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In re Field Hogs, Inc. **(July 2011, MPT-1)** In this performance test, examinees are employed by the law firm that represents Field Hogs, Inc., a manufacturer of heavy lawn and field equipment for consumer use. The company has been sued four times on various products liability and tort theories; the firm successfully defended two of these cases, but two others resulted in substantial jury awards for the plaintiffs. Field Hogs wants to limit its costs and any unwanted publicity in future litigation. To address these concerns, Field Hogs has asked the law firm to draft an arbitration clause to be added to its sales contracts. Examinees' task is to draft an objective memorandum analyzing whether the proposed arbitration clause would cover tort claims against Field Hogs and whether the allocation of arbitration costs would affect the clause's enforceability. In addition, examinees are asked to draft an arbitration clause that is likely to be enforceable in court and that addresses the client's priorities. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a memorandum summarizing Fields Hogs' litigation history, a copy of the law firm's standard commercial arbitration clause, and the Consumer Procedures of the National Arbitration Organization. The Library contains two cases discussing the standards for enforceable arbitration clauses.

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REPRESENTATIVE GOOD ANSWER
QUESTION 1

Memorandum on Arbitration Clauses

MEMORANDUM

Client: Field Hogs, Inc.
Date: July 26, 2011

This memorandum is in response to the questions put forth by our client Field Hogs, Inc. ("Field Hogs") in regards to their proposed arbitration clause. For the reasons set forth below, their currently proposed arbitration clause is too vague as to what types of claims are covered and its cost shifting measures are likely to violate current standards for substantive unconscionability. The second part of this memorandum proposes a modified version of the arbitration clause which should address our client's concerns for reducing the costs of litigation and avoiding negative publicity for any future claims.

Question I.a. Would the arbitration clause cover all potential claims?

As drafted, the current arbitration clause for Field Hogs would not cover all potential claims as it does not clearly and explicitly specify that tort liability is covered under the contract clause. In a similar contract dispute, *LeBlanc v. Sani-John Corporation*, the Franklin Court of Appeals determined that a contract clause must clearly and explicitly express the intent to include tort claims within its scope, otherwise such claims would not "arise out of the contract" and would be invalidated. *LeBlanc v. Sani-John Corporation*. (Fr. Ct. App. 2003). This ruling narrowed the court's previous holdings which had found that, "[o]nly the most forceful evidence of purpose to exclude a claim from arbitration can prevail over a broad contractual arbitration clause." *Id*. citing *New Home Builders, Inc. v. Lake St. Clair Recreation Assoc*. (Fr. Ct. App. 1999). A drafter of arbitration clauses should also be wary that the court in LeBlanc was troubled by public policy considerations in allowing tort causes of action to be limited by contract terms, and cited the Olympia Court opinion in *Willis v. Redibuilt Mobile Home, Inc*. for the proposition that "tort claims are independent of the sale. Plaintiffs could maintain such claims against defendants regardless of the warranty and the sale transaction." *Willis v. Redibuilt Mobile Home, Inc*. (Olympia Ct. App. 1995). Based on the holding in *LeBlanc*, a drafter must clearly and expressly indicate in the contract terms that torts liability is covered by the arbitration clause in addition to contractual claims. Even then, a drafter must be wary that the courts have not expressly upheld such provisions in any case to date.

Question I.b. Would the allocation of arbitration costs be enforceable against consumers?

As drafted, the current arbitration clause's terms for sharing the cost of arbitration would likely not be upheld as a court would be concerned that an administrative fee of $2,000, which must be paid by the consumer, in combination with paying half the costs of unspecified arbitrator fees in cases which exceed $75,000, would have the potential to discourage consumers from pursuing their claims. In the most extensive analysis of the arbitration cost sharing terms to date, *Howard v. Omega Funding Corp*., the Franklin Supreme Court held, that "when a party to arbitration argues that the arbitration agreement is unconscionable and unenforceable, that claim is decided based on the same state law principles that apply to contract in generally." *Howard v. Omega Funding Corp*. (Franklin Supreme Ct. 2004). "In particular, unconscionability sufficient to invalidate a contractual clause under Franklin law requires both procedural unconscionability… and substantive unconscionability." *Id*. The court also cites *Georges v. Forestdale Bank* for the proposition that "the cost of arbitration is a matter of substantive, not procedural, unconscionability." *Id*. The court then went on to cite a wide range of cases from both Franklin and Columbia showing the difficulty in validating such clauses. In case after case, the courts held a wide range of such cost-allocation measures to be invalid as the courts reasoned such clauses would have a "chilling effect" on consumers. In particular, in both *Ready Cash Loan, Inc. v. Morton* and in *Athens v. Franklin Tribune*, the Franklin court of appeals invalidated arbitration provisions very similar to that currently proposed by the National Arbitration Organization. Furthermore, in *Scotburg v. A-1 Auto Sales Inc*., the Columbia court invalidated an arbitration clause that was silent on the costs of arbitration as it was worried that such uncertainty would also have a chilling effect on consumer action. In conclusion, while there are key differences in the cost shifting measures proposed by the National Arbitration Organization, the reality of the current legal precedent indicates that any cost shifting of the arbitration costs to the consumer side will be viewed very critically by the courts, and have very little chance of being upheld.

2. Modified Arbitration Clause

Any claim, dispute, or controversy (whether in contract, torts, or otherwise) arising out of or relating to this contract or the breach thereof shall be settled by arbitration. It is the specific intent of both parties that this arbitration will include all tort claims for any damage to property or personal injury resulting from the proper or improper use of the goods covered under this contract. If the arbitrator determines the buyer's complaints to be valid (and not improper, frivolous, or wasteful) the entire costs of arbitration will be paid for by the seller. Otherwise the buyer will be responsible for the first $750.00 of the arbitration costs and seller will be responsible for the remainder. If any portion of this clause is deemed invalid or unenforceable, it shall not invalidate the remaining portions of the clause, each of which shall be enforceable regardless of such invalidity.

<u>Explanation of benefits of the modified clause</u>

First, the above arbitration clause has the benefit of very clearly and expressly stating that it is the intent of both parties that tort claims would be covered. This does not guarantee that the courts will find such claims should not be covered by such a clause

in a later decision based on the public policy reasons put forth in *LeBlanc*, but it does mean that the arbitration clause should survive any legal challenges based on the present legal framework in Franklin. The clause also shifts the financial costs of the arbitration completely to Field Hogs provided the consumer is actually concerned with a valid complaint. While this might seem unfair for them to bear the full weight of the arbitration costs, it ensures that the clause will not be invalidated for being unfair to consumers. This means that Field Hogs will have a better chance of keeping litigation out of court and will ultimately have a better chance of keeping down its litigation costs and avoid negative publicity caused by having to defend its cost shifting measures in court. I have also included a provision that severs each of the clauses from the others, so that if one were to be invalidated by the courts, it would not necessarily invalidate the remaining clauses. This is important as the court in *LeBlanc* seemed hesitant to say that requiring arbitration on tort claims didn't violate public policy.

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QUESTION #2

Traveler has visited many remote places throughout the world and wants to backpack through a place he has never before visited -- a remote province in a country called Northeast China.

On March 1, 2010, Traveler emailed Guide and offered to pay Guide $10,000 if Guide would agree to act as a guide and accompany Traveler on his excursion to Northeast China during the summer of 2011. On March 4, 2010, Guide telephoned Traveler in response to the email and advised Traveler as follows: "I will be your guide, provided that I don't have a better job before we leave for Northeast China." Traveler agreed and the conversation ended.

Neither party was aware of the fact that on January 1, 2010, the government of Northeast China declared the remote province where Traveler was planning to visit a "prohibited area" for non-residents. The government notice did not receive much notoriety because very few people ever visit that remote province in Northeast China.

Shortly after the parties' conversation on March 4, 2010, Guide began to buy supplies and equipment in anticipation of their trip. Guide continued to buy items until January 1, 2011, when due to diplomatic disagreements, the USA and Northeast China cancelled all travel between the two countries for the foreseeable future. As of January 1, 2011, Guide had expended $5,000 in accumulating supplies and equipment for their trip.

In January, 2011, Guide seeks your legal advice. Fully analyze and discuss the legal rights and remedies, if any, that Guide may have against Traveler, what defenses Traveler may raise, and the likelihood of success of either party if the matter is litigated.

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Guide likely will not be able to recover the full contract price under contract law, but may be able to recover for his purchase of supplies.

Was there a contract to perform guide services?

The first issue here is whether Guide and Traveler formed a contract. Because this was a contract to provide services, this contract falls under the common law. A contract requires an offer, which is a clear manifestation of intent to enter a contract, and an acceptance, and must be supported by consideration. Here, there was a clear offer by Traveler by email on March 1, 2010 with all necessary terms, including the price term, which manifested an intent to contract. Guide's telephone response on March 4, 2010 was a conditional acceptance, because he attached the condition that he would only be Traveler's guide if he didn't have a better job then. Under the common law's mirror image rule, an acceptance must be identical to the terms of offer or it is a rejection and counter offer. Guide's response became a counteroffer to Traveler, who then orally accepted. So a contract existed on March 4, 2010 which included a condition of performance.

Traveler's defenses to contract formation

The next issue is what defenses Traveler may raise to the enforcement of this contract. Traveler has several defenses available.

Consideration: First, he might argue that the contract lacks consideration, because Guide's promise to perform was illusory. Genuine consideration requires a bargained for legal detriment to both parties. Traveler's legal detriment was to pay a definite sum of $10,000, while Guide's detriment depended on how he felt about whatever job he had before they left for Northeast China. Traveler's argument would be that his promise is illusory because it does not adequately bind Guide because it is too discretionary (like a term that requires a party to perform "if I feel like it"). But here it seems likely that a court will view this as a sufficient legal detriment.

Statute of frauds: If the condition is sufficient to constitute consideration, Traveler will also likely raise a statute of frauds defense. Contracts for services which are not capable of being performed within a year are within the statute of frauds. Therefore, they require either full performance or a writing to satisfy the statute. Here, this is a contract for the performance of guide services which cannot be completed for over a year, because it was executed on March 4, 2010 and will not be completed until summer of 2011. Because there has not been full performance by Traveler (payment of the $10,000), there must be a writing, signed by the party to be charged, with all material terms. In the absence of such a writing, Traveler can move to dismiss this

case before it gets to trial. Guide might argue that Traveler's initial e-mail suffices as a writing, because it is signed by Traveler. But this argument will fail because Guide rejected that initial offer orally. That offer is dead, and the only operable offer and acceptance were made orally. Therefore, Guide will not be able to enforce the full contract.

Mutual mistake and frustration of purpose: Even if the statute of frauds did not apply here, Traveler might argue that the contract was void and should be rescinded because of mutual mistake and frustration of purpose. If either party is mistaken as to a material fact that is a basis of the bargain and neither party assumed the risk of loss, the contract can be rescinded and the parties put back in the position they were in before the contract was formed. Here, at the time the contract was formed, travel to the province in Northeast China was prohibited to nonresidents, which would make Traveler's trip impossible. Neither party was aware of this, and it seems unlikely that either party could be said to have assumed the risk of that mistake. Therefore, there may be a mutual mistake such that the contract is unenforceable. Similarly, if the purpose of the bargain has become legally impossible, rescission is appropriate. Here, not only was travel to this province illegal for Traveler at the time the contract was made, but subsequently all travel to Northeast China was prohibited. Therefore, the purpose of the trip had become legally impossible, and the contract is subject to rescission.

If Guide had been able to enforce the contract, he could have recovered the full $10,000 contract price as his expectation damages, less any mitigation. But based on the above, Guide is unlikely to prevail in enforcing the original contract.

Can Guide recover under some other theory?

Although he cannot recover under contract law, Guide may be able to recover in quasi-contract for his damages incurred in relying on the purported contract with Traveler. In pursuing his obligations under the agreement, Guide purchased $5,000 of supplies and equipment. Traveler may argue that damages are inappropriate because Guide has not enriched Traveler, but that argument seems unlikely to prevail. Traveler is more likely to succeed in reducing the amount of the damages by arguing that Guide has a duty to mitigate these damages by attempting to sell what he can.

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QUESTION #3

Abe and Brent were roommates. On March 31, Abe said to Brent, "Tomorrow is April 1 and it's my girlfriend's birthday. I have no money, but I want to give her a nice watch for her birthday."

Brent said to Abe, "You drive me to the mall and wait in the car outside. I'll go into a mall jewelry store I know and I can get us a watch without having to pay for it."

Abe laughed and said. "Let's go."

Abe drove Brent to the mall and waited in the car while Brent went inside. Five minutes later, Brent returned without the watch. Brent told Abe, "I went into the store, took a watch and put it in my pocket and started walking toward the door. Just then a security guard came into the store. I got scared and put the watch back on the counter."

On April 6, Abe was arrested in an unrelated crime. He was informed of his Miranda rights before he made any statements to police. Abe then talked to the police at length, describing everything that happened on March 31, as detailed above.

You are the lead prosecutor. You know all the facts in this case because you have listened to the recorded statement that Abe made to the police when he was arrested.

Analyze and fully discuss the crimes Abe and Brent may have committed. Consider any defenses either may have, and identify any problems of proof that may arise at trial.

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Brent and Abe may be charged with the following crimes and have the following defenses:

Conspiracy: In the majority of states, a conspiracy requires 1) an agreement; 2) between two or more people to commit a criminal act; and 3) an act in furtherance of that agreement. The agreement is the most important element. If there is a conspiracy, the parties involved will all be guilty of any crimes committed in furtherance of that conspiracy.

Here Abe told Brent that he wanted a watch for his girlfriend but he didn't have money to pay for it. Brent told Abe that if Abe drove he could get him a watch without having to pay for it. Abe agreed. This meets the element of having two parties, but may not meet the agreement element. Conspiracy is a specific intent crime, which means the parties agreeing must have the intent to commit a crime. Here, Brent clearly has criminal intent because he knows that the way he will get the watch for free is by stealing it. But he did not communicate this to Abe. He merely said he could get a watch for free. Thus Abe may not have the criminal intent necessary for the conspiracy. For a specific intent crime a mistake of fact is a defense, even if that mistake is unreasonable. Thus, Brent could claim that he mistakenly thought Abe had a deal with the jeweler or that he was going to trade something in for the watch. Now, although his mistake may seem unreasonable, that could be a complete defense to this specific intent crime and Abe would not be found guilty of conspiracy.

Brent, on the other hand, would still likely be found guilty, because in most states, even if one party to the conspiracy lacks the necessary intent, the other party who has the criminal intent can still be found guilty. Here, Brent agreed with Abe, he had the criminal intent to steal the watch from the jewelry store, and he took an act in furtherance of that intent when he put the watch in his pocket. Although Brent did not complete the theft, his act will likely be sufficient to make him guilty of the conspiracy. But, in a minority of states, a conspiracy fails if there are not two parties in agreement to commit the criminal act. In those jurisdictions, if only one party has the criminal intent, then there can be no conspiracy. But that is a small minority, so it is not likely the case here.

Defense: Withdrawal: Withdrawal requires one member of the conspiracy to communicate to the other co-conspirators that he is withdrawing and is no longer in support of the conspiracy. A person who withdraws will still be guilty of the conspiracy and any other crimes committed already in furtherance, but will not be guilty of crimes committed in furtherance after his withdrawal.

Brent can argue that by putting the watch back, he withdrew from the conspiracy and thus cannot be found guilty of any crimes in furtherance of the conspiracy. This is not a very good defense because Brent will still be found guilty of the conspiracy and since he did not communicate his withdrawal to Abe until after he attempted the crime, he can still be found guilty of the attempt crime. Furthermore, his communication was not clear that he was withdrawing, just that he got scared when he saw the guard, and moreover, he is the person who committed the act. Thus, he cannot claim withdrawal in an attempt to not be found guilty of an act in furtherance of the conspiracy when he was the one committing the act.

Larceny: Larceny is: 1) the trespassory taking (without permission), 2) of another's property, 3) with the intent to permanently deprive. This is a specific intent crime and thus the defendant must have the specific intent to permanently deprive at the time he commits the taking.

Brent will likely be found guilty of larceny because he: 1) took the watch without permission, which is the definition of trespassory taking, 2) the watch belonged to the jewelry store and not him, meaning it was another's property, and 3) he intended to keep the watch and give it to Abe for his girlfriend. This demonstrates that Brent fulfilled all the elements necessary for larceny and had the necessary specific criminal intent to permanently deprive the jewelry store of the watch by giving it to Abe.

Abe could also be found guilty of the larceny 1) if he is found guilty of the conspiracy because the larceny is a crime in furtherance of the conspiracy, and 2) if he is found to have been an accomplice to the larceny. As stated above, Abe is likely not guilty of conspiracy, so he will not be guilty under those grounds. But he may be guilty under accomplice liability. If an accomplice aides or abettes a crime by encouraging the crime with the intent that the crime be carried out, he is just as guilty of the underlying crime as the principle. Here Abe could be found to have aided and abetted the crime by driving Brent to the jewelry store when he knew he wasn't going to pay for the watch, and by encouraging him by saying "let's go" when Brent said he was going to get the watch for free. Thus, he may be guilty of larceny as an accomplice. But this is a specific intent crime, and again mistake is a complete defense. Here, Abe can argue that he did not know that Brent planned on stealing the watch when he encouraged him to get him a free watch or when he drove him to the mall. If the court deems his mistake to be honest, even if it is unreasonable, it negates the necessary intent that the larceny be carried out and he cannot be guilty of larceny as an accomplice.

Defense: Abandonment: Brent can attempt to claim that he is not guilty of larceny because he abandoned the crime and thus although he had the necessary mens rea, he did not have the actus reus to be found guilty. This defense will not likely prevail though because Brent likely committed a sufficient act to satisfy the actus reus element of larceny. For larceny, if the defendant has the necessary mens rea to permanently deprive, the only act necessary is that he take the property. It doesn't matter how far he takes it or if he changes his mind and puts it back. All that matters is the concurrence principle: that he had the necessary state of mind (mens rea) at the time he committed

the act (actus reus). Here Brent had the criminal intent to permanently deprive the jewelry store of the watch when he did the act of taking it and putting it in his pocket and started walking toward the door. At that point, the crime had been committed. It doesn't matter that he got scared when he saw the security guard and put the watch back, because he had already committed the criminal act with the criminal intent. Thus this defense will not prevail.

Attempt:

If Brent does not succeed on the abandonment claim and is not found guilty of larceny, he still will be found guilty of attempted larceny. In order to be found guilty of attempt he must, 1) have the intent to carry out the crime, and 2) take a substantial step toward that goal. The jurisdictions differ on what that step must entail: some say it must be an overt act, some say it must be a substantial step, and they all say that mere preparation is not enough. No matter what jurisdiction, Brent will be found guilty because he took a very substantial step toward carrying out the larceny. As discussed above, he has the necessary intent to carry out the criminal act as evidenced by telling Brent how he could get the watch. He also took a more than substantial step toward carrying it out when he rode to the mall, went into the store, put the watch in his pocket, and started walking out. If these acts do not qualify as the act for the larceny itself, they surely will be enough for the attempt. And again, under the concurrence principle, Abe had the criminal intent at the time he committed the act. Thus, he will be found guilty.

Under the conspiracy theory or accomplice theory, the court may try to charge Brent with attempted larceny as well, but again, as discussed above, because attempt is a specific intent crime and Brent can claim he was mistaken and lacked the necessary intent, he will not be found guilty of attempt.

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QUESTION #4

Portable Shredder Services (PSS) is a partnership that operates a mobile shredding business. When a client needs paper shredded, PSS sends a truck and a crew to perform the operation.

Adam, Beth, and Chris are partners in PSS. Each of them contributed $50,000 in start-up capital, and each actively works in the business.

The PSS partnership agreement provides in relevant part that (1) each partner is required to devote substantially all of the partner's working efforts to the business and (2) any partner can withdraw from the partnership upon giving six months' written notice. The partnership agreement contains no other relevant provisions modifying any of the statutory default rules.

PSS has not been profitable. Adam is convinced that the assets of PSS are worth more than the value of the business as a going concern. He believes that the only way he can receive a fair price for his share of partnership assets is if those assets are sold. Beth and Chris, on the other hand, wish to continue operating the business, if they can.

Adam would like to withdraw immediately from the partnership in order to force Beth and Chris to cease the operations of PSS immediately and sell the partnership's assets.

Adam has asked your law firm to answer the following three questions:

1. If Adam immediately withdraws from the partnership, what will be the consequences (a) to him and (b) to the partnership? Explain.

2. If Adam gives six months' written notice before withdrawing from the partnership, what will be the consequences (a) to him and (b) to the partnership? Explain.

3. If the partnership's business is wound up after Adam's withdrawal, will he be liable for partnership debts incurred during the winding-up process after his withdrawal? Explain.

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QUESTION 4

Immediate Withdrawal: Consequences to Adam

A partnership is the association of two or more people, carrying on a business for profit. Adam, Beth and Chris have formed a valid partnership under the facts. Partnerships are governed by statutory rules, unless the partnership agreement replaces those rules. In this case, A, B and C have a partnership agreement, and therefore the agreement will govern the relationship unless there are gaps, in which case the default rules will apply.

The first question Adam has asked is what effect his immediate withdrawal from the partnership will be to a) him and b) to the partnership. As a default rule, and an overriding rule as a result of public policy, a partner may withdraw from a partnership at any time, even if the partnership has a stated term or undertaking that is yet to be complete. While there is an absolute right to withdraw at any time, and that fact cannot be changed by the partnership agreement, the court will accept limitations on the right to withdraw, such as reasonable notice periods. Any wrongful withdrawal will result in the wrongfully dissociating partner being held liable for damages associated with the wrongful dissociation.

Applying the above rules, Adam can validly withdraw from the partnership immediately. Just because Adam has the right to withdraw, though, does not mean that his withdrawal will not carry consequences. In this case, the partnership agreement states that any partner must give six months' notice in order to withdraw. Because this is seemingly a reasonable limitation on the absolute right to withdraw, it will likely be upheld by a court, rendering Adam's immediate withdrawal wrongful. If Adam withdraws immediately, he will likely be liable for any damages arising from the immediate withdrawal, such as failure to make necessary contributions, and any other acts that bind the partnership whether they are based in contract or tort. Once Adam withdraws, he will no longer be able to take part in any management decisions, and therefore will be liable for acts of the partnership without having any voice regarding those acts. Further, because the partnership agreement provides that Adam is to devote substantially all of his efforts to the business, he will be breaching that agreement, and will be liable to the partnership for any damages resulting from a breach of that agreement, such as having to hire someone else to do the work in his place.

Immediate Withdrawal: Consequences to the Partnership:

Under the default rules, when a party dissociates (or withdraws), this dissociation of one partner will cause the dissolution of the partnership as a whole. Once a partnership enters the dissolution process, it begins the winding up process. Again, these default rules (unlike the rule regarding the ability of a partner to dissociate) can be changed by the partnership agreement. In this case, the partnership agreement is somewhat

ambiguous as to what happens in the case of a withdrawing or dissociating partner. Provision (2) stating that any partner must give six months' notice seems to imply that the partnership will continue despite the dissociation of the partner that gave notice. In any event, Beth and Chris may choose between themselves to continue the partnership, as the definition of a partnership is two or more people carrying on a business for profit. Thus, Beth and Chris could continue the partnership and Adam's withdrawal would have no effect.

If the default rules apply, and Provision (2) is not seen as a provision allowing for the continuation of the partnership, then the partnership will begin the dissolution process upon Adam's withdrawal. More on this in Question 3.

Question 2:

Withdrawal with Six Months' Notice: Effect on Adam

If Adam gives six months' notice as required in the partnership agreement, his future will fare better than in Question 1. As stated before, a partner has an absolute right to withdraw or dissociate from the partnership at any time, subject to the limitations stated above. In this case, Adam would be complying with the Partnership Agreement, and his withdrawal would not be wrongful, and he would therefore not be liable for damages to the partnership resulting from his wrongful withdrawal.

When a partner dissociates, the partner has a right to a buyout. When a buyout occurs, the dissociating partner has a right to either his share of the liquated value of the partnership, or the going concern, whichever is greater. Furthermore, the buyout price contemplates any future risks and liabilities and should be taken into account when determining the buyout price, so that any future liabilities can be indemnified by the partnership as a result of this consideration.

In this case, Adam indicated that he believes the liquated value would be greater than the going concern value, and therefore he will likely be entitled to liquidation value. I will note that Adam will also be able to get a buyout even if he wrongfully dissociates as in Question 1, but he may not be able to get the buyout right away. He may have to wait until the partnership is able, because he dissociated wrongfully.

To determine the liquated value, the partnership will have to figure out the liquated value, which means the value of all assets if they are sold, and may or may not include goodwill. Given that the partnership is not doing well, there is not likely a lot of goodwill to argue about.

Partners in a partnership by default share profits and losses equally. Therefore, after determining the liquated value, Adam is entitled to 1/3 of any profits, or in the case of losses, he must pay 1/3 of any losses at that point. After those numbers have been decided, the risk to the partnership must be accounted for to determine Adam's share he will take or pay.

Finally, any partner that dissociates will be liable for any partnership obligations for up to two years following the dissociation. Adam can limit this time to 90 days if he files a Statement of Dissociation with the Secretary of State. That statement will put creditors on constructive notice that Adam can no longer rightfully bind the partnership, and the creditor will lose out rather than the partnership.

Withdrawal with Six Months' Notice: Effect on Partnership:

As noted above, Adam's dissociation may result in dissolution unless Beth and Chris decide to continue the partnership. If Beth and Chris continue the partnership, they will do so without Adam as a partner after Adam is bought out. If the partnership cannot pay Adam the amount he is entitled to pursuant to the buyout, a court may order the partnership to dissolve the liquidated assets so that Adam can be paid.

Once Adam has been bought out, even though Adam may still be liable for partnership debts (discussed below), he will be indemnified by the partnership, unless he wrongfully entered into contracts on behalf of the partnership after that time or he committed an intentional tort. Adam can also continue to bind the partnership after he dissociates unless a creditor knows he has dissociated and continues to give him a loan or sign a contract with him as a member of the partnership. The partnership can also file a statement of dissociation to let creditors know that Adam no longer has authority to bind the partnership. Creditors will be deemed to have constructive notice of this fact 90 days after Adam's dissociation and Adam will no longer be able to bind the partnership.

Question 3:

After a partner dissociates, they remain liable for partnership debts and obligations and torts, and similarly, the partnership will remain liable for any torts or contracts entered into with the dissociating partner if the creditor does not have notice or these facts. When a partnership is wound up, all partners remain liable for acts taken in the wind-up process, as they are deemed a necessary act of the partnership. As stated earlier, partners are equally liable for these acts taken in the wind-up process.

Once dissolution is complete (when the partnership is terminated) the partnership remains liable for debts incurred while the partnership was a partnership, and any obligations incurred in the wind-up process. A dissociating partner remains liable for acts of the partnership for two years after dissociation, unless that time is shortened to 90 days with a statement of dissociation. In this case, Adam would be liable for any partnership obligations for two years, or 90 days if he files the statement, and because partners are jointly and severally liable, Adam's obligations to third parties for torts or contract entered into after his dissociation will not cease. As noted earlier, however, Adam will have a right to indemnification from the partnership because these kinds of liabilities are supposed to be taken into account when considering the buyout price.

Once dissolution is complete, the partnership will also remain liable for two years, and any partners act taken after dissociation will be binding on the partnership if the third

party or creditors did not know that the partnership has dissolved. In that case, it would be prudent for the partnership to file a statement of dissolution to make third party creditors aware of the non-existence of a partnership.

Finally, once wound up, all creditors must first be paid, then all contributions will be returned to the partners (in this case, 50,000 each), and then any profits or losses will be divided equally.

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QUESTION #5

Wife seeks legal advice and representation to end her marriage of 20 years. She and Husband are both 50 years old. They moved to a Midwestern state three months ago, having previously been residents of a Southern state.

Three years ago, Wife had overlooked a string of infidelities by Husband, largely because Husband apologized, and gave Wife a prized champion bloodline dog which cost Husband $250,000. Husband also promised never to cheat on Wife again. Wife recently learned, however, that Husband had broken his promise and had again been unfaithful.

Wife tells you that the day before they were married, she signed an antenuptial agreement which Husband's attorney had prepared. The agreement provided that 1) neither party would be entitled to alimony upon a dissolution of the marriage, 2) the parties would share joint custody of any children of the marriage, and 3) all income would be treated as the separate property of the earning spouse and not subject to division as marital property.

At the time of the marriage, each party earned an annual income of approximately $20,000. Husband worked as a short order cook and Wife worked as a waitress. Neither party disclosed any financial information to the other before signing the agreement. They were married before Wife had any indication that Husband would become a successful high-earning chef.

Over the past decade, because Husband is a successful high-earning chef, Wife has become accustomed to a life of luxury. She has not had to work at all in the last 10 years, and has a household staff of three (a housekeeper, a nanny, and a gardener), each of whom are paid a salary of $50,000 a year by Husband. The nanny helps her care for the couple's two children, who are eight and nine years old. The couple still owns a home in the Southern state they just moved from and that house is worth $1,000,000. The couple just bought a new home in the Midwestern state they moved to and that home is valued at $2,500,000. Both houses were purchased with Husband's earnings.

The couple also has a vacation home on Maui which is valued at $2,000,000, but is encumbered by a mortgage with a remaining balance of $1,950,000. Wife has no personal savings. Over the last decade, Husband has saved $1,000,000 from his earnings.

Husband's annual income has been as high as $3,000,000 per year over the past seven years, but has recently dropped to around $200,000 a year. A combination of the economy's slow recovery from recession and Husband's diminished success in promoting his business has led to this recent decline in income.

Wife says she wants a divorce because Husband has “cheated and doesn’t need to be around the kids.” She also wants spousal maintenance in order to maintain what she calls her “well-deserved standard of living.”

Wife asks you to advise her about the following: 1) whether the antenuptial agreement is valid, and 2) if the marriage is ended, what the likely outcome will be with respect to property division, spousal maintenance, sole physical custody of the children, and child support payments. Fully analyze and discuss your answers to these questions.

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QUESTION 5

Antenuptial Agreement

An antenuptial or prenuptial agreement is an agreement entered into upon consideration of marriage. It is a valid contract. Therefore, an offer, acceptance, and consideration must be present. Consideration is satisfied upon the completion of the marriage. An antenuptial agreement determines how property will be divided and support will be provided upon the termination of a marriage. Since an antenuptial agreement is a contract, the usual contract defenses apply. An antenuptial agreement must be a writing, signed by the individuals intending to marry, before the marriage, after having an opportunity to consult with independent legal counsel, after full disclosure of assets and earnings, and must dispose of the property in an equitable manner. Prenuptials that substantially favor one party over another significantly hint at unconscionability.

The antenuptial agreement between Husband and Wife would not be enforced by a Court for many reasons. The contract was signed before the marriage, but it was signed only a day before the marriage. Close proximity to the marriage is a sign of duress. With a marriage only a day away, guests in town, and expectations high, a party is not likely to refuse to sign a prenuptial agreement for fear the wedding may be called off. In addition, Husband's attorney drafted the agreement. There is no indication that Wife was given an opportunity to seek independent legal advice. Husband's attorney may have been enough, but written informed consent is required to overcome the presumption that an opportunity for independent legal advice was not given. Third, the facts state that neither party disclosed any financial information to the other before signing the agreement. Full and fair financial disclosure is required for an agreement to be conscionable. The information can be attached to the agreement or provided within, but it must be provided. An inadvertent minor error will not void an antenuptial, but failure to disclose will. Finally, the agreement is very one sided and will be unconscionable at the time of enforcement. According to the agreement, neither party would be entitled to alimony; the parties would share joint custody; and all income would be treated as separate property of the earning spouse and not subject to division. In the instant case, wife would have nothing. Generally, provisions regarding children are still subject to judicial oversight. Parties cannot overcome the best interest of the child in an antenuptial agreement. To conclude, the antenuptial agreement between Husband and Wife would not be enforceable for the foregoing reasons.

Property Division, Spousal Maintenance, Sole Physical Custody of the Children, and Child Support Payments

Minnesota, like most states, recognizes no-fault divorce. In a no-fault divorce, the parties are not required to prove fault or a reason for ending the marriage other than

that it cannot be fixed. Therefore, any property division or alimony will not be based on husband's infidelities. It will be based on the financial situations of the parties and their ability to pay.

Property Division

During dissolution proceedings property is divided between the parties. Property acquired before the marriage, or through gift or inheritance during the marriage is considered the separate property of the spouse acquiring the property. It will be granted to the owning spouse. Property acquired during the marriage, regardless of whose name the property is on the purchase or who made the purchase, is considered marital property. Neither party has separate property. All of the current property was acquired during the marriage and there is no indication that anything was acquired with the funds of separate property. Three pieces of property exist: a home in South State valued at $1 million; a home is Midwestern State valued at $2.5 million; and a vacation home in Maui with a present value to the couple of $50,000 ($2 million - $1.95 million). The retirement account is also marital property. Retirement accounts, including IRA's and government pensions, are considered marital property, adding another $1 million to the marital estate. The value of the marital estate is $4,550,000.

Property during a dissolution does not necessarily have to be divided equally. Courts will consider the age of the parties, education, ability to work, length of the marriage, health, and ability to acquire future assets. In the instant case, Wife is entitled to a larger division. She has not worked in 10 years. In addition, she does not appear to have any formal education. Wife worked as a waitress when the parties first married. The marriage lasted for 20 years. Her contributions in the home are considered just as valuable as husband's contributions to growing the marital estate. Husband also has a high earning potential. It only recently dropped to $200,000. He made as much as $3 million in one year. Husband has the potential to acquire more assets after dissolution. Wife may be able to claim the Midwestern State home and the vacation home, the parties may come to a different agreement on how to divide the property.

Spousal Maintenance

Spousal maintenance, as previously stated is not awarded based on fault. It is based on the need of the parties. Spousal maintenance may be permanent, rehabilitative, or made in a lump sum payment. Property may always be awarded in lieu of spousal maintenance. Spousal maintenance is awarded based on the length of the marriage, education, health, age, the standard of living, ability of the party to pay, etc. The parties maintained a high standard of living. In addition, they were married for a significant amount of time. Wife has little to no education and she is 50 years old. Husband has an earning potential of at least $200,000. He has the ability to pay some spousal maintenance. Since husband does not make as much money as he once did, Wife may be entitled to an even larger property division, in lieu of spousal maintenance. She may request a lump sum payment. At only 50, the court may grant her permanent maintenance, but it may also grant her only rehabilitative maintenance. This would

entitle her to maintenance for a specified amount of time to allow her to receive training or education to enter the job market. A lump sum payment without further payments may be in her best interest.

Sole Physical Custody of the Children

Legal custody does not appear to be at issue. In addition, in Minnesota there is a presumption of joint legal custody. There is no presumption of joint physical custody. Physical custody of minor children is based on the best interest of the child standard (BIC). Courts, when considering the BIC, will consider: the age of the children; the wishes of the parents; the wishes of the children, if old enough; if one parent is the primary caregiver; the age of the parents; the health, including mental health of the parents; the health of the child; location of the residences; abuse; and any other factor that may be in the child's best interest. In the present case, the children are relatively young, 8 and 9. Their interests will likely not be considered. Wife wishes to retain sole physical custody, therefore unless father agrees, they differ. Presumably both parents are around the same age. There does not appear to be any health concerns; or the presence of abuse. Another factor is that husband will need to be willing to purchase another residence in Midwestern State to be near the children. Mother may have had a nanny, but she is still the parent that has been present more through the children's lives. She may still qualify as the primary caregiver. Wife may be able to gain sole physical custody, but if she does, Husband will be entitled to liberal visitation. The courts will not want to sever the relationship he has with his children.

Child Support Payments

Whether mother is granted sole physical custody of the children, or not, she will still probably be entitled to child support. Child support is based on the relative needs of the children and the ability of the parties to pay. The paying party's income and payments to be made are based on the child support guidelines. These determine the amount that someone is required to pay. If without an income, Wife will be entitled to some child support.

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QUESTION #6

OfficeEquip is a U.S. distributor of office machines. It is incorporated in State A, where it has its principal place of business. BritCo is a manufacturer of copiers. It is incorporated in Scotland and has its principal place of business in London, England. OfficeEquip sued BritCo, alleging that BritCo had breached a long-term contract to supply copiers to OfficeEquip.

The suit was filed in the United States District Court for State A, and OfficeEquip properly invoked the court's diversity (alienage) jurisdiction.

BritCo made a timely motion to dismiss the complaint on the ground that it was filed in violation of a forum-selection clause in the supply contract that required all contract disputes to be adjudicated in London. While its motion to dismiss was pending, BritCo filed an answer to the complaint.

In its answer, BritCo denied breaching the supply contract. BritCo also made a counterclaim seeking damages for OfficeEquip's alleged breach of a contractual covenant not to compete with BritCo.

OfficeEquip filed a motion for judgment on the pleadings on BritCo's counterclaim, arguing that the covenant not to compete was unenforceable as a matter of law.

After a short period of discovery, the district judge issued the following two orders:

OfficeEquip's motion for judgment on the pleadings is granted. The contractual covenant not to compete is void as a matter of public policy and is therefore unenforceable. Given that this is strictly a legal issue and entirely severable from OfficeEquip's breach of contract claim, there is no just reason for delay, and I accordingly direct that judgment should be entered in favor of OfficeEquip on BritCo's counterclaim.

BritCo's motion to dismiss is denied. Enforcement of the forum-selection clause would be unreasonable in this case. OfficeEquip has never done business in London, and it would be extremely inconvenient for it to litigate there.

Trial on the breach of contract claim is scheduled in three months.

1. Can BritCo immediately appeal the district court's order granting OfficeEquip's motion for judgment on the pleadings with respect to BritCo's counterclaim? Explain.

2. Can BritCo immediately appeal the district court's order denying its motion to dismiss? Explain.

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QUESTION 6

Motion for Judgment on the Pleadings

BritCo can immediately appeal the district court's order granting OfficeEquip's motion for judgment on the pleadings. Generally, appeals are permitted after entry of a final judgment of all matters in a case. A judge is permitted to sever issues from a case if doing so would promote efficient handling of the remaining issues. Motion practice generally does not produce final judgments. In this case, however, the motion was one for a judgment on the pleadings and it was granted. No further evidence could change the court's mind. By severing the counterclaim from the other claims in the case, the judge resolved all issues of law and fact as to that claim. Because there are no further issues left for the judge to decide, the judgment is final and thus appealable. The judgment was final and no further action needs to be taken by the trial court. Because the court determined that the pendant claim was entirely severable and issued a final judgment on the covenant to compete issue, that issue is immediately appealable.

Motion to Dismiss

Britco cannot immediately appeal the district court's order denying its motion to dismiss. Appeals are generally available only after entry of a final judgment. Interlocutory appeals are generally permitted only under limited circumstances, such as when an injunction is ordered, a receiver is appointed, or a party suffers property deprivation. A judge may specifically permit an interlocutory appeal if it turns on a conflicting point of law that must be resolved before the case can continue, and judicial economy would be facilitated by addressing the issue immediately. Generally speaking, interlocutory appeals are only permitted where judicial efficiency and significant liberties are at stake such that the party affected would be harmed without the order. In this case, the district court denied an order to dismiss, which means that the court believes the claim should proceed to trial. The district court has determined that a factual inquiry must be made to determine whether enforcing the forum-selection clause would be unreasonable. Because further factual inquiry is needed to decide the case before the district court will make a ruling, the parties must wait until that inquiry is completed and a final judgment is issued. The appellate court will not need to remand the decision because the motion was denied. If the facts support BritCo on the issue, it may still win despite the denial of the motion for dismissal on the pleadings. Because the case is still pending before the trial court and because issues of fact must still be resolved, the court order denying BritCo's motion to dismiss is not immediately appealable.

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QUESTION #7

In 1980, Oscar sold undeveloped land that he owned in fee simple to Sam, but Sam failed to record the deed.

In 1985, Sam granted Railroad an easement to operate a rail line across a portion of the land to serve a grain storage facility located on a neighboring tract of land. Railroad recorded this easement, laid railroad tracks on the land, and operated trains weekly until the grain storage facility went out of business in 2000. The tracks are still in place and clearly visible, but no trains have operated over them since 2000.

In 1990, Sam conveyed the land to Daughter as a graduation gift. Daughter promptly recorded the deed given to her by Sam. Except for the railroad tracks, the land has remained undeveloped.

Oscar died six months ago. Unaware of the prior transactions, the executor of Oscar's estate sold the land to Purchaser for its fair market value. Purchaser was also unaware of these prior transactions. The executor gave Purchaser a quitclaim deed to the land. Purchaser promptly recorded this deed.

The state in which the land is located maintains its records under a grantor-grantee indexing system, and the state's recording act provides: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law."

What are the rights, if any, of Purchaser, Daughter, and Railroad in the land? Explain.

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QUESTION 7

This problem deals with several transfers of a piece of real property and easements over that property. Three entities, Purchaser, Daughter and Railroad, are asserting rights in the land. In this jurisdiction, there is a race statute governing the property.

RAILROAD:

Railroad is asserting their rights to an easement in gross over the property. An easement in gross is a right of a party to enter onto another party's land. Easements in gross are usually made between utilities and railroads and the owner of the land. In contract, an easement appurtenant is an easement whereby one piece of land is subservient to another piece of land. Because it is a railroad at issue here which crosses over all lands, it is likely to be an easement in gross.

Regardless of whether it is an easement in gross or an easement appurtenant, this is an express easement. Express easements are created by express communication by the landowner giving up an interest. In this case, Sam owned the property and granted an easement to Railroad through a writing which was recorded. Thus, there is a recorded express easement on the land.

Both Daughter and Purchaser will likely argue that Railroad abandoned the easement in 2000 when it stopped using the easement. Easements can be terminated by abandonment, but that abandonment must include both non-use and another act showing an intent to abandon the easement. Such an act would be pulling up the tracks. In this case, the railroad has only ceased use of the tracks. Both Daughter and Purchaser will argue that the closing of the grain mill is an affirmative act showing abandonment. However, the Railroad did not close the mill. The Railroad has not done any act to show that it intends to abandon the easement. Instead, the tracks are still in place and able to be used. Thus, it will likely be held that the easement has not been abandoned. As a result, either Daughter or Purchaser will take the property subject to this easement.

PURCHASER:

Purchaser will argue that he is the rightful owner under the state's notice statute. Under a notice statute, the party must be a bona fide purchaser to quality. To be a bona fide purchaser, the Purchaser must have paid value for the property and have taken the property without notice. There is no question that Purchaser paid value for the land. Purchaser has paid fair market value for the land.

Purchaser did not take the property without notice. Notice can be found in three ways: actual, constructive, or of record. Actual notice is where a purchaser sees another party

already in possession of the land. In this case, the land is unoccupied. Therefore, there could be no actual notice. Constructive notice would occur if the purchaser had heard or had reason to believe that someone else owned the property. Again, that does not seem to be the case here as Purchaser has heard nothing from other people. Record notice is here. A purchaser searches the records and finds that another party has recorded a deed to that property. In this case, Daughter has filed her deed to the property. Prospective property owners are charged with knowledge of the recording index. Thus, because Daughter had recorded her deed, Purchaser has notice of Daughter's conveyance.

Purchaser may argue that Sam's is a wild deed and is thus enforceable since it was never recorded. If a subsequent purchaser comes along and purchases from the direct line of title, that subsequent purchaser can overcome the awareness of the wild deed. In this case, Purchaser may have an argument in that he purchased from Oscar's estate whereas Daughter received title to the property via gift from Sam who never recorded his deed. Therefore, Purchaser should be awarded title to the land even though he received record notice of Daughter's recorded deed.

In the alternative, if the court disagrees and finds that the Daughter is rightfully in possession of the property, then Purchaser must sue the estate if Purchaser wishes to recover the cost or for specific performance. No specific performance will be allowed under such a scenario even though land transactions often qualify for specific performance. Instead, Purchaser would have to sue the Estate for the return of the money he paid for the property.

DAUGHTER:

Daughter has also staked claim to this property. She has received this property as a gift from her father, Sam. She, at once, recorded her title. Daughter is not a bona fide purchaser under the statute. Although she took without notice of any other conflicting deed, she did not pay value for the deed. Therefore, she is not a bona fide purchaser.

Daughter will argue that under the statute, she has given record notice to all other people that she owned the land. However, because of the wild deed that fails to link her ownership back to Oscar, her ownership to the land is imperfect and Purchaser can come in and claim ownership even though he had record notice of her recorded deed. By not recording, Oscar has allowed for a wild deed. By subsequently deeding to Daughter without first recording himself, Daughter's deed has become a floating deed which is unconnected to the line of ownership. It therefore should not preclude Purchaser from taking title.

Daughter likely has no recourse against her father for the faulty gift since Daughter was not a purchaser for value.