouse's CP earnings are placed in the separate account and the debtor spouse has no access to it. However, here it is H who has the obligation. Thus, because the separate savings account was funded only with H's earnings, it will be deemed to be community property, since the earnings of one spouse through labor are community property. And, because any profit from community property remains community property, whatever interest H has earned will remain CP. Of course, the facts do indicate that H and W were both employed when they entered the marriage. Thus, it is possible that some of the earnings H used to fill the savings account were his premarital earnings. H might attempt to trace some of the value of the savings

account to those funds. However, where assets have been commingled, they are presumptively community property and W will have a hard time asserting the amount of separate property in H's account. If she were able to trace, the community would be reimbursed to the extent that those separate property funds (if any) were available to pay for the child support.

Transmutation and the savings account

In order for the separate account to constitute a transmutation of CP to H's separate property, the agreement would need to be in writing, with W (as the adversely affected) spouse expressly conveying the interest to H and signing the writing. Here, H's name on the bank account does not constitute a transmutation.

Thus, community property was properly used to pay for the child support payments, even if they were a premarital obligation of H. Because H had no apparent separate property available when the payments were made, the community is not entitled to reimbursement.

Payments on student loan

A loan constitutes community property to the extent that the lender relied on community property in making it. Here, H decided to go to law school and take out loans while he was married to W. The lender presumably relied on the future earnings of H and W's current income, all community property at the time. Thus, the "intent of the lender" makes this a community loan. Moreover, H used his earnings as a lawyer to pay off this loan, thus it was paid for entirely with community property. By statute, the community is entitled to reimbursement, with interest, when community funds are used to pay for the education of one spouse which greatly enhances that spouse's earning capacity. Here, H's law degree has resulted in him becoming a lawyer at a large law firm, with a presumably generous salary. Thus, the degree has greatly enhanced H's earning capacity. The community is therefore entitled to reimbursement for the amount of the student loan used for the education itself (not for the amount used for ordinary living expenses), with interest. However, if H can establish an equitable defense, reimbursement will not apply.

Equitable defenses to community reimbursement

Where the community has already substantially benefited from the increased earnings due to one spouse's education, there will be no reimbursement to the community at divorce. Substantial benefit is presumed where the community has benefited from the increased earnings for 10 years. Here, H began working in 2001, as an associate presumably, and became a partner in 2004. The couple is now seeking a divorce in 2006. Thus, at most, it has benefited from H's earnings for 5 years, which does not constitute a substantial benefit.

Also, where community funds have been used to pay for an education for the other spouse as well, the community is not entitled to reimbursement. Here, W worked the entire time H was in law school, and did not benefit from an education. Thus, this

defense will not apply.

Finally, where the degree has lessened the obligations of one spouse to pay for support of the educated spouse post-divorce, reimbursement may not apply. Here, it is unclear what W's earning capacity is. If she is extremely well paid (a CEO perhaps) then she might still be under an obligation to pay spousal support to H post-divorce, and this obligation might be lessened by H's ability to earn a lawyer's salary. However, there are no facts indicating what W makes, so this defense presumably does not apply.

Community's Interest in H's Law Degree and the Goodwill of H's Law Firm

Law degree

By statute, professional degrees earned by one spouse during the marriage are not community property, although as noted above the community may be entitled to reimbursement for the cost of acquiring that education. That one spouse worked to pay for the education is irrelevant to the ownership of the degree. The reimbursement interest does not amount to a community interest in the degree itself – meaning an interest in the present discounted value of the future earnings attributable to the degree. Thus, the law degree remains H's separate property going forward, and the community is entitled only to reimbursement with interest for the cost of acquiring the degree.

Goodwill

Goodwill is the value of a business over the expected normal rate of return on the capital invested in that business. In essence, it constitutes the intangible value of the business' reputation above and beyond the raw liquidation value of the business. When the goodwill is generated by community labor, it is a community property asset. Here, H's share of the goodwill was earned entirely while he was married to W. Thus, the goodwill itself is a community property asset.

Valuation and the Partnership Agreement

The valuation of goodwill occurs by one of two methods. First, it can be valued by capitalizing the future stream of income to a present fixed sum (according to varying calculations). Second, it can be valued by looking to the "market price" of the interest. The latter is established by bona fide offers to purchase the business or concern. Here, the partnership agreement of H's firm specifies that the value of H's share in the firm's goodwill is valued at \$3,000, but only "in the event of a dissolution of a partner's marriage." However, the community is not bound by this valuation, because it does not constitute a valid market valuation of H's goodwill interest. Buy/sell options in a partnership agreement created by the relevant spouse's firm will not control the valuation of that spouse's interest at divorce. This is because of the obvious risk of abuse inherent in such a valuation. The partner-spouse could agree with his or her other partners to create a very low valuation only for purposes of divorce, in order to deprive the non-partner spouse of his or her rightful share of the partner spouse's interest. Here, that seems to be exactly what has occurred, especially given that the agreement expressly provides that it only applies when one of the partners gets divorced. Thus, the \$3,000

valuation will not control, and the court will apply the capitalization (or some other) method.

Valuation of a SP business

The Van Camp and Pereira doctrines would not apply here, since H did not enter into the marriage with a SP business interest. Thus, to the extent the law firm is considered a business, and H considered an owner, H's interest will be entirely community property, as noted above.

Answer B to Question 6

Community Property

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after legal separation is considered separate property (SP). Further, all property acquired by either spouse during marriage by gift, bequest or devise is that spouse's separate property. Upon dissolution of marriage, all community property assets are subject to equal division in kind unless statute or policy requires otherwise.

(1)(a) Is the community entitled to reimbursement for the child support payments?

Child Support

Child support obligations from a previous marriage are considered the separate property obligation of the acquiring spouse. However, during marriage, community funds may be reached to satisfy any payments. Upon divorce, the community is entitled to reimbursement for any child support payments made with community property funds when separate property funds were available.

Here, H had a child support obligation from a previous marriage. Every month he paid his child support by check from the joint checking account held in both H and W's names. The checking account contained W's earnings during marriage; thus the checking account contained community property, because all earnings during marriage are considered community property. The issue is whether H had separate property funds available at the time the payments were made.

Bank Account titled in H's name alone – transmutation?

The fact that a bank account is titled in one spouse's name alone does not automatically rebut the community property presumption. Any change to the character of a community property asset after 1985 is required to be in a signed writing, specifically indicating that the nature of the asset is being transmuted.

Here, H opened a bank account in his own name in 1997; however, he deposits into that account his earnings. All earnings during marriage are presumed to be CP. There is no indication that there was a written transmutation of these funds from CP to H's SP; thus the CP presumption cannot be rebutted and all of H's earnings in his savings account will be considered CP.

Also, neither H nor W brought any significant assets to the marriage. Thus, it does not appear that H had any SP assets available at the time the CP funds were used to pay the child support payments. As such, the community will not be reimbursed for any payments made.

(1)(b) Is the community entitled to reimbursement for the payments on the student loan?

Debts

Generally, all debts acquired during marriage are considered community property. However, if it was the intent of the lender to only look to satisfaction of the debt by one spouse's SP, then the debt will be a SP debt.

Here, H took out educational loans to obtain a law degree. Any educational debt acquired during marriage is CP; however, upon divorce, it will be assigned to the acquiring spouse. Thus, it is likely that the lender only looked to H's SP to satisfy the debt knowing that if H and W were divorced, only H would be liable on the debt. However, there are no specific facts to support this argument.

Education

Any education acquired during marriage is the SP of the acquiring spouse. However, upon dissolution of marriage, the community is entitled to reimbursement for any payments made to finance the education if the education substantially increased the spouses' earning capacity unless (1) the community has already substantially benefited from the education; (2) the other spouse also received a community funded education; or (3) obtaining the education offset the need for spousal support.

Here, H obtained a law degree. H began law school in 1998 and W continued to work to support the couple. H took out a student loan to pay his tuition. H graduated in 2001, passed the bar and got a job with a big law firm. Being a lawyer substantially enhanced his earning capacity because in 2004, he became a partner and his earnings were substantial. H paid off his student loan using these earnings. Because H used his earnings during marriage to pay off the loan, the loan was paid off with community funds. Thus, the community financed H's education. As such, the community is entitled to reimbursement unless an exception applies.

Has the community already benefited?

If the spouse has had the education for more than 10 years, there is a presumption that the community has already benefited from the education and no reimbursement is required. Here, H got his law degree in 2001 and H and W filed for dissolution in 2006. Thus, H has only had the job for 5 years at the time of dissolution and the presumption will not apply.

On the facts, no other exception applies. W did not receive a community funded education, and there is no indication that without the education, H would have needed substantial child support. Thus, the community is entitled to reimbursement of the community funds spent to pay off H's student loan.

(2)(c) Does the community have an interest in H's law degree?

Education

Any education acquired during marriage is the SP of the acquiring spouse. As discussed above, the community is only entitled to reimbursement for any community funds spent to finance the education if the education substantially enhanced the spouses' earning capacity. Further, educational debt remaining at the time of dissolution is assigned to the acquiring spouse.

Here, there is no debt remaining on H's education. The community will take no interest in H's education, but as explained above, will be reimbursed for the funds expended to pay off H's loans.

(2)(d) Does the community have an interest in the goodwill of H's law firm and, if so, is the community bound by the firm's valuation?

Goodwill

All assets acquired during marriage by the labor and efforts of a spouse are community property, and goodwill is no exception. The goodwill of a professional practice is a community asset. Goodwill is the value of the continued patronage to the practice. It is the value of the business that is not derived from personal skill or the value of the assets of the business. It can be valued by expert testimony or by capitalizing the excess earnings of the practice.

Here, H will argue that no valuation is necessary because the partnership provides that its value was \$3000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage. However, this argument is likely to fail. In a similar case, the California Supreme Court held that any valuation provided for in a partnership agreement may be considered in valuing the goodwill of a professional practice, however, it is not conclusive as to the value. Further, the court indicated an unwillingness to let partners contract with each other in order to defeat the community property system.

Thus, the court may consider the agreement as evidence of value, but ultimately will allow W to put on evidence of an expert to explain what the goodwill of the business is really valued at. This will be considered CP and subject to equal division in kind.