BOARD'S ANALYSIS

QUESTION 1

Rescission – As a general rule, an executory contract may be unilaterally rescinded by a party where there has been a substantial and material breach, sufficient to defeat the object of the contract. *Vincent v. Palmer, 179 Md. 365, 19 A.2d 183 (1941).*

Here, the existence of recorded restrictions and covenants is substantial and related to the object of the contract. However, the Seller did not breach the sales contract because it stated that title was "subject to all restrictions of record." The rights of the assignee Commercial Developers ("CD") are no greater than those of the assignor ("Buyer"). Consequently, CD will not be successful in seeking to rescind the contract.

Rights Against Swift - CD would not be successful in an action against Swift.

In Maryland, the general rule is that the liability of an attorney to examine and pass upon a title to land is founded on contract rather than tort, and therefore, does not extend beyond the person by whom they were employed.

A "downstream" title holder or contract assignee lacks privity with the attorney and, therefore, has no cause of action in contract. *Wlodarnk v. Thrift, 178 Md. 453, 13 A.2d 774 (1940).*

Under the stated facts, Swift prepared the Contract Assignment and knew that CD would be the purchaser. However, Swift's title opinion was not included in that assignment and Swift did not know the Buyer had sent his title opinion to CD.

[An Answer which discusses the facts and concludes that Swift is liable based on tort because he should have known CD would rely on his title opinion will receive substantial credit].

BOARD'S ANALYSIS

QUESTION 2

a. The Court should overrule the objections. Both of the common law rules asserted by the objecting attorney have been modified by the Maryland Rules of Evidence. MRE 5-607 provides that the credibility of a witness may be challenged by any party, including the party who called the witness. MRE 5-613 states that a witness may be questioned about a prior inconsistent statement without disclosure of the prior statement's contents if prior to the end of the examination disclosure is made and the witness given an opportunity to explain or deny making the statement.

b. The Court should sustain the objection. As to the issue of character, evidence of prior crimes is inadmissible to prove the character of the person. MRE 5-404(b). MRE 5-609 sets out a several part analysis regarding the admissibility of prior crimes to attack credibility. First, the crime must be an infamous one or "[an]other crime relevant to the witnesses' credibility" and the Court must determine that the probative value outweighs the danger of unfair prejudice to the witness or objecting party. MRE 5-609(a). Second, the conviction must have occurred within 15 years. MRE 5-609(b).

In Maryland, infamous crimes are treason, felony, perjury, forgery and the so-called *crimen falsi*, i.e. misdemeanors involving dishonesty. Neither malicious destruction of property nor the illegal possession of a weapon involves dishonesty and, since they are misdemeanors, they are not infamous crimes. While theft is an infamous crime, Blifill was convicted in 1990, outside of the 15 year limit set out in MRE 5-609(b).

c. Blifill cannot be compelled to testify if he has invoked the Fifth Amendment. Unlike a criminal case, there is no waiver of a witness' Fifth Amendment rights in a civil case if that witness testifies to other matters. The witness may invoke the right as to each question that may be incriminating. The opposition, however, is entitled to a negative inference from such invocation to the extent it is relevant to the case.

QUESTION 3

BOARD'S ANALYSIS

The LLC should not be liable for either the rent or the damages to the Space claimed by the Landlord. The LLC was formed after the claims for rent and the damages to the Space arose. The claims arose prior to the date on which the LLC was formed, The Articles of Organization were accepted by the Maryland State Department of Assessments and Taxation on September 1, 2006. See, Md. Corps. & Assn's Code Ann. §4A-202 (b). Unless the Articles of Organization or the Operating Agreement among the members provide that the LLC will assume the liability for claims against the individual members prior to the date of formation, or unless there is a successful argument that the LLC ratified the actions of individual members, the LLC should not be liable for any claims made by Landlord.

Steve signed the lease on behalf of the LLC prior to its formation and without authority to do so as stated in the Articles of Organization. The Articles provided that no member was authorized to act as an agent of the LLC. Therefore, Steve cannot avoid liability by asserting the shield provided to members of an LLC as set forth in Md. Corps. & Assn's Code Ann. §4A-301. Steve will be personally liable for both the rent due under the lease as well as for the damages that he caused to the Space. He will seek contribution for the rent and damages from Carla and the LLC; however, it is unlikely that Carla or the LLC will be liable for the indemnification unless Steve is successful in arguing ratification by the LLC and/or Carla or the oral understanding and agreement with Carla.

The Landlord will seek the rent and damages simultaneously from Carla because the Landlord will claim that she ratified the lease entered into by Steve because she paid the rent under the lease or that they were partners under an oral understanding. She will claim that she advanced the rent and that she is not personally liable to the Landlord as she neither signed nor ratified the lease as her personal obligation. Instead, she will argue that she should receive indemnification from all liabilities from Steve since he signed that lease individually and personally caused the fire to the Space. In addition, she will argue that her contribution of $50,000 to the LLC should not be used to pay any rent or damages to the Landlord because the contribution would be an asset of the LLC upon its formation.

BOARD'S ANALYSIS

QUESTION 4

a. Dealer's statements to Buyer as to the similarity between the 2003 and 2006 models represents an express warranty as to the condition of the 2006 vehicle under § 2-313 of the Uniform Commercial Code ("UCC"), codified in Maryland as Commercial Law Article 2-101 *et seq*. When Buyer realized that the 2006 model was substantially different from the 2003 model, he was entitled to revoke his acceptance. *Mercedes-Benz v. Garten*, 94 Md. App. 547 (1993). Because the vehicle operated normally, albeit not to Buyer's expectation that it would be identical to the 2003 model, there is not a breach of the implied warranty for fitness for the uses to which the goods are customarily used, (UCC § 2-314).

b. Dealer's primary defense is that Buyer's revocation was defective. Buyer initially accepted the vehicle by paying for it. UCC 2-606. The first issue is whether Buyer revoked his acceptance within a reasonable time. UCC 2-607. The facts indicate that Buyer returned the vehicle as soon as he learned that there were more than cosmetic differences between the two models. However, Buyer then at least arguably rescinded his recession by taking back possession of the vehicle and disposing of it. However, the Court of Special Appeals in *Garten* held that Buyer's actions were reasonable in light of the Dealer's obdurate refusal to attempt to resolve the matter.

BOARD ANALYSIS

QUESTION 5

Sam Spade could bring an action in tort against John Buck's Tractor Company and its agent, Security Officer, for the battery that occurred when Security Officer grabbed Sam's arm and forcibly escorted him from the property. A battery is a nonconsensual touching and it clearly occurred under these facts. Security Officer was acting at the direction of the Company's employee. Thus, under general principles of agency, both the officer and the Company would be liable.

Similarly, the Company, its employee (Sales Person) and its agent (Tommy Towem) would be subject to a defamation claim for the slander that occurred when Towem and Sales Person called Sam a thief. Slander is defined as "the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business or means of getting a living off another. Cant v. Bartlett, 292 Md. 611, 622 (1982) citing 53 C.J.S. Libel and Slander Section 1(b) (1948). The comments meet the definition and were overheard by Neighbor and anyone else in the area when they were made.

The Company may be liable for the intentional tort of conversion when it, through the actions of its agents Towem, repossessed the tractor and kept the farm tools. As noted by the Court of Appeals in Merchants' National Bank v. Williams, 110 Md. 334, 351-52 (1909):

> Conversion…consists either in the appropriation of the property of another, or in its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding the possession from him under an adverse claim of title, and all who aid, command, assist, or participate in the commission of such unlawful acts are liable.

There is arguably no conversion of the funds since money is not recoverable in action for conversion unless identifiable or specific funds are at issue (i.e., rare coins, etc.). In Allied Investment Corp. & Allied Venture Partnership v. Jasen, 354 MD. 547 (1999). In Carcars Motors of Silver Spring, Inc. v. Borzym, 379 MD 249 (2004), the Court of Appeals suggested (under facts similar to those at issue) that the proper action for recovering the funds would lie in contract since the Company owed Sam Spade once it repossessed his tractor and monies.

John Buck and its agents may be liable for the tort of trespass to chattels for its repossession of the tractor. Sam had a right to possess the tractor. If he can show that damages resulted from the repossession, it may also be liable for the conversion for the tools repossessed along with the tractor. A conversion occurs when there has been a wrongful detention of another's chattel, and a refusal to return it and/or a resulting loss. The tools were taken along with the tractor and were not returned.

BOARD'S ANALYSIS

QUESTION 6

The motions to suppress should be granted, and evidence seized from both bedrooms should be suppressed.

The Fourth Amendment of the U.S. Constitution guards against unreasonable searches and seizures, and requires that search warrants be issued only after a finding of probable cause.

a. Reasonable Expectation of Privacy.

In order for there to be a search, an individual must have a reasonable expectation of privacy. *Katz v. United States*, 386 U.S. 954 (1967). In this case, there is no question that Husband has a reasonable expectation of privacy in his home. *Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that warrantless entry of a person's house is unreasonable per se.) However the Supreme Court has held that Brother, as an over-night house guest, also has a reasonable expectation of privacy in his temporary quarters. *Minnesota v. Olson*, 495 U.S. 91 (1990).

b. Consent.

An exception to the general prohibition against a warrantless search of a person's home is the voluntary consent of an individual with authority to consent to the search. *Jones v. United States*, 357 U.S. 499 (1958); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). In this case, both Husband and Wife claimed ownership of the house, with neither party disputing the other's claim of ownership. Moreover, Wife informed the officers that Husband was her husband. Therefore it was reasonable for the officers to conclude that each party was a co-occupant of the house. The Supreme Court has held that a physically present co-occupant's stated refusal to permit entry renders a warrantless entry and search unreasonable and invalid as to him. *Georgia v. Randolph*, 547 U.S. 103 (2006). Husband refused to consent to the search of the house, and therefore the Officer's entry and search was unreasonable and invalid as to him.

Even though Brother did not have the legal authority to determine who may or may not enter the house, he had a reasonable expectation of privacy in the house. *Olson, supra*. Thus, the officers' warrantless entry and search was unreasonable and invalid as to Brother. *Olson, supra*.

"If the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents veto." Id.

c. Exigent Circumstances.

Another exception to a warrantless search is a claim of a pressing or urgent law enforcement need, i.e., exigent circumstances. *Illinois v. McArthur*, 531 U.S. 326 (2001); *United States v. Place*, 462 U.S. 696 (1983). Here, Husband and Brother knew that the officers had been made aware of the illegal drugs. Therefore, the Officers could reasonably conclude that the illegal drugs would be destroyed before they returned with a search warrant. The Supreme Court has held that the imminent destruction of evidence may constitute an exigent circumstance. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). However, the privacy concerns and law related concerns must be balanced to determine if the intrusion was reasonable. *McArthur, supra; Delaware v. Prouse*, 440 U.S. 648 (1979). In this case, the officers could have acted in a less intrusive manner while still protecting the evidence from being destroyed. One officer could have left to obtain a warrant while the other officer remained behind to prevent re-entry into the house. The Supreme Court has held that when police have reliable information that a residence contains illegal drugs, they may seal the apartment from the outside and restrict entry into the residence while waiting for the warrant. *Segura v. United States*, 468 U.S. 814 (1984). *McArthur, supra*, held that the temporary restraint of re-entry into a house supported by probable cause to prevent destruction of evidence is reasonable. *See also, United States v. Jeffers*, 342 U.S. 48 (1951). Given the officer's ability to seal re-entry to the house, exigent circumstances did not exist.

d. Exclusionary Rule.

Evidence seized unlawfully is not admissible in court. *Weeks v. United States*, 232 U.S. 383 (1914). Therefore, the illegal drugs seized from the house should be excluded from evidence by the Court.

BOARD ANALYSIS

QUESTION 7

On behalf of the minority shareholder, Barrister should move to disqualify Horace from, representing more than one of the defendants. If it is determined that Horace obtained information from Ralph relative to the activities of DataMo and PreMa, Horace may have placed himself in a position which would disqualify him to represent any one of them. It is likely that he could represent only Ralph. However, if he has obtained confidential information from Ralph and from either or both of the other defendants, the court would disqualify him from representing any of the defendants.

Representation of a corporation as an entity as well as its controlling directors, individually, creates a likely conflict of interest for the attorney, particularly when the corporation's interests are adverse to those of the directors. Rule 1.7 of the Maryland Rules of Professional Conduct makes it clear that when a suit is filed against a corporation and its directors individually, a possible conflict of interest immediately arises. The test for determining where there is an impairing conflict is probability, not certainty. Once there is a probability of conflict the court may restrain conduct which has the potential to evolve into a breach of ethics even before such conduct becomes ripe for disciplinary action. It is clear on these facts that the three parties have interests that may be materially adverse to each other, and that Horace could not diligently advance the interests of all three.

The court should grant the motion to disqualify Horace from representing more than one of the parties. Depending on the extent of Horace's involvement in obtaining confidential information, the court could disqualify him from representing any one of them.

In order for the minority stockholder to maintain a derivative suit, the stockholder must first make demand on the corporate directors to take action unless demand would be futile. Here, Barrister should file a motion with the court requesting waiver of this requirement on the ground that such action would be futile. Given the known facts, it is probable that the court would grant the motion.

If the minority stockholder produces evidence that Ralph was using DataMo and PreMa for his own purposes to the detriment of DataMo's stockholders, and that the corporations were being used as shells in the conduct of Ralph's personal business, the court will impose personal liability on otherwise immune corporate officials for wrongful acts done in the name of the corporation. This is commonly referred to as "piercing the corporate veil".

Maryland Rule of Professional Conduct 4.2 prohibits a lawyer from communicating with a person represented by counsel unless such contact is authorized by the other attorney or

permitted by court order. This prohibition extends to contacts with officers and employees of an organization as well.

MRPC 4.2(b). Here, Barrister's communications with Fred violate Rule 4.2. In addition to professional sanctions, Barrister's actions are ground for being disqualified from further participation in the pending action between these parties.

QUESTION 8

BOARD ANALYSIS

Dick was charged and convicted of two crimes resulting from the same incident. An analysis of the elements of these crimes is necessary to determine the required evidence for conviction of these crimes.

These crimes contain different elements. They are separate and distinct. Dick was not convicted twice for the same offense. Therefore, there is no merger and there is no double jeopardy issue in Dick's case.

Arson is a specific intent crime. Arson requires the defendant to act "willfully and maliciously". Defendant must intentionally, knowingly and purposefully do the act with intent to harm property. Criminal Law Article, § 6-102 (a) and §6-101 (c) and (e) (2002). Also, the fact that Dick co-owned the property that he attempted to burn does not prohibit his successful prosecution.

Intent of the defendant is not an element of reckless endangerment. This crime addresses the conduct of the defendant even where he has caused no injury. It is a deterrent. A reckless act constituting a "gross departure from the standard of conduct that a law-abiding person would observe" is required for conviction. It is a general intent crime which creates a substantial risk of death or serious physical injury to persons in conscious disregard and indifference of the consequences to the other persons. Criminal Law Article, § 3-204 (a) (1) (2005 Supplement).

Arson is a crime against habitation. Dick caused char marks on the side entrance door and its threshold and caused smoke throughout the house as a result of leaving a burning bag of charcoal brickettes against the side entrance door. It was intentionally done to "get even" and Dick subsequently admitted he was satisfied.

Reckless endangerment is a crime against a person. The conduct of Dick was his indifference to the risk to Jane of death or serious physical injury which may have resulted from the fire. His act was reckless and well beyond the standard of conduct of a law-abiding person.

Holbrook v. State, 364 Md. 354, 772 A.2d 1240 (2001)

Dick made the statements to his attorney with no one else present. The statements constituted a threat against a public official, a crime under Criminal Law Section 3-708. Maryland Lawyers' Rule of Professional Conduct (MLRPC) 1.6 provides for the confidentiality of information between an attorney and client. Section (b) (1) of that rule provides that the attorney may reveal information relating to the representation of Dick to the extent that the

attorney reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. MLRPC Rules 1.0 (j) and (k) define "reasonably" and "reasonably believes".

Dick's attorney should take into consideration the facts that Dick made the statements immediately after the sentencing, that Dick is incarcerated, and that Dick did not explain what he meant by "get even". The decision to reveal this conversation must then be made on the basis of whether the attorney believes Dick's statement of "get even" as meaning reasonably certain death or substantial bodily harm, and whether that belief is reasonable under the circumstances presented that Dick is now incarcerated for a period of years. See also Newman v. State, 384 Md. 285, 863 A 2d 321 (2004).

BOARD'S ANALYSIS

QUESTION 9

a. Don is entitled to a jury trial, but not necessarily in Baltimore County. Since Paul's claim exceeds $10,000.00, either party is entitled to a jury trial under the Maryland Constitution, Declaration of Rights Art. 23, as implemented by § 4-402(e)(1) of the Courts Article.

However, the venue of Paul's action is not limited to Baltimore County, where Don lives. Pursuant to § 6-201(a) and 6-202(8) of the Courts Article, a defendant may be sued in either the county where he resides or regularly does business or in the County where the tort occurred. Since the accident occurred in Cecil County, venue is proper in that County.

b. In order to accomplish Don's objectives I should:

(1) File a written demand for jury trial in the District Court for Cecil County. The jury trial demand must be filed within the 10 days of the time for filing a notice of intention to defend. Rule 3-325 (a)(2). The notice of intention to defend should be filed within 15 days of the service of the District Court Complaint. Since Don has "just been served", you should file the timely jury trial demand. The Clerk will thereafter transmit the record to the Circuit Court for Cecil County. Rule 3-325(c).

(2) After the case is transferred to the Circuit Court, the Clerk sends the parties a notice. The Defendant, Don, then has 30 days to file an Answer or other response. Rule 2-326.

Since venue is proper in Cecil County, I may file a Motion to Transfer the action to the Circuit Court for Baltimore County based on "convenience of the parties." Rule 2-327(c). However, since the accident occurred in Cecil County, it is extremely unlikely the Motion to Transfer would be granted.

c. Rule 2-323(g) contains 20 affirmative defenses which must be separately pled. The affirmative defenses applicable to this auto accident are contributory negligence in that Paul possibly was speeding.

d. Interrogatories to a witness are improper. Rule 2-421. No pleading or response by you is required. You may represent Dr. Tough and instruct him not to answer the

Interrogatories. Alternatively, a Motion raising this objection may be filed by Don or Dr. Tough's counsel.

e. Rule 2-424(b) requires the Response to Request for Admissions to be signed by the party or the party's attorney. Rule 1-311(a) requires that every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice in Maryland. Rule 1-311(b) states that the attorney's signature "constitutes a certification that the attorney has read the pleadings or paper, that to the best of the attorney's knowledge, information and belief there is good ground to support it, and that it is not interposed for improper purpose or delay."

MRPC 3.1 states that a lawyer shall not assert or controvert an issue in a proceeding unless there is a basis for doing so that is not frivolous.

At least in a civil case such as this, you cannot ethically deny the request for admission of a fact which your client knows to be true.

BOARD'S ANALYSIS

QUESTION 10

a. PRE TRIAL IDENTIFICATION: The Due Process Clause of the Fourteenth Amendment may, under certain circumstances, compel the exclusion of a **pre-trial identification** obtained by police. In Maryland, if the **identification** was tainted by suggestiveness, the inquiry progresses to a reliability inquiry. In determining the admissibility of an extrajudicial **identification** the defense has the initial burden of showing some unnecessary suggestiveness in the procedures employed by police. If the defense meets the burden, then the State must prove, by clear and **convincing** evidence, the existence of reliability in the **identification** that outweighs the corrupting effect of the suggestive procedure. An excludable pretrial **identification** is one that is so (1) impermissibly (2) suggestive (3) as to give rise to a very substantial likelihood of irreparable misidentification.

Here the first identification procedure was impermissibly suggestive and normally would be suppressed. There, however, is an independent basis for Jason's in-court identification of Cathleen because he was her manager and knew her.

RIGHT TO COUNSEL AT IDENTIFICATION: A **pre-trial** confrontation is a critical stage of the proceedings. Therefore, absent a waiver of the right, such confrontation without the presence of counsel for the accused is illegal. A defendant has the **right to counsel** at post-charge lineups, since such a procedure constitutes a critical stage of the prosecution and the accused may be unaware of any suggestive influences.

IDENTIFICATION AT TRIAL: If the trial court finds that a **pre-trial** confrontation or viewing was illegal, any and all evidence of the **pre-trial identification** is per se inadmissible. The burden is then on the state to establish that the in-court **identification** offered had a source independent of the illegal **pre-trial** confrontation or viewing. It must do this by clear and convincing evidence that the in-court **identification** is based upon observations of the suspect by the witness other than the confrontation or photographic **identifications.** The test is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

In-court identification may be called into question based on 1 and 2 above; however, in this case there is an independent basis for Jason's in-court identification of Cathleen because he was her manager and knew her.

b. MERGER & ILLEGAL SENTENCE: Since all the elements of first degree assault are present in the offense of second degree murder, the offenses, based on the same conduct of defendant, are deemed the same for **merger** and double jeopardy purposes under the required evidence test, which is the general standard in Maryland governing the **merger** of offenses. In other words, 1st degree assault is a lesser included offense of 2nd degree murder. Upon conviction of a greater offense, a separate **sentence** may not be imposed on any lesser included offense. Failure to merge the offenses has resulted in an illegal sentence on the first degree assault conviction.

c. DOUBLE JEOPARDY: The **dual sovereignty** doctrine, as originally articulated and consistently applied by the Supreme Court, compels the conclusion that successive prosecutions by two sovereigns for the same conduct are not barred by the **double jeopardy** clause of the U.S. Const. The court has uniformly held that the states are separate sovereigns with respect to the federal government because each state's power to prosecute is derived from its own "inherent **sovereignty**," not from the federal government. It follows that an act denounced as a crime by both national and state **sovereignties** is an offense against the peace and dignity of both and may be punished by each. ***Heath v. Ala., 474 U.S. 82 (1985)*.**