JULY 1999 MARYLAND BAR EXAMINATION
REPRESENTATIVE GOOD ANSWERS

PART A

QUESTION I
(20 Points - 25 Minutes)

In August, 1998, Alice, Barry and Chris decided to form a corporation to operate a donut franchise in Sperryville, Maryland.

They hired Lawyer Jones to draft the papers to form a corporation for their new business, Soggy Dough, Inc. ("Soggy Dough"). Jones drafted articles of incorporation for a stock corporation in which Alice, Barry and Chris are designated the initial directors. Jones advised them that he would sign the articles as the incorporator and file them with the Maryland Department of Assessments and Taxation prior to leaving on September 1 for a three (3) week vacation. He failed to file the articles as promised, but on October 1, 1998, the articles of incorporation were accepted for filing by the Department. He never advised Alice, Barry and Chris of the date of acceptance.

On September 20, 1998 Alice and Barry negotiated and signed, on behalf of the corporation, a five year lease for space in Super Mall at an annual rent of $50,000.

On October 2, 1998, Alice, Barry and Chris met and adopted by-laws for the corporation. Each was elected as an officer and director of Soggy Dough. The by-laws require the signatures of 2 of the 3 officers to bind the corporation on any contract obligation in excess of $10,000.

In mid October, Barry and Chris attended a franchise training session in Texas. In their absence, Alice met with a representative of Kitchen Corp. She was told that an order for equipment placed immediately would be delivered by the end of October. Anxious to open for business, Alice signed, as an officer of Soggy Dough, a contract to purchase kitchen equipment for a purchase price of $90,000. When she signed the contract on October 18, 1998, she told the representative that the by-laws required the signature of a second officer on the contract. In response, the representative nodded, but nonetheless, he processed the order later that afternoon. Although, Alice repeatedly promised to seek the second signature, the Kitchen Corp. contract was never signed by a second officer. The kitchen equipment was delivered by the end of October, but the delivery was rejected by Barry. The donut shop opened in Super Mall November 1 using equipment purchased from another source.

In early December, Alice told her husband, Mr. A, that Barry and Chris orally approved the contract, but that they later found a better deal. Mr. A told this to his barber who

unbeknownst to him was dating the manager of Kitchen Corp.

Soggy Dough was not well received in Sperryville, and at the end of February, 1999, the donut shop closed. Rent had not been paid to Super Mall since October and the $90,000 purchase price for the Kitchen Corp. equipment remained unpaid.

Super Mall sues Soggy Dough, Alice, Barry and Chris for nonpayment of rent under the lease. Kitchen Corp. sues Soggy Dough and Alice for breach of contract to purchase the kitchen equipment.

(a) Discuss the liability of each defendant for the unpaid rent and give the reasons for your conclusions.

(b) What defenses, if any, do Soggy Dough and Alice have to the suit filed by Kitchen Corp.? Discuss fully.

REPRESENTATIVE ANSWER NO. 1

Discussion of liability of each defendant for the unpaid rent and conclusions.

1. Soggy Dough may be held liable on a de facto corporation theory, but this theory is shaky under Maryland law. Under Maryland law, a corporation may be held liable for acts even though it was not a de jure corporation at the time if there was a relevant corporate statute in place, there was a colorable attempt to comply with it, and there was an exercise of corporate power. Here, the filing of the articles of incorporation were thought to be filed (late due to attorney – Alice, Barry & Chris did not know) and there was a lease signed on behalf of the corporation by Alice and Barry. Soggy Dough will counter (as a corporation) that there had not yet been an initial meeting of directors, so there could not be a ratification. Also, de facto incorporation theory would be weak, as it is of unclear status in Maryland. It might also be held liable by corporation by estoppel theory, where a corporation was held out to exist and someone deals with a corporation on that basis. Here, since it was held out to be formed by Alice and Barry, Soggy Dough may be liable for the unpaid rent.

2. There is a better argument for holding out Alice and Barry as promoters, and liable for pre-incorporation contracts. Promoters enter contracts on behalf of the corporation before it is formed, and remain liable on the contract unless there is a novation. Here, Alice and Barry signed the lease agreement on behalf of Soggy Dough. Since they entered the contract before Soggy Dough was incorporated, they can arguably be held liable (and there was no official novation), although Alice and Barry will both argue that they relied on their Lawyer's representation that the articles of incorporation were filed.

3. It will be hard to hold Chris liable for the rent on either de facto corporation/estoppel

theories, or the promoter theory. If there is a defacto corporation/corporation by estoppel, Chris will lose only the amount of his investment, not anything further, because of the limited liability of shareholders (there is no evidence of breach of duty of care/loyalty as a director). If there is no corporation, and only promoter liability, Chris did not sign the lease agreement. Since, under Maryland law, a promoter must sign a contract to be liable, Chris will not be liable.

4. It should be further noted that if a promoter situation is found, Soggy Dough will likely not be liable because, under Maryland law, a corporation must adopt a promoter's contract to be held liable on it. The lessor will argue that Soggy Dough did adopt it, because it paid rent, and it should be estopped from denying liability. This argument will likely prevail. The lessor might also argue that Alice, Barry and Chris could be held liable on a partnership theory (share losses equally because association of two or more as co-owners of business for profit). Also, Alice, Barry and Chris might want to consider joining Lawyer Jones as a defendant, for his negligence in not filing the articles of incorporation in a timely fashion.

Defenses Soggy Dough and Alice may have to the suit filed by Kitchen Corp.

1. Soggy Dough will assert that the Kitchen Corp. representative had notice of the bylaw requirement. Under Maryland law, bylaws govern how corporate affairs are handled. Here, the bylaws require the authority of 2 officers to approve large contracts. Here, Alice signed the contract by herself, and told the representative that she did not have the authority to sign by herself, but that the signature of another officer would be required. The representative knew this, yet still put in the contract. Thus, there was no authority for Alice alone to bind Soggy Dough and the contract should not be enforced against Soggy Dough.

2. As for Alice, she was acting on behalf of the corporation, so she should not be held personally liable for the contract. As an officer and director, she has authority to bind the corporation, subject to restrictions in the bylaws. Here, Alice signed the contract, but clearly told the representative of the two signature requirement; this was further buttressed by Barry's rejection of the delivery. There was no contract formed because there was no acceptance by Alice. Thus, Alice will not be held liable personally or as a officer of Soggy Dough.

REPRESENTATIVE ANSWER NO.2

Alice & Barry

1. Alice and Barry signed the lease for the store before the corporation was incorporated. This can be considered a pre-incorporation contract and under that contract the promoters of the corporation are personally liable unless there is a novation of the contract by the

corporation. Here there was a ratification of the contract but there was not a novation so Alice and Barry may still be personally liable. However, they will argue that they were acting under the direction of their attorney's advice that the charter would be filed by September 1 and so on September 20 they were acting as agents of the corporation. They will argue that there was a de facto corporation. A de facto corporation exists when there is a good faith attempt to comply with the statute and for some reason it fails. However, this doctrine may not be alive in Maryland so this might not work. Or, they can argue a corporation by estoppel in which a third party does business with what they believe to be a corporation, and as such, they are estopped from denying its existence. Here, since they signed the lease on behalf of the corporation, Super Mall will probably be estopped from denying the existence of the corporation.

As such, when the lease was signed and ratified by the corporation, the corporation became liable on the contract, and Alice, Barry and Chris will not be held personally liable since they had authority to enter into it. Super Mall may still argue that a corporation did not exist at the time of the signing of the lease and that all that existed was a partnership since they were at that point co-owners of a business for profit. But, the doctrine of corporation by estoppel will save Alice, Barry and Chris from personal liability, and thus, Soggy Dough will be held liable.

Soggy Dough

1. Soggy Dough will have the defense that Alice acted without authority of the corporation. Directors and officers are agents of a corporation and as such can bind the corporation into contracts when they have authority to do so. In Maryland, there are three types of authority – express, apparent and implicit. Here, there was express authority to bind the corporation on a contract over $10,000 as long as there were two signatures of directors. Since there were not two signatures on the contract, there was no express authority. Implied authority does not exist either because Soggy Dough had never dealt with Kitchen Corp. in the past. There may be implied authority. This exists when the agent is cloaked with the appearance of authority and a third person reasonably relies on this. Kitchen Corp. will argue that it relied on that authority and so the corporation will be held liable. However, Alice will assert that Kitchen Corp. knew that she had no authority to bind the corporation, that the only way the contract would be accepted would be by another director signing the contract, and as such, there was never a valid contract. Thus, neither she nor the corporation should be held liable.

2. Soggy Dough will argue that even though the officers may have orally agreed to the contract it was never signed by another officer and that oral agreement did not create a ratification of the contract. They never used the equipment although they had knowledge of it so there was no ratification of the contract. Soggy Dough will also argue that there was no authority in Alice to bind the corporation. Alice will also argue that she relied on Kitchen Corp. in that it knew she needed another signature, and thus, no binding contract

would exist until she had gotten one.

QUESTION II
(10 Points - 12 Minutes)

During the trial of the Kitchen Corp. case, Alice's attorney, Lawyer Fox, asked Alice to describe what occurred during her initial meeting with the representative of the plaintiff, Kitchen Corp. Alice testified, among other things, that she told the representative that two signatures were necessary for any corporate contract over $10,000. Lawyer Fox then asked Alice, "What did the representative of Kitchen Corp. say or do when you told him you needed two signatures on the contract?" The attorney for Kitchen Corp., Lawyer Smart, objected.

How should the Court rule on the objection? Explain the reasons for the ruling.

REPRESENTATIVE ANSWER NO. 1

The way the Court should rule on the objection and explanation for the ruling.

1. The court should admit the representative's statement as an exception to hearsay or as non-hearsay. The representative's statement is hearsay, as an out of court statement offered for the truth of the matter asserted (his understanding of Alice's limited ability to bind Soggy Dough). However, this statement can be construed several ways. Under Maryland law, an out of court statement is non-hearsay if it is a verbal act or legally operative fact-here, the representative's response would be vital to discerning whether he knew Alice's single signature constituted a contract, or if he knew that her ability to bind the corporation was limited and no contract could be formed. As an alternative, it can be used as an admission by a party opponent. Under Maryland law, an admission by a party opponent is a hearsay exception if it is by a party, even if available to testify, and the party did not know it was against his interest at the time. The key here is that the statement is by Kitchen Corp.'s employee (the representative). An admission by a party opponent, under Maryland law, may include the statements of an employee if made within the scope of the employment relationship. Here, the representative was working to benefit Kitchen Corp. by attempting to obtain a contract of sale from Alice. (This survives even if Kitchen Corp. argues that its representative was an independent contractor, since the representative is benefitting Kitchen Corp., and creating contracts on its behalf.) Thus, the statement by the Kitchen Corp. representative should be admitted as either non-hearsay, or as an exception to the hearsay rule by virtue of a vicarious admission by a party opponent.

REPRESENTATIVE ANSWER NO. 2

1. The court should overrule the objection. In Maryland, admissions are an exception to

hearsay. Hearsay is an out of court statement being offered in court to prove the truth of the matter asserted. The representative of Kitchen Corp. made a statement while acting within the scope of his employment. Thus, that statement can be considered a party admission since he was an employee of Kitchen Corp. and those admissions he makes are also admissions on behalf of the corporation.

The court may also find that since what Alice will testify to is a nod (because the facts state that the representative nodded) that may be considered non-hearsay and the nod will just be offered to prove what effect the statement had on the representative and Alice.

QUESTION III
(5 Points - 8 Minutes)

Lawyer Smart the attorney for Kitchen Corp., called Mr. A as a witness, and asked him what, if anything, his wife had told him in December concerning the Kitchen Corp. contract. Lawyer Fox, Alice's attorney, objected.

Discuss the arguments made by Lawyer Smart and Lawyer Fox on this objection. Will the objection be sustained, and why?

REPRESENTATIVE ANSWER NO. 1

Arguments made by Lawyer Smart & Lawyer Fox with objections.

1. Admission of Mr. A's statement will depend on whether it is protected by the marital communications privilege. Under Maryland law, a witness spouse (by his assertion, or that of the defendant spouse) may not testify to communications made in reliance of the marital-confidential-relationship. Here, Lawyer Fox will argue that Alice made the statement regarding the Kitchen Corp. contract to Mr. A in reliance on their confidential relationship (marriage). Lawyer Smart will argue, however, that the confidential nature of this communication was breached by Mr. A telling his barber of the true reasons for the rejection of the Kitchen Corp. contract. On this issue, Lawyer Smart will not likely prevail, since the statement was intended to be confidential.

REPRESENTATIVE ANSWER NO. 2

Lawyer Smart will argue that this is not a privileged marital communication and thus Mr. A can answer; the statement will constitute an admission on behalf of Alice. Additionally, since Mr. A told these statements to a third party he lost this privilege and cannot reclaim it at trial. Also, he will argue it is an exception to hearsay as a declaration against interest if Alice knew it was against her interests when made, pecuniary interest.

Lawyer Fox will argue that this is a privileged communication under the marital privilege

of confidential communications. This privilege extends to parties who are married in a civil or criminal case, and the statements made during their marriage, either spouse can claim the privilege. Lawyer Fox will argue that Alice made this statement in confidence to Mr. A and regardless of whether he told a third party this privilege is not lost and she can prevent him from testifying.

The court will most likely sustain the objection and allow Alice to assert her privilege of confidential marital communications.

PART B

QUESTION I
(20 Points - 25 Minutes)

Paula Smith and Junne, her 16-year old daughter, are residents of Pennsylvania. On June 15, 1995, they decided to visit a friend in Baltimore, Maryland. As they were leaving Baltimore, Paula chose to head home on Interstate 95, a highway with which she was unfamiliar. She drove in the far left lane at a speed 5 miles below the speed limit, in order to get her bearings. Three miles out of the Baltimore City limits, her vehicle was involved in an accident with a vehicle driven by Dave Driver, a resident of Pennsylvania. A Maryland State Trooper who witnessed the accident issued a traffic ticket to Paula for driving below the posted speed limit and Dave for following too closely. Junne was not hospitalized as a result of the accident, but did miss three weeks from her summer job as a result of minor injuries sustained. Paula was hospitalized with a back injury and was released from the hospital on November 1, 1996.

On July 1, 1998 Paula and Junne went to see Allison Attorney, a Maryland attorney who represented friends of Paula in their divorce proceedings, and asked that she represent them and file suit against Dave Driver. Allison was admitted to the Maryland Bar in 1997 and has only practiced family law. Allison agreed to represent both. She set a fee of $15,000 for her representation of Paula, and asked that Paula pay her a "mere" fee of $500.00 to represent Junne.

As soon as Junne and Paula left Allison's office, Allison went to see you, an attorney with an office in her building, and asked that you give her advice as to how to proceed with the case, and as to whether you foresee any problems.

What advice would you give? Discuss fully.

REPRESENTATIVE ANSWER NO. 1

Advice

1. The Maryland Rules of Professional Conduct govern fees charged by attorneys. Fees should be commensurate with experience, skill, time, complexity of the case and customary fees in the area. A fee may be contingent in a personal injury case as long as the contingency fee is in writing and it is understood by the client how fees and expenses are to be handled. Here, Allison has charged a flat fee for the personal injury action of both Junne and Paula. Contingency fees are more customary than flat fees. However, if Allison chooses to charge a flat fee it must be reasonable as compared to her skill and experience. Although she has not handled personal injury cases, this does not make her incompetent – only inexperienced. Accordingly, her fee for Paula is rather high. I would

advise her to use a contingency fee instead.

2. The Rules of Professional Conduct also govern attorney conflicts of interest. Here, Paula was also cited by the Trooper as a contributing factor in the auto accident. Paula could potentially be adjudicated the tortfeasor, making Junne's interests adverse to Paula's. I would advise Allison that the strong possibility exists for a conflict of interest between the two, even though they are daughter and mother.

3. The Maryland Rules of Professional Conduct forbid attorneys from bringing frivolous suits. Here, Junne sought no medical care, but lost three weeks at a summer job. There is nothing from a medical professional saying she was on medical leave for her injuries. Allison cannot bring a claim that has no merit. I would advise her that if she chooses to represent Junne, she needs to investigate this more fully to be assured this claim is not frivolous.

4. Lastly, Allison has neglected to advise Junne and Paula that the statute of limitations has run and no cause of action can be filed by Paula. Junne, however, could file until she's 21, if she has a valid claim.

REPRESENTATIVE ANSWER NO. 2

Discussion

1. There are some ethical and procedural issues that I would discuss with Allison. The first is whether she has the experience to accept the case. Even though Alison has only practiced family law thus far, she can accept this case if it deals with a subject she can learn with due diligence. The facts of the case indicate that she could effectively represent her clients with research on her part. The fact that she is a new attorney should not hinder her ability to do this research.

2. Her fee for Paula strikes me as too high and not based on any reasonable grounds. Allison could have arranged for a contingency fee or she could have set an hourly fee that was reasonable for someone with her experience. However, if she wants to have a set fee for the case, then she should explain why $15,000 is reasonable for her time, level of experience and how it fares compared to fees in the local legal community for similar work, etc. She also should explain the great disparity between the fees for Paula and Junne.

3. Allison has a potential conflict of interest by representing both Paula and Junne. Paula may not be able to recover based on contributory negligence while Junne does not appear to be contributorily negligent. Junne needs to consent to this dual representation and should have been advised to seek separate counsel.

4. The Statute of Limitations has run. For most causes of action, including negligence, the SOL is 3 years from the time when the action arose. Paula would have had to file her complaint by June 15, 1998 to satisfy the SOL. Paula could still opt to file the complaint as Dave could waive this failure to comply with it by not asserting it as an affirmative defense in his answer. The SOL for Junne has not run because she was under a legal disability when the accident occurred (i.e., she was a minor). It is not clear whether she is now 16 or was at the time of the accident. She can file suit on her own once she reaches the age of majority.

5. The final issue to address procedurally is whether Maryland courts would have personal jurisdiction over Dave. Personal jurisdiction will exist if Dave consents to it, is served in Maryland or is subject to it based on Maryland's long arm jurisdiction. Because the injury occurred in Maryland the issue will be whether this one contact is enough to satisfy the minimum contacts test. The court would look at the nature of the contact, whether Dave purposefully availed himself to suit in Maryland, Maryland's interest in adjudicating this matter and the convenience/hardship to Dave to defend in Maryland.

QUESTION II
(5 Points - 10 Minutes)

Allison files suit against Dave Driver on July 10, 1998 in the Circuit Court for Harford County. Driver's attorney immediately files a motion for change of venue to Baltimore City, only noting that "it would be inconvenient" for Driver to attend hearings in Harford County. Allison timely files an objection to the motion.

How should the Court rule on Driver's motion for change of venue? Discuss fully.

REPRESENTATIVE ANSWER NO. 1

The Court should rule on Driver's motion for change of venue.

1. The motion to transfer venue to another circuit court may be granted if the case could have been brought in the other circuit and the transfer serves the interests of justice. Here, venue is proper where the tort occurred or, in an action for damages against a nonresident individual, in any county in the State. Baltimore City is therefore a proper venue.

2. Just because it is proper, the court need not grant the motion. The motion serves the interest of justice because Baltimore is a major metropolitan area and it would make it more convenient for Dave to come there and stay for the trial. Perhaps it would also be easier for the other witnesses to stay there also. The motion should be granted.

REPRESENTATIVE ANSWER NO. 2

Discussion

Both plaintiffs and defendant are residents of Pennsylvania. However, the accident took place in the Baltimore vicinity. Baltimore is a proper venue since under 6-202 venue is proper where the cause of action arose. However, on motion, a party may move to transfer venue due to forum non conveniens. The Court may transfer the action to any other court where the action could have been brought for the convenience of the parties and in the interest of justice.

The court will grant the change of venue, in its discretion, if it finds the action could have been brought in Baltimore City and this serves justice.

QUESTION III
(5 Points - 10 Minutes)

Cyndy Jones is employed as a police officer for the Town of Easton, Maryland. On January 5, 1998, while driving her patrol car, on duty, her vehicle was rear ended by a vehicle driven by Dave Drew. Both vehicles were damaged as a result of the accident and Cyndy sustained personal injuries.

On May 1, 1998, the Town filed suit against Dave in the District Court, seeking $1,800 reimbursement for property damages to its vehicle. On June 30, 1998, Cyndy filed suit against Dave in the Circuit Court, seeking $35,000 in damages for the personal injuries she sustained.

On July 10, 1998, after hearing from both drivers, the District Court ruled in favor of Dave Drew. On August 11, 1998, Dave Drew's attorney filed a motion for summary judgment in Cyndy's action, claiming that her suit is barred by the District Court's ruling.

How should the court rule on Dave Drew's motion and why? Discuss Fully.

REPRESENTATIVE ANSWER NO. 1

Opinion on how the court should rule on Dave Drew's motion.

1. The question is whether Cyndy will be collaterally estopped from bringing suit because the Town's action was dismissed. In order for an issue to be collaterally estopped the same issue must have been actually litigated in the first suit and must have been necessary to its judgment. As well, the same party or someone in privity must have been the litigant.

2. Certainly Cyndy testified in the first proceeding , the same issue (negligence) was litigated, and was necessary to the judgment. However, Cyndy and the Town are not the same and the Town may not have vigorously represented Cyndy's interest in its own action. Further, the district court's rules on discovery are much more limited than the circuit court's. As well, Cyndy had no opportunity for a jury to hear her case. For both of these reasons, the court should deny Dave's motion.

REPRESENTATIVE ANSWER NO. 2

Discussion

1. There are two issues to be resolved. First, did the Town's suit result in res judicata for Cyndy's suit. Second, did the Town's suit collaterally estop Cyndy's suit. Res judicata principles bar re-adjudication of the same causes of action by the same parties or those in privity. Causes of action are loosely defined as claims arising out of the same transaction or events. In this case, the first element is satisfied. Both suits arise out of the same collision. The second requirement is the identity of the parties. The employer/employee relationship is one of legal privity. However, Cyndy is not suing in her capacity as a police officer. She is suing in her individual capacity and it is unlikely that her personal interests were sufficiently represented in the original suit. Thus Cyndy's action should not be barred under the principles of res judicata.

2. The second issue is collateral estoppel. Its requirements are that the issue be identical, actually litigated and the issue's resolution was necessary for the judgment. Collateral estoppel may be used offensively or defensively. To succeed on a motion for summary judgment there must be no disputed issues of material fact. In this case it isn't clear whether the elements of Cyndy's claims have been actually litigated, resolved and necessary for the previous judgment.

PART C

QUESTION I
(19 Points - 25 Minutes)

Al and Bev were married in 1976. Four years later they purchased a home in Bel Air, Harford County, Maryland. Their marriage suffered from the poor financial decisions they made. They separated in 1997 and were ultimately divorced on June 15, 1999.

A separation agreement provided that Al was to convey his interest in the marital home to Bev. Bev in turn wishes to sell the home and Charles is interested in purchasing it. Charles contacted Second National Mortgage Company for a loan and the mortgage company has retained you to do a title search of the property.

The land records reveal the following:

The deed for the property is in the name of Al and Bev.

There is a District Court Judgment recorded in the land records against Al in favor of ABC Credit Card Company in the amount of $3,000. It is dated April 21, 1989.

There is a right of way in favor of the next door neighbor, Jones, across the rear of the property to provide additional access to Jones' garage. It read as follows:

"Al and Bev grant to Jones the right of ingress and egress across the rear ten (10) feet of our property to provide access to his garage."

Jones sold the property in 1991.

There are two judgments against Al and Bev jointly and severally in favor of XYZ Bank. One is a judgment for $2,000, recorded January 5, 1986. The other is in the amount of $2,500 and is dated February 10, 1988.

Finally, EZ Furniture has filed suit against Bev for $21,000 for furniture purchased while she and Al were separated but before they were divorced. Trial is set for August 1, 1999.

As a Harford County lawyer admitted to the Maryland Bar, you are requested to advise the mortgage company as to what steps are necessary for the proposed mortgage to be a first lien on the property. Explain fully.

REPRESENTATIVE ANSWER NO. 1

The first step in creating a first lien on the property of the mortgage company would be to

have Al transfer the property by deed to Bev alone. When Al and Bev were married title to the property was presumed to be held as tenants by the entireties. This means an individual creditor of the debtor spouse cannot get to the property. Here, the ABC Credit Card judgment would not attach to the property so long as it is held by Al and Bev. A creditor cannot place a lien on land while it is held by tenants by the entireties. However, once the divorce occurred the tenancy is severed and the property becomes a tenancy in common. ABC Credit would have a lien against Al's interest in the property which would have to be satisfied prior to closing.

The 1986 judgment against Al and Bev jointly and severally is valid for 12 years. Because more than 12 years have passed since XYZ filed, their filing has lapsed. They would have to have filed a Continuation Statement within six months of the expiration of the filing. The 1988 judgment against Al and Bev is a judgment against both and would create a lien on the tenancy by the entirety property. Because Al and Bev both acted together in incurring this judgment, the judgment is validly attached to the land even where conveyed to Bev alone. These debts would have to be satisfied at the time of closing and before recordation of the judgment. The EZ Furniture does not have a lien against the property because their suit has not been finalized. Until they reduce their claim to judgment and record it they have no interest in Bev's real property. So long as Second National is recorded before EZ obtains a judgment.

The right of way will not prevent the mortgage company from having a first lien on the property. The right of way may be an easement if it is recorded and the parties intended it to run with the land. However, because it was granted personally from Al and Bev to Jones, the courts may view this right as more in the nature of a license. Either way, the right of way does not affect the marketability of the title and does not prevent the mortgage company from obtaining a first lien on the property.

REPRESENTATIVE ANSWER NO. 2

Al and Bev (A & B) purchased the house in 1980 while married and the deed is registered in both their names. They were therefore tenants by the entireties having established the five unities - time, title, interest, possession and marriage. This meant neither party could unilaterally sever tenancy. A $3,000 judgment against Al alone by ABC Corp., failed to sever the tenancy. It also did not attach to the property because the property was held as tenants by the entireties. Upon divorce, the property was severed and A & B became tenants in common. The judgment, if recorded, would then become a lien on A's interest in the property. This judgment would have to be disposed of in some manner prior to the closing.

The 1986 judgment against both A & B was valid for 12 years. Because more than 12 years passed since XYZ filed, their filing has lapsed. They would have had to file a Continuation Statement within six months of the expiration of the filing. The 1988 judgment against A & B is a judgment against both during the tenancy by the entirety. Because A & B both acted

together in incurring this judgment, the judgment is validly attached to the land even when it is conveyed to B alone. If Second National wants to have a first lien, this judgment must be paid prior to or at closing or ask the judgment creditor to subordinate their lien to Second National in exchange for some consideration. The EZ Furniture claim against B for $21,000 has not been reduced to judgment and recorded. Therefore, it has no interest in B's real property, so long as Second National records before EZ obtains a judgment.

Jones has valid right of way on the property and his successor in interest also holds this right of way. The easement was validly recorded. This right of way does not have Second National's priority with regard to its lien. Second National can foreclose and sell the property but the easement would survive the foreclosure.

To insure that Title passes properly, Second National should make sure that A & B transfer title to B alone before she transfers title to Charles.

QUESTION II
(16 Point - 20 Minutes)

Business Properties, Inc. (BPI), a Maryland corporation, has a real estate brokerage firm specializing in the sale of ongoing businesses and business properties. BPI has an independent contractor agreement with Alan, a licensed broker who owns and operates a personal service business and works closely with BPI on all of its business sales transactions. His agreement with BPI includes a provision which states that Alan is not the agent of BPI, but an independent contractor not authorized to make a contract, agreement, warranty or representation on behalf of BPI.

When he retired from government service in March 1997, Paul became interested in purchasing a small business in Maryland. In July of that year, Paul saw a newspaper advertisement placed by BPI for the sale of a small business in Howard County, Maryland. Paul called the listed number and talked to Alan. Thereafter, Paul and Alan visited the advertised business and two others in the same county which were potentially available for sale, but for which BPI had no listing agreement. One of these was the Free Spirit Shop owned by Carl. Paul indicated an interest in purchasing the business and Alan met with the owner, Carl, the next day and obtained a listing agreement authorizing sale of his business and property to "Paul only." The agreement further provided for payment by Carl of a commission to BPI in the event the business was sold to Paul. A subsequent sales contract called for settlement on October 6, 1997.

In early September, Paul asked to review the financial statements of the business and Carl arranged to have Alan and Paul visit the office of Carl's accountant to review the material which was provided to them. Neither Carl nor his accountant was present during this visit. Alan assured Paul that, he was experienced in analyzing and evaluating the financial condition of businesses such as the Free Spirit Shop. Alan conducted a review of the records

and made representations to Paul about what those records meant and the profitability of the business. In a confidential written evaluation prepared as a result of the meeting, Alan stated that the business had been generating average profits of $70,000 per year over the past four years. Neither Carl nor his accountant made any representations to Paul at any time regarding the profitability of the business, nor were they aware of the representations made to Paul by Alan. In reliance on the profit analysis made by Alan, Paul purchased the Free Spirit Shop on October 6, 1997.

After operating the business and compiling financial information for over a year, Paul realized that his confidence in Alan had been misplaced and that the evaluation Alan had given him was erroneous. Profits were under 25% of the amount reported by Alan. On that basis, Paul paid substantially more for the business than it was actually worth. **Paul has consulted you, a practicing attorney in Maryland, for advice as to his rights against Carl, Alan, and BPI. Paul would like to rescind the contract with Carl or, in the alternative, recover damages based upon the actual value of the business and loss of income.**

On the facts set forth, advise Paul as to the potential liability of Carl, Alan and BPI.

REPRESENTATIVE ANSWER NO. 1

Alan. Paul can bring a cause of action against Alan for intentional and negligent misrepresentation. In this case, Alan misrepresented the financial condition of the Company after assuring Paul that he knew how to interpret corporate finance reports. This information was material to the amount Paul would pay and Paul relied on Alan's statements to his detriment. Paul will have to show that his reliance was reasonable, which he may have trouble doing, since he could have had an outside accountant handle the evaluation, but based on Alan's assurances, he should be able to recover.

Paul can also bring an action for negligent misrepresentation. Based on their relationship and the fact that Alan represented that he was an expert at looking at these books, Alan had a duty to provide accurate information to Paul about the transaction. He didn't and as discussed above there was reliance and damages. In selling the business, Alan had, in essence, warranted that his representations were accurate and Paul can sue him based on those representations.

BPI. A principal is liable for contracts entered into by its agents if there is a principal agent relationship, the agent is acting within the scope of the agency and within his authority. In this case, there was no actual authority since Alan, by contract, was an independent contractor without authority to act on behalf of BPI.

However, Paul can argue successfully that Alan had apparent authority. Apparent authority arises when the principal cloaks the agent with authority, and the third party reasonably relies on that authority. Here, Paul dialed the number listed for BPI and Alan answered. Alan acted like an employee and never disclosed his true relationship with BPI. The agreement

authorized Carl to sell to PAUL only and the commission went to BPI and not Alan.

Based on the apparent authority BPI would be responsible for Alan's conduct. Carl. Carl made no false representations and allowed Paul to review his books. Carl had no fiduciary relationship requiring disclosure. There was a mistake but it went only to the value of the subject matter and was unilateral. The price paid does not seem so hugely disproportionate to the value of the business that Carl would know that the other side made a mistake in entering into the contract.

Rescission is not likely in this case because Carl was unaware of Alan's representations and he did not actively engage in any fraud or misrepresentation.

REPRESENTATIVE ANSWER NO. 2

Alan is liable to Paul for actively misrepresenting the financial information when he was aware that Paul would rely on his statements. Alan's actions satisfy all of the elements of fraud because he knowingly made a material misrepresentation to Paul upon which Paul reasonably relied to his detriment.

BPI may be liable to Paul and likely is because Alan regularly operated under the apparent authority of BPI. Evidence that Paul reasonably viewed as indicating Alan's agency for BPI is seen in the fact that Paul originally responded to a BPI ad and called the BPI business number. This in combination with Alan's regular dealings with BPI, his willingness to hold himself out as an agent of BPI and BPI's willingness to have Alan act as an agent makes him legally an agent.

Carl is not likely liable. Although BPI and Alan are technically Carl's agents, Carl knew nothing of Alan's fraud. Moreover, Carl did not himself actively conceal or fail to disclose any information. Carl may have been aware that he was receiving a high price for the business, but this is insufficient to ground liability for fraud.

Paul will not be able to rescind the contract with Carl because Carl is not guilty of any culpable behavior. Paul will, however, be able to collect damages from Alan and BPI, jointly and severally, for the amount by which he overpaid for Free Spirit Shop as a result of Alan's fraudulent manipulation of the books.

PART D

QUESTION I
(15 Points - 20 Minutes)

Whitley was an armed security guard employed by Blink's Security, Inc. assigned to a branch of ABC bank located in downtown Annapolis, Maryland. For several years, with the full knowledge of Jane, the branch manager of the bank, Whitley had made it a practice to perform his duties with an unloaded revolver. His rationale was that the bank had never been robbed, and that the mere presence of the revolver was effective as a deterrent to any would-be robber.

On July 1, 1998, Greg and Jerry entered the bank. Greg went up to the teller and handed her a note stating "this is a stickup. Give me all of your 20's and 50's. Don't raise any alarm or I will shoot you." Greg did not display a weapon.

As the teller was filling a bag with the money, Susie, a customer in the bank, noticed what was happening and started screaming. Jerry, who was standing near Whitley, pulled a pistol and started shooting. Whitley pulled his revolver, but, because it was not loaded, he was unable to stop Jerry from firing. Both Greg and Jerry escaped.

During the incident, Susie was shot in the spine by Jerry and has suffered serious permanent injuries which render her unable to care for her two year old daughter or to have sexual relations with her husband.

Susie and her husband have come to you, a Maryland attorney, for advice concerning their possible actions.

What advice would you give them? Explain fully.

REPRESENTATIVE ANSWER NO. 1

Susie and her husband may sue Jerry for civil damages based on the tort of battery. Battery, an intentional tort, is the offensive touching of another person. Jerry shot Susie and will be held liable. Jerry has no credible defense that he can claim. It is unlikely that Susie will recover much money from Jerry even if she receives a substantial judgment. Most bank robbers are not rich. I would recommend that she let the criminal justice system deal with Jerry.

Susie should sue Whitley, individually, as well as his employer, Blink's Security, Inc., under the doctrine of respondeat superior, for negligence. Normally one has no duty to rescue or come to the aid of another. Whitley, however, had a duty based upon contract. He was paid to be an armed security guard.

Duty and breach are only two of the elements of a claim for negligence. Susie will also have to show causation (both actual and proximate). Direct causation will be established if it can be shown that, had Whitley been armed, he could have prevented Jerry from shooting Susie. Proximate causation deals with foreseeability and fairness in holding a defendant liable. It certainly is foreseeable that a bank robber will be armed. In fact, it might also be expected since most people know that bank security guards are armed.

Susie must also prove her damages which is easy. She can recover all of her medical bills and for pain and suffering as ordinary damages. She may also be able to recover the cost of providing childcare. Her husband can sue for loss of consortium (loss of sexual relations with his wife and recover damages).

Blinks Security, Inc. will be liable for Whitley's negligence under the doctrine of respondeat superior. This doctrine is based upon the employer-employee relationship and is appropriate where there is assent, benefit and control. All three are satisfied: assent(he was employed by them under a contract), benefit (the company was being paid for his services to ABC Bank) and control (they probably were responsible for his training, uniforms and equipment). In addition, he was doing his job-providing security- which is within the scope of his employment.

Blinks may try to argue that he was acting beyond the scope of his employment by not having a loaded weapon. We would have to know the company's regulations and policies concerning that matter.

Whitley and Blinks have the defense of contributory negligence against both Susie and her husband should they choose to sue for loss of consortium. Contributory negligence is an absolute bar to recovery in Maryland and Susie won't be able to collect damages if the defendants can show that she was at fault in the slightest. Whether Susie was at fault is a question of fact for the jury to decide. It is possible since her screaming started the commotion that led to her injury and we are told that Jerry didn't flash or brandish a weapon prior to her screaming.

There is no special duty or rule required for banks, unlike for innkeepers and common carriers. Also, armed security guards are employed primarily to protect against robbery, not injuries to customers. Was Jane negligent for not insisting that Whitley load his weapon? Liability against Jane and the bank will be harder to prove than against Whitley and Brinks. Susie and her husband should file a negligence suit against them nonetheless.

REPRESENTATIVE ANSWER NO. 2

I would advise Susie and her husband that they have possible claims against Whitley, ABC Bank and Blink's Security arising out of the July 1, 1998 bank robbery in which Susie was shot and disabled. Susie may also have a chance of recovery based in tort against Greg and

Jerry although it is doubtful Susie will succeed in getting Greg and Jerry into a courtroom or that Greg and Jerry even have any money other than the money stolen from the bank.

Susie may be able to recover for her injuries from Whitley based upon a negligence claim. Negligence will be found where the defendant owed the plaintiff a duty, the defendant breaches that duty, and the breach is the factual and legal cause of the resulting harm.

Whitley had a duty as a security guard for the bank to take reasonable steps to protect the bank's customers. Whitley, in not carrying a loaded weapon, was arguably in breach of the duty owed to customers of the bank. Whether Whitley's breach was the proximate cause of Susie's injury may be proven if Susie's injury wouldn't have occurred but for Whitley's breach. Whitley could have shot Jerry before Jerry shot Susie, thus satisfying the "but for" test.

In addition, there must be legal cause in order to hold Whitley liable. Here, Whitley's breach in not carrying a loaded gun could foreseeably result in a customer being shot. Whitley should have known that a robbery was possible necessitating the need for a loaded weapon to defend the bank and its customers.

The final element of the negligence claim against Whitley is injury which Susie did suffer. She is no longer able to care for her child or have sexual relations with her husband due to her spinal injury resulting from being shot by Jerry.

Therefore, Susie has strong likelihood of success based upon a negligence claim for Whitley's failure to carry a loaded gun. Under the circumstances, Whitley may be able to avoid personal liability for his negligence due to his status as an agent of either the bank or Blink's Security.

Blink's may be held liable for the negligence of its agent, Whitley, which resulted in the injury to Susie when Whitley was unable to execute his duty to protect the bank and its customers in case of a robbery.

The rule for principal liability for its agent's torts applies where a principal-agent relationship exists, the tort was within the scope of employment, and the agent was acting within the scope of his authority.

Here, Whitley was employed by Blink's. Although Whitley was assigned to the bank, this does not remove Whitley from the control of Blink's. Generally a principal, such as Blink's, retains control over its agents even when loaned to a secondary principal (bank).

Whitley was acting for the benefit of Blink's in executing the services which Blink's contracted to provide to the bank, therefore further reinforcing his status as an agent of Blink's and not an agent of Bank directly.

Whitley's negligence was within the scope of his employment in that he had the authority to take whatever precautions necessary to execute his duties as a security guard.

Therefore, under the circumstances, Susie should pursue a claim against Blink's which is vicariously liable for the negligence of Whitley as its agent.

Although Susie could arguably pursue a claim against the bank, the only fact helpful to her would be ratification by the bank's manager, Jane, of Whitley's failure to carry a loaded gun. Susie has a higher likelihood of success against Blink's.

It was not reasonable to allow Whitley not to have a loaded gun. This totally defeats the purpose of having an armed security guard. The bank, having breached its duty by Jane's conduct, is responsible for the resulting injuries to Susie.

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Susie's husband may bring a separate action against each of the defendants for loss of consortium.

QUESTION II
(20 Points - 25 Minutes)

Joe, Frank and Barney, friends since childhood, were drinking in a local bar in Charles County, Maryland. They drank continuously from 11:00 A.M. until about 7:30 P.M. when their money ran out. Joe asked the others if they were interested in making some quick money by robbing the convenience store across the street from the bar.

Frank said that he would participate as long as no one got hurt, and that any money acquired would be divided evenly among the three of them. Barney said that he was not interested, but would stand outside the bar and watch while they committed the robbery.

Joe then asked Barney if he and Frank could use Barney's gun to frighten the store clerk. Barney handed over his gun but advised Joe that it was not loaded.

As Barney watched from just outside of the bar, his friends entered the store. Joe pointed the gun at the clerk and said, "give us all of your money or I'll shoot." The store clerk, instead of handling over the money, pulled out a revolver and shot Joe dead. Frank then ran out of the store without taking any money, but he grabbed a carton of cigarettes on the way out. Barney and Frank were arrested the next day.

After their release on bail, Barney and Frank come to you, a Maryland attorney, for advice.

(1) Assuming that the above facts can be proven and the arrest was lawful, with what crimes may each of the defendants be charged? Provide the factual basis for each.

(2) Based upon these facts, what defenses, if any, may each of the defendants assert to each charge?

REPRESENTATIVE ANSWER NO. 1

If he had lived, Joe could have been charged with solicitation because he was the originator of the scheme to rob the store for more money. He encouraged Frank into walking across the street and attempting to rob the convenience store when he mentioned "quick money" to his friends after theirs ran out.

Joe, Frank and Barney could all be charged with conspiracy because they all worked together in order to rob the convenience store. Joe had the plan and acquired the weapon in furtherance of the robbery and he also used the gun which he aimed at the store clerk. Frank went to the store with Joe and therefore, participated directly. Barney, although he did not go into the store, provided the gun to Joe and Frank (albeit unloaded), and stood watch while Joe and Frank went to rob the store.

As they were all co-conspirators, the three can also be charged with attempted robbery because Joe and frank went into the store in order to permanently deprive the proprietor of money. In so doing, Joe used a dangerous instrumentality, Barney's gun, in order to achieve the objective of stealing the money. However, the crime was never completed because the clerk shot Joe, so the robbery was only attempted. Barney and Frank are each guilty of any foreseeable results of their union with Joe except for Joe's death because Maryland does not hold conspirators guilty of the murder of their co-conspirators who are killed during the crime by a non-participant.

The same conspiracy analysis applies to assault as well. Joe used his/Barney's gun to frighten the clerk so that the clerk would give him the money from the cash register. Joe had no other way to force the clerk to give him the money except by creating an apprehension of bodily harm.

Joe used Barney’s gun to commit the attempted robbery because he does not have a gun of his own. The use of this weapon in this manner constitutes the use of a weapon in the commission of a crime of violence.

Barney can be charged as an accessory before the fact because he offered to stand guard while Joe and Frank entered the store for the purpose of robbing it.

Frank can be charged with the common law crime of petty larceny and the statutory crime of theft because after the assault and shooting, Frank took a carton of cigarettes with out paying for them and with the intent to permanently deprive the owner of them.

They will argue that they are innocent of these crimes because their voluntary intoxication

(they drank for 8 ½ hours) prevented them from forming the intent to commit these specific intent crimes. Frank will argue lack of intent for the charge of larceny/theft because he was too drunk to form the requisite intent.

Alternately, Barney will argue that he never consented to be a part of the robbery conspiracy which he made very clear when he told Joe and Frank that he was not interested in robbing the convenience store.

Barney will argue that, although he gave Joe his gun, it was not an inherently dangerous instrumentality because it was not loaded. And he informed them that it was not loaded. Since the gun was not loaded, he couldn't be an accessory. Also, there was no conspiracy due to the lack of intent resulting from their intoxication, therefore, he wasn't an accessory before the fact to any of the crimes charged.

Joe, if he were alive, would argue that, because the gun wasn't loaded, he did not violate any handgun statutes.

REPRESENTATIVE ANSWER NO. 2

Barney may be charged with the following:

1. Conspiracy to rob the convenience store.
   Defense - no intent to form the conspiracy. He told Frank and Joe that he was not interested.

2. Possession of a concealed weapon - the gun that he gave to Frank and Joe.

3. Use of a handgun in the commission of a crime of violence - he gave the gun to Frank and Joe knowing they were going to use it to rob the store.

4. Possession of a deadly weapon - the gun.
   Defense - It wasn't loaded.

5. Accessory before the fact - Provided the gun and stood outside the store essentially as a lookout.

   Defense - He will argue that he was merely present and did not aid or abet the commission of the crime.

6. If it is found that there was a conspiracy, Barney will also be liable for all other crimes committed by Frank and Joe that were foreseeable. However, Barney's defense to conspiracy is that he lacked the requisite specific intent to form a conspiracy because he was intoxicated.

Frank may be charged with the following:

1. Conspiracy to rob the store - when he agreed to Joe's solicitation to rob the store.
   Defense - lacked the specific intent because he was voluntarily intoxicated.

2. Use of a handgun in the commission of a felony - even though he did not personally use the gun, he is liable for all the acts of his co-conspirators, even if he is not the principal in the first degree.

3. Possession of concealed weapon.

4. Possession dangerous weapon.

5. Attempted robbery - When Joe and Frank entered the store and Joe pulled out the gun saying give me the money or I'll shoot.
Defense - lacked specific intent because of intoxication.

6. Robbery.
Defense - robbery was not completed.

7. Aggravated assault - Joe, co-conspirator, pulled a gun on the clerk and threatened his life.
Defense - was not within the scope of his intent when he entered the conspiracy. He didn't want anyone to be hurt.

8. Theft under $300.00 - The carton of cigarettes.
Defense - no specific intent because of intoxication.

Neither Barney nor Frank is liable for the death of Joe. There is no responsibility when a "good guy" kills one of the co-felons while in the commission of a crime.

PART E

QUESTION I
(20 Points - 30 Minutes)

Sally, a printing equipment dealer, sold a used printing press to Paul in Maryland. She told him the printing plates had been damaged and repairs had been made. She gave Paul the repair records to review.

The prior damage and details of the repairs were clearly noted in the repair records. The repair records also stated that the press had been inspected on June 1, 1999 by an independent inspector, and was "in first-class operating condition." Before Paul purchased the press, he signed a bill of sale to the effect that "after inspection of the printing press and repair record, purchaser agrees to accept the press on an "as is, where is" basis for $60,000."

Paul shipped the printing press from Sally's warehouse in Baltimore to his printing business in Charles County, Maryland. Immediately thereafter, the press was found to have latent mechanical defects and it was incapable of operation without extensive repairs costing $50,000. The defects existed when Sally sold the press to Paul. Paul also received notice from Maryland Bank that it had a security interest in the press for $5,000 and that prior to the sale, a legally sufficient security interest and financing statement, signed by Sally, listing the press as collateral had been recorded by the Bank in the records of the Maryland State Department of Assessments and Taxation on January 2, 1999.

Paul seeks advice from you, a Maryland attorney. Draft a short memo, dealing with the following issues:

(1) Describe the rights and remedies Paul can assert against Sally under the U.C.C. based on the facts stated?

(2) Analyze the likelihood that Paul will prevail in his claims.

(3) Discuss whether Paul has any valid defense against potential claims by Maryland Bank against the printing press.

(4) Assume that Sally was a printing shop owner at the time she sold the press to Paul. Discuss whether this fact (1) has any bearing on Sally's legal obligations in the sale of the printing press and (2) has any bearing on Paul's defenses to claims of Maryland Bank.

REPRESENTATIVE ANSWER NO. 1

TO Paul
FROM Attorney
DATE July 29, 1999
RE Possible claims

I have researched the issues as requested. Please feel free to call me with any additional questions or concerns.

1. **Rights and Remedies against Sally.**

Paul may assert a claim for breach of warranty against Sally. First, we can argue that Sally("S") gave you, Paul ("P"), an express warranty that the press would be in operating condition when she stated that the press was in "first-class operating condition." The press clearly was not.

Second, P may argue that S, as a merchant, provided an implied warranty of merchantability – that the press would be fit for its ordinary purpose. Here, the press clearly was not fit for the ordinary purpose.

There is no basis upon which to suggest that S breached a warranty for fitness for particular use because there are no facts to suggest that P was buying the press for a particular use or that S knew of it.

2. **Likelihood of Success**.

It is likely that P will prevail on the breach of express warranty because express warranties may not be disclaimed and because the defect could not have been discovered in the initial examination before signing the contract.

However, there is not likely to be a successful breach of implied warranty of merchantability claim because S included the term "as is" in the agreement. This disclaims the implied warranty of merchantability.

On the success of the express warranty breach, P will be entitled to recover expectation damages, incidental damages and foreseeable consequential damages.

3. **Claims against Bank.**

Bank had an enforceable, perfected security interest in the printing press. However, as a

buyer in the ordinary course of S's business, P took clear of Bank's interest in the press because P's priority rights were greater under §9-307(1)(a).

4. Assuming S were a printing shop owner and not in the regular course of selling presses, the Bank would have the priority in the security interest because P would not have been a buyer in the ordinary course of S's business and filed before P took possession of the press. Also, the fact that S was a printing shop owner would not change the nature of the case against S, except the rule of law would be different. She would not be considered a merchant and would not have the warranty of merchantability implied in her contract with P. However, even with the warranty, P loses on this issue.

REPRESENTATIVE ANSWER NO. 2

1. Paul may assert three claims against Sally under the UCC:

(a) **Breach of express warranty** because the records stated that the press was in first-class operating condition.

(b) **Breach of implied warranty of merchantability** which is implied in every sale of goods under the UCC.

(c) **Breach of implied warranty of fitness**, which may be implied in the sale of goods selected by seller to meet a purpose stated by buyer knowing that buyer relied on seller's advice/selection.

2. Paul may succeed on his claim for breach of express warranty because an express warranty cannot effectively be waived – any language indicating such a waiver is inconsistent with the express warranty is in favor of the warranty. Sally may argue that the only warranty was on the repair records, not on the bill of sale which attempts to limit the warranty, but she used the records to induce the sale and this argument will not wash.

Paul will probably not succeed on his breach of implied warranty of merchantability because the "as is" language should be sufficient under §2-316(3)(a) – unless the printing press is construed to be consumer goods in which case the warranty may not be waived.

His claim of implied warranty of fitness will not succeed because he did not rely on seller to select the goods.

3. The Maryland Bank's security interest appears to be correctly perfected, but this does not give its claim priority over Paul's. A purchase in inventory by a buyer in the ordinary course of business has priority over a perfected security interest in that inventory. Paul is a buyer in the ordinary course of business, because he purchased in good faith from a person in the business of selling printing presses.

4. If Sally was a printing shop owner, she might not qualify as a merchant for the purposes of the warranty provisions of the UCC, because she might not be a dealer in printing presses, or a person who holds himself out to have knowledge, unless she regularly resold her presses.

Such a change in Sally's status would also negate Paul's defense against Maryland Bank, because the press would be considered equipment, not inventory, and would not be subject to the special protections of §9-307.

QUESTION II
(10 Points - 15 Minutes)

Eric ("The Arm") Scott, signed a written contract to pitch for the major league Baltimore Suns' baseball team for the 1999 season. The Suns guaranteed Scott a place on the team as a pitcher and agreed to pay him $6 million, payable in 12 monthly installments, of $500,000 each, beginning March 1, 1999.

When the season started, Scott's pitching was totally ineffective. By May 31, 1999, he had lost all eight games he started. After three monthly payments, the Suns' management decided to replace Scott. The Suns' management notified Scott by letter of its decision to terminate Scott's pitching services, effective June 1, 1999, and that "the team will not comply with the obligations" to you under the written contract.

By the same letter, and with the proposed purpose "to avoid any damage to you," the Suns instead offered to employ Scott, in lieu of pitching, as a "roving instructor and good will ambassador" for the balance of the 1999 season at the same $500,000 per month salary ($4,500,000 for the balance of the year). The proposed employment would require Scott to work with young pitchers on the Suns' minor league teams and make personal appearances at banquets.

The next day, Scott received a written proposal from another major league baseball club, the Chicago Cubs, offering him an immediate spot on the Cubs' pitching roster at a guaranteed salary of $900,000 ($100,000 per month) until March 1, 2000.

Scott comes to you, a Maryland attorney, for legal advice. Scott tells you that he would prefer not to accept either offer, and that he wants to accept a $45,000 ($5,000 per month) offer as head coach of the baseball team at his former high school, beginning immediately.

If Scott accepts the offer of employment as high school head baseball coach, how much damages, if any, can he recover from the Baltimore Suns for the period June 1, 1999 through March 1, 2000? Explain fully the legal and factual bases for your answer.

Representative Answer No. 1

Scott may recover the amount of money that he would have made pitching for the Suns, less

the amount of money he will earn coaching. He will also be entitled to incidental damages.

In all breach of contract cases, the non-breaching party has a duty to mitigate damages. That means that the non-breaching party, in an employment case must secure comparable employment if he has the chance.

In this case, the Suns' offer was clearly not comparable employment. He was hired to pitch and had no duty to accept a job that required him to coach and make public appearances. Thus, he had no duty to accept this job.

The other job presents a much more complex question as to whether it was comparable. On one hand, it was performing the exact same type of work as he would have been doing, but on the other hand, the compensation was dramatically lower, it was in a completely different city, in a completely different part of the country and with a completely different team. It is for these reasons that I would conclude that the job was not comparable employment and Scott had no duty to take it.

Although Scott did not take a comparable job in coaching his high school team, the compensation he receives from that job must be subtracted from his damages recovered. If this did not occur, he would be unjustly enriched by receiving more money than he would have – the contract would have been performed. Therefore, he can recover $455,500 which is ($4,500,000 minus $45,000). He also may get incidental damages.

REPRESENTATIVE ANSWER NO. 2

Scott's contract with the Suns is a personal service employment contract.

If Scott decides to take the job with the high school team, he could likely not recover any damages from the Suns because they attempted to honor the contract with him by paying him the same salary to work in another position. Thus, he would not have been harmed economically. Essentially, the Suns are offering Scott avoidance damages and a new offer of employment. However, Scott could argue that he contracted to work with the Suns as a pitcher, and by not honoring that agreement, the Suns are in breach. In this instance, Scott could argue that the Suns should pay him $5.1 million, the difference between his contract amount with the Suns and the contract offered to him by the Cubs. If Sam were to claim that he should be compensated for his loss of employment as a Suns' pitcher, then paying him the $5.1 million would place him in the same position he would have been in economically as a Suns' pitcher even though he would be pitching for another team. However, Sam could not claim this if he were to coach for the high school. He is obligated to account for avoidable damages, which he could do by finding a comparable job with comparable pay or slightly less pay, as is the case with the Cubs' pitching job.

PART F

QUESTION I
(20 Points - 25 Minutes)

The constitution of the state of Westover provides that its courts may exercise jurisdiction over all "persons and causes of action to the extent permitted by the Constitution of the United States of America." The Westover Courts and Judicial Proceedings Article provides, in pertinent part:

Service of Process - Small Claims. In addition to other methods prescribed by law, process may be served in a civil action for less than $2,500 by mailing the summons, together with an exact photocopy of the complaint and all pleadings or papers filed therewith, to each defendant at his or her last known address. Such mailing may be by first class United States mail, postage prepaid. The plaintiff shall file a certificate with the court of such filing and service shall be effective as of seven calendar days after the date of mailing.

Appliance Shack, Inc. is a retail chain with several stores in Maryland. In 1998, it relocated its corporate headquarters from Maryland to Westover. In June of that year, it filed a civil action in small claims court in Westover against John Smith, a retired teacher who resides in Carroll County, Maryland on Smith's overdue account for merchandise purchased at its Carroll County store. Service of process was accomplished by first class mail in accordance with the above-quoted rule; Smith did not answer and a judgment was entered against him by default in the amount of $1,500. In compliance with applicable law, Appliance Shack has now filed an action to enroll the judgment against Smith in the court records of Carroll County.

Smith claims that he never received notice of the action filed by Appliance Shack in Westover and does not owe the money. He also says that he has never been to Westover in his life. He has retained you, an attorney practicing in Maryland, to prevent the judgment from being enrolled in the court records for Carroll County.

What arguments would you advance on Smith's behalf? How is the court likely to rule? Explain your answer thoroughly.

REPRESENTATIVE ANSWER NO. 1

The Constitution places a limit on personal jurisdiction so that it does not impede substantial justice and notices of fair play. This presents a two part test 1) reasonableness 2) Notice of the Contact. Westover would acquire personal jurisdiction over Smith if this suit meets that test. Beginning with the notice of the contact, Smith has never been to Westover, the transaction was made in Maryland, the Appliance Shack was headquartered in Maryland until around the time of the suit (it is unclear where they were located at the origin of the lease

action). This is almost no contact with Westover, except indirectly.

Second, the reasonableness of Westover claiming jurisdiction. It is unclear how close Westover is to Maryland but that could influence the determination, also the claim arose in Maryland so Maryland law would apply, giving Westover little interest in the proceeding.

Lastly, the travel combined with the little amount in question makes it fairly unreasonable for Westover to claim jurisdiction under the Constitutional standard. A court would likely rule that Westover does not have personal jurisdiction over Smith.

Additionally, I would argue improper service of process. In Maryland, service must be in person or by certified mail. They do allow service outside the jurisdiction based on the laws of another jurisdiction if they are reasonably calculated to give actual notice. While in this case Smith is inside MD the service by standard mail [will] likely be insufficient and would most likely have to be done in accordance with Maryland law.

While the full faith and credit calls for Maryland to respect the decisions of other state Courts, this only applies to Courts with proper jurisdiction and properly adjudicated. The Maryland Court would likely rule in favor of Smith and find no personal jurisdiction in Westover and insufficient process in Maryland.

REPRESENTATIVE ANSWER NO. 2

I would argue that the judgment must not be enrolled here because it was reached in violation of the Federal Constitution's Due Process requirements. The Constitution requires that in order to exercise personal jurisdiction over a defendant without his consent, a two part test must be satisfied. The first part of the test deals with the nature of the defendant's contacts with the forum state. In this case, S. has never been to Westover. He does not reside there, work there, or do business with Westover residents. Therefore, S. has NO contacts with the state of Westover. Furthermore, he has never "purposefully availed" himself of Westover or its laws. Therefore, S. does not have sufficient contacts with Westover to satisfy the Constitutional due process requirements.

The second prong of the test for whether Westover may exercise jurisdiction is whether doing so would be "reasonable." This involves a balancing test in which the state's interest in the transaction and the burden of the defendant are weighed. Here, the state has almost no interest in the transaction alleged. This is because the transaction occurred in Maryland and Maryland law (NOT WESTOVER LAW) should apply, so the forum state has no interest.

In contrast, the burden on S. of defending this claim in the forum state is high. He has never

even been there. Therefore, Westover may not exercise personal jurisdiction. In addition, the statute allowing service on S. does not ensure in any way that the Constitutional standards are met. Therefore, service and process were insufficient because they were achieved under an unconstitutional statute.

Appliance shack will argue that the full faith and credit clause and the constitution's requirements of comity between the states requires MD to recognize the Westover judgment. This agreement will fail. These principles do not require MD to recognize a judgment as constitutionally infirm as the one against Mr. Smith.

QUESTION II
(15 Points - 20 Minutes)

Alvin Adams was arrested and charged with possession of CDS (controlled dangerous substance). The arrest occurred during a police raid of Adams' apartment. Adams lives in public housing, and possession of drugs is a breach of his lease. The public housing authority has filed an action to evict Adams based upon these facts. The trial for the eviction based on the breach of lease is scheduled one month before the criminal trial for the possession of CDS. Mr. Adams has retained you, an attorney practicing in Maryland, to represent him in both the civil and the criminal trials.

Explain to what extent the Fifth Amendment applies to the civil proceeding for the breach of lease. If Adams waives his Fifth Amendment rights in the civil trial, what rights, if any, does he preserve against self-incrimination? What effect, if any, would his refusal to waive his Fifth Amendment rights have upon the outcome of the civil action? Explain your answer thoroughly.

REPRESENTATIVE ANSWER NO. 1

Alvin's constitutional right to invoke the 5th amendment (prevents an individual from being compelled to testify against himself) applies to the civil proceeding for the breach of lease. This is because it is possible for Alvin to incriminate himself by testifying as to whether or not he had possession of CDS. Therefore, his 5th Amendment right applies to this civil proceeding.

If Alvin, however, waives his 5th Amendment rights and decides to testify, he will have WAIVED his 5th Amendment right for his criminal trial for possession of CDS. At his criminal trial, Alvin will be forced to testify on this issue and all the incriminating facts surrounding the arrest and possession. By waiving his civil trial, he preserves NO rights against self-incrimination.

Alvin's refusal to waive his 5th Amendment rights may have an adverse impact on the outcome of the civil action. The opposing party may be able to comment on Alvin's refusal to testify and jury instructions unless evidence rules keep comments out - may not be able

to make adverse comments if too prejudicial.

REPRESENTATIVE ANSWER NO. 2

The 5th Amendment of the U.S. Constitution guarantees a criminal defendant the right to be free from compelled self-incrimination. This right may be waived and only applies where the self-incrimination is compelled by the state. As a practical matter, procedural techniques could likely be used to ensure that the criminal trial occurred before the civil one. This would alleviate the problem here. However, if this was not possible, Adams could assert his 5th Amendment privilege in the civil action. If he did so, the fact finder would be free to draw negative inferences from his assertion of the privilege. In other words, asserting the privilege would allow the civil fact finder to presume that Adams possessed CDS. Obviously, by asserting his privilege against self incrimination in the civil trial, he would preserve it for the criminal trial.

If Adams waives his 5th Amendment right in the civil trial, he will lose it in the criminal trial. There is an argument that because the state is bringing the eviction action, the state is compelling Adams to testify in that action. The problem with this argument is that Adams is free to assert his 5th Amendment privilege in the civil trial. Therefore, he is not being "compelled" to testify even though asserting his privilege comes at a cost.