Summary of Suggested Answers & Annotations to the Essay Part of the February 2012 Virginia Bar Exam

Prepared by Susan S. Grover, Eric Chason & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Robert W. Wooldridge, Jr. of George Mason University Law School & C. Scott Pryor of Regent University Law School.

After each bar exam, representatives from some of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. jrz These answers also include references to some of the case and statutory law for reference even though the BBE may not expect such specificity in applicant's answers on the exam.

1. (Va. Civil Pro) 02/12 Virginia Peanut Company ("VPC"), a Delaware corporation with its principal place of business in Surry County, Virginia, had a long-term contract to buy fertilizer and other farm supplies from Southern Resources Corporation ("Southern"), a Colorado corporation with its principal place of business in Colorado. Southern was a large and frequent supplier of farm supplies to Virginia farmers. The contract called for Southern to deliver certain supplies to VPC in Virginia on the 15th day of each month during the growing season. The contract was signed on December 1, 2000, and required regular deliveries from April 15, 2001 through September 15, 2010. It provided in part that, "This contract shall be construed and enforced in accordance with Colorado law."

On July 15, 2005, Southern missed its delivery. VPC waited until July 17, and then its general manager, Dale Smith, called the president of Southern, Mr. Radley, to inquire about the missed delivery. Radley replied, "One of my managers was supposed to let you know that we won' be able to make the July delivery. But don't worry; we'll be back on track in August." Smith was annoyed at the lapse, but Southern's performance had been generally satisfactory up to then, so he took no further action at that time. Southern met all further delivery requirements.

On February 1, 2011 however, VPC sued Southern in the Circuit Court for the County of Surry, Virginia for damages sustained on account of Southern's failure to make the July 15, 2005, delivery. Upon receiving VPC's affidavit that Southern was a non-resident of Virginia, the Clerk of the Circuit Court sent the Complaint to the Secretary of the Commonwealth of Virginia, who forwarded the Complaint to Southern at its office in Colorado.

Southern appeared by counsel and filed a motion to quash the service of process on the ground that the court lacked personal jurisdiction over Southern. After a hearing, the Judge denied the motion to quash. Southern then filed its grounds of defense asserting, among other things, that VPC's claim was barred by the statute of limitations.

At his deposition, President Radley of Southern acknowledged the July 17, 2005, conversation with President Smith of VPC. He admitted that Southern had failed to deliver supplies as scheduled on July 15, 2005, and explained that, "We simply couldn't do it right then. Our subcontractor was behind in his deliveries, and there was nothing we could do."

Southern moved for summary judgment on the ground that the claim was barred by the applicable Virginia statute of limitations. The Circuit Court denied Southern's motion, holding that the claim was governed by Colorado's 10-year statute of limitations for causes of action based on written contracts.

VPC moved for summary judgment on the issue of liability, relying, over Southern's objection, on Radley's deposition testimony. The Circuit Court found no material factual issues to be in dispute and granted VPC's motion. Following a subsequent trial on damages, the court entered judgment in favor of VPC in the amount of $15,000.

(a) Did the court err in denying Southern's motion to quash service of process? Explain fully.

(b) Did the court err in denying Southern's motion for summary judgment? Explain fully.

(c) Irrespective of whether the court ruled correctly on Southern's motion for summary judgment, did the court err in granting VPC's motion for summary judgment? Explain fully.

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(a) The court was correct in denying Southern's motion to quash.

(i) When long-arm jurisdiction is an issue, the court must make two inquiries:
1) Whether the facts alleged fit any of the specific provisions of Virginia's Long-Arm Statute; and
2) Whether the defendant had the type of purposeful contacts with Virginia that constitutionally makes it fair (due process) to be sued in Virginia. This is commonly referred to as having sufficient minimum contacts.

(ii) On these facts, under §8.01-328(2), Southern contracted to supply services or things in the Commonwealth and this engaged Virginia's long arm statute. §8.01-328(1) may apply also, transacting business in Virginia. These subsections do not require proof of any continuing business, soliciting business, etc in Virginia. VPC is asserting a cause of action on this contract.

(b) The trial court erred in denying SJ on the basis that the S/L had run because Colorado's S/L applied. The issue is controlled by §8.01-247, which provides that the statute of limitations on a contract claim brought in Virginia on a contract governed by the law of another state, will be the shorter of the two states' statutes. Virginia's contract statutes of limitations are shorter than Colorado's. The breach occurred on July 15, 2005 and suit was filed on February 01,2011, more than five years later, so either under §8.01-246(2), the S/L on a written non UCC contract of sale would be five years, or if fertilizer and supplies are goods under the UCC, the s/l would be four years under §8.2-725(1). Either way the plaintiff waited too late to file suit.

(c) The trial court erred in granting summary judgment based on discovery depositions taken under Rule 4:5, which is prohibited in Rule 3:20 as well as in §8.01-420, unless all parties agree for the court to do so.

2. (Corporations & Agency) 02/12 Dirtco, Inc. is a Virginia corporation engaged in removal of excess soil and waste materials from building project sites. The corporation is headquartered in Rocky Mount, Virginia, but operates in surrounding counties within the Commonwealth of Virginia. George is the president of Dirtco, and Beverly is its corporate secretary. Both George and Beverly regularly attend board meetings, although neither of them is a director or shareholder of Dirtco. The board of directors and all of the shareholders of Dirtco are members of a single family, and none of them is involved in the day-to-day operations of the corporation.

At a March 2, 2010 board of directors meeting, a resolution was passed, authorizing the president of the corporation to enter into any contract for not more than $100,000 without the prior express approval of the board of directors. On April 2, 2010, George, as president, signed five separate contracts with Truckco in the amount of $50,000 each for the purchase of five dump trucks. Truckco was curious as to why George insisted on five separate contracts, inasmuch as such a transaction would ordinarily have been done with a single purchase order, but did not inquire further. The board of directors learned of these contracts and, at its next meeting on April 4, 2010, repudiated the contracts and sent notice of the repudiation to Truckco.

On April 2, 2010, George proposed to the board of directors that the corporation purchase a front-end loader from Equipco for $150,000 in order to compete for some new small earth-moving jobs. The board refused to authorize the proposed purchase, believing that any expansion of the business was not worthwhile. Following the meeting and without the board's knowledge, on April 9, 2010, George signed a contract as president of Dirtco to purchase a used front-end loader from Rentco instead for $125,000. One week later, the board learned of the contract to purchase the front end loader and immediately repudiated it, sending notice of their repudiation to Rentco.

On May 9, 2010, George signed a contract as president of Dirtco providing for the purchase of an airplane from Aviation Sales for $500,000. Beverly, as secretary, signed and delivered a document certifying to Aviation Sales that the Dirtco board of directors had earlier approved the execution of this contract by its president George in a resolution validly passed at a duly called meeting of the board. The certificate included the text of the corporate resolution. Beverly frequently signed such certificates as part of her duties as corporate secretary.

In fact, the execution of this contract had not been approved at a Dirtco board meeting. Instead, without a board meeting, a written consent resolution purporting to approve the contract had been circulated and signed by four of the five members of the Dirtco board of directors. Aviation Sales was unaware that the certificate was incorrect. On May 16, 2010, the board repudiated the contract with Aviation Sales, sending notice of their repudiation to Aviation Sales.

(a) Can Truckco recover damages for breach of contract from Dirtco, Inc. and/or George? Discuss fully.

(b) Can Rentco recover damages for breach of contract from Dirtco and, if so, does Dirtco have a cause of action against George? Discuss fully.

(c) Can Aviation Sales recover damages for breach of contract from Dirtco? Discuss fully.

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(a) Truckco most likely cannot recover damages for breach of contract from Dirtco, Inc. but can recover damages for breach of contract from George. The first issue is whether George had actual or apparent authority to enter into the five contracts with Truckco. Truckco will argue that George had actual authority because the Board expressly authorized him to enter into contracts for less than $100,000 and each of these contracts was for $50,000. However, for an agent to have actual authority, the agent must reasonably believe that he has authority, based upon the manifestations of the principal. Here, the facts indicate that customarily the purchase of the five trucks typically would have been done in a single purchase order and that George "insisted" on five separate contracts, both of which suggest that George did not reasonably believe that he had authority to purchase the five trucks, and, therefore, he did not have actual authority. Apparent authority requires that the third party reasonably believe, based upon manifestations of the principal, that the agent has authority to enter into the transaction. Truckco similarly thought it "curious" that George insisted on five separate contracts, and thus it was on notice that the agent may not have authority to enter into such a contract. In that situation, the third party is obligated to make further inquiry, which Truckco did not do, and therefore, Truckco cannot attribute the contract to Dirtco based on apparent authority. Finally, because Dirtco's Board immediately repudiated the contract, there also was no ratification.

Truckco can, however, recover damages from George for breach of contract. When an agent enters into a contract on behalf of a principal, the agent impliedly warrants to the third party that he has authority to enter into the contract. If, as here, the agent does not have such authority, then the agent is liable to the third party on the contract.

(b) Yes, Rentco likely can recover damages for breach of contract from Dirtco and, if so, Dirtco will have a cause of action against George. George did not have actual authority to enter into the contract with Rentco – the contract exceeded the $100,000 limit allowing George to contract without prior Board approval and George knew that the Board was not interested in such a purchase because of its rejection of the proposed deal with Equipco. However, George likely had apparent authority. As President of Dirtco, George has apparent authority to enter into contracts in the ordinary course of Dirtco's business and the facts suggest that this contract was within the scope of Dirtco's business. Furthermore, nothing in the facts suggests that Rentco knew or should have known about the Board's limitation on George's authority. Therefore, Rentco was reasonable in believing that George had authority.

If Dirtco is liable to Rentco, then George is liable to Dirtco for exceeding his authority and breaching his duty to follow the principal's instructions.

(c) Yes, Aviation Sales can recover damages for breach of contract from Dirtco. First, George did not have actual authority to enter into this contract. It was outside the scope of the Board's blanket authorization, and the consent resolution was not effective and therefore did not give him actual authority. In Virginia, a board of directors can act without a meeting of the board; however, the statute requires unanimous written consent of the directors. Here, only four of the five directors consented, and therefore, the purported consent resolution was ineffective. Nonetheless, Dirtco is bound by the contract with Aviation Sales based on apparent authority. Although George did not have apparent authority based solely on his position as President of Dirtco because buying an airplane was not within the ordinary course of Dirtco's business, the

Secretary's representation to Aviation Sales created such apparent authority. Because the Secretary has actual authority to make representations concerning actions of the Board, the Secretary's statement is attributable to Dirtco, and Aviation Sales was reasonable in believing that the Board had authorized the contract. Therefore, Dirtco is bound by the contract because George had apparent authority to enter into it on Dirtco's behalf.

3. (Wills) 02/12 Wesley, a lifelong bachelor, owned three separate horse-breeding farms in Scott County, Virginia: Blackhawk Farms, Redhawk Acres, and Goldhaven. Redhawk had been the family farm on which he and his siblings had grown up. Upon the death of Wesley's parents, Wesley was devised Redhawk Acres, which caused hard feelings among his siblings and most of their children, Wesley's nephews and nieces.

In his old age, Wesley leased the farms to tenants and retired to his house in Gate City, Virginia. All his siblings predeceased him. The only family member with whom he had maintained regular contact was Norma, one of his nieces, who moved in with him in Gate City and became his devoted caregiver.

Over the years, Wesley had invested wisely and had accumulated over $5,000,000 in cash and securities and a valuable collection of antique horse tack. Wesley's eyesight deteriorated to the point that he relied upon Norma to read his mail to him and to prepare checks for his signature. He frequently forgot things and sometimes became confused as to the year or had to ask Norma whether he had actually purchased items that appeared on his bills. At Norma's suggestion Wesley arranged to meet with Andrew, an attorney whom Norma occasionally dated, to discuss drafting a will. Before that could happen, Wesley suffered a stroke and became more confused and disoriented.

After a period of recuperation, Wesley, who was bedridden, remembered that he had never met with Andrew. At Wesley's request, Norma arranged for Andrew to come to the house, where Wesley and Andrew met in private for an hour and a half.

Wesley told Andrew that he owned the three farms, the collection of tack, and the cash and securities, and that he felt obligated to maintain his family's tradition of passing the family farm, Redhawk Acres, to a male descendant. Wesley said that, although he was not pleased that Ricky (Norma's brother) had ignored him for many years, he wanted to leave Redhawk Acres to Ricky. Because Norma had been so good to him he wanted her to receive Blackhawk Farms, Goldhaven, and $1,000,000. He instructed Andrew that all the rest of his property was to be divided equally among the remaining nephews and nieces, whose names he could not remember and who he complained had failed to visit him even once since his retirement.

Andrew prepared the will as instructed and, to assure himself that Wesley had not changed his mind about the disposition of his estate, read the entire will out loud to Wesley before the witnesses were admitted to his room. Andrew then admitted the witnesses and asked Wesley to identify what he was about to sign. Wesley said, "My will." Wesley then signed the will while the witnesses, who also then signed, were at his bedside.

Two years later Wesley died, survived by Norma and all the nephews and nieces, including Ricky. The nephews and nieces, believing that Norma and her boyfriend, Andrew, had cheated them out of their rightful share of their incompetent Uncle Wesley's estate, filed a will contest to have the will declared invalid.

What are the two most likely grounds upon which the nephews and nieces might base their will contest, and what is the likely outcome on each ground? Explain fully.

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Capacity:

To establish testamentary capacity, the burden of persuasion is upon the proponents of the will to prove by a preponderance of the evidence that "at the time the testator executed his will, the testator was capable of recollecting his property, the natural objects of his bounty, and their claims upon him, and knew the business about which he was engaged and how he wished to dispose of his property." A testator need not retain all the force of intellect that he or she had at a former period and may even be legally incompetent to transact other types of business. The relevant time for purposes of assessing

testamentary competence is as of the time of will execution. Evidence of sickness or impaired intellect at other times is insufficient, standing along, to render a will invalid.

The proponent bears the burden of proving testamentary capacity. Once the proponent establishes compliance with the statutory requirements, the contestant bears the burden of going forward with evidence. The burden of persuasion always remains with the proponent.

Wesley, on his own accord, asks to speak with the lawyer Andrew. While he may have lost capacity during the stroke, he appears to have recovered. The correct time to analyze is at execution. Element (iii) above is the most important here. He seems to know about his property. He forgets some nieces and nephews' names, but they don't visit him. He still gives them some of his estate. He seems to have capacity.

Undue Influence:

Because undue influence is a species of fraud, the person seeking to challenge the will must prove undue influence by clear and convincing evidence. It consists of measures taken with respect to the testator that, under the surrounding circumstances, the testator could not resist, that controlled the testator's volition, and that induced the testator to do that which he would not otherwise have done. Bequests made out of kindness or affection, which are not made pursuant to undue influence (assuming the lack of other fraud surrounding the bequest) are valid.

Direct proof of undue influence is difficult to produce. Contestants can establish a presumption of undue influence that shifts the burden of production to the proponent by satisfying the following test:

i) The testator suffered from weakness of mind (e.g., from advanced age or injury) when the will was made;

ii) The testator named a beneficiary who stood in a relationship of confidence or dependence; and

iii) The testator previously had expressed an intention to make a contrary disposition of his property.

Norma stands in a confidential relationship with Wesley because he relied so heavily on her. She suggested an attorney, Andrew, with whom she has a personal relationship. Andrew does read the will to Wesley, but before the witnesses are admitted. All of this might be enough to shift the burden of production to the proponents. It probably should not result in the will being invalidated. A principled argument would likely receive credit, regardless of which conclusion the applicant reaches.

4. (Local Government, Va. Civil Pro) 02/12 On January 7, 2009, Sam Smith visited the main branch of the public library owned and operated by the City of Norfolk (the City) to do some research on a paper he was writing. While he was in the library, the eastern region of Virginia was hit by a major winter storm, and by the time Sam left to go home the City was blanketed by almost two feet of snow. As Sam was leaving the library, he tripped on a broken floor tile, fell head first on the floor and was knocked unconscious.

Sam was transported from the library to the local hospital emergency room in an ambulance operated by the City's paramedic rescue service. As the ambulance approached an intersection, it was struck broadside by a City truck equipped with a snowplow that was removing accumulated snow from the street. As a result of this accident, Sam was knocked off the gurney in the ambulance and suffered a broken arm. When he finally arrived at the hospital, Sam's injuries were treated and he was kept in the hospital overnight for observation because the physician was concerned about the injury to his head.

While Sam was in the hospital, his neighbor, Nancy, who happened to be the secretary to the City's Public Works Director, came to check on him at the hospital. Sam told Nancy what had occurred at the library. He specifically told her how he tripped at the library, the time he tripped, the exact location where he had fallen, and the injuries he had sustained as a result of the fall. Sam also told Nancy that he believed the tile had been broken up for some time because he had seen it during earlier visits to the library. They agreed that the library was in need of refurbishment and repair. At Sam's request, Nancy typed a letter containing all that Sam had told her and delivered it the next day to the City Manager.

Upon returning home from the hospital, Sam discovered that his car had been hit by a City of Norfolk garbage collection truck that was picking up the garbage bins in front of Nancy's house. His car was a total loss. Nancy had seen the accident and reported to Sam that the garbage truck driver admitted

that he had failed to put chains on the tires despite icy conditions and that he was driving faster than usual because he was late in finishing his route. Sam was furious and decided that he would definitely sue the City for all that had happened to him.

Sam retained, Bob Barrister, an attorney who primarily represents clients involved in automobile accidents, to represent him. On January 10, 2009, Bob delivered to the City Manager a letter notifying the City of the details of the snowplow's collision with the ambulance and Sam's claim for the resulting damages. In the same letter, he also demanded, on Sam's behalf, the sum of $750,000 in settlement of all claims Sam might have against the City.

The City did not respond, so ten months later, Bob filed in the Norfolk Circuit Court a complaint seeking personal injury and property damages on Sam's behalf, naming the City and the garbage truck driver as defendants. The complaint included three counts and alleged

(i) in Count I, that the City was guilty of gross negligence causing the accident at the library;

(ii) in Count II, that the City was negligent in the operation of the snowplow, which collided with the ambulance; and

(iii) in Count III, that both the City and the City employee driving the garbage truck were grossly negligent in causing the damage to Sam's parked car.

Can Sam maintain each count of his complaint? Explain fully.

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There are two issues in each subpart. The first is whether the notice provisions of Va. Code §15.2-209 were complied with. Here's an extract of the statute:

§ 15.2-209. Notice to be given to counties, cities, and towns of tort claims for damages
A. Every claim cognizable against any county, city, or town **for negligence** shall be forever barred unless the claimant or his agent, attorney, or representative has filed a **written statement** of the **nature of the claim, which includes the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued.** However, if the claimant was under a disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply.

B. The statement shall be filed with the county, city, or town attorney or with the chief executive or mayor of the county, city, or town.

C. The notice is deemed filed when it is received in the office of the official to whom the notice is directed. The notice may be delivered by hand, by any form of United States mail service (including regular, certified, registered or overnight mail), or by commercial delivery service.

D. .....

E. This section does not, and shall not be construed to, abrogate, limit, expand or modify the sovereign immunity of any county, city, town, or any officer, agent or employee of the foregoing.

F. .....

G. The provisions of this section are mandatory and shall be strictly construed. This section is procedural and compliance with its provisions is not jurisdictional.
HISTORY: 2007, c. 368.

The second issue for each count is whether the City enjoyed sovereign immunity as a defense against the claim. Generally, [1] when a City is performing a governmental function, (often characterized as "for the common good") it enjoys immunity from tort claims; and [2] when a City is performing a proprietary function, it does not enjoy immunity from tort claims..

(i) Count I - Accident at the Library

Notice issue:

As to the claim for the injury at the library, the statute has been complied with because Sam's neighbor, Nancy, who is a city employee, took down all the required data elements that are required, reduced it to writing and delivered the writing to the City Manager. She can serve in a dual capacity as was recognized in a couple of cases:

Heller v. Virginia Beach 213 Va. 683 [03/73] Delivery of written information to two VB police officers who took notes and said they'd give the information to the proper people and did send information to City Attorney served in dual agency role.
Miles v. City of Richmond 236 Va. 341 [11/88] Delivery of information to City employee of injury in elevator with employee taking notes, sending report with all information to City Attorney was complied, citing Heller.

Immunity Issue:

Maintaining the library is a governmental function. Sovereign immunity applies. An applicant might also get credit for a good argument that failing to maintain the library floor in good repair constituted failure to perform a proprietary function so that immunity would not apply. Under Taylor v. City of Newport News, et als 214 Va. 9 [1973] "where governmental and proprietary functions coincide, the governmental function is the overriding factor.

(ii) Count II Ambulance-Snow Plow Collision

Notice Issue:

It appears that Sam's attorney complied with the notice requirement as to the ambulance – snow plow collision, assuming the question's reference to "the details" means the notice contained all the required data elements.

Immunity Issue:

The plowing of streets during or resulting from a major winter snow storm would be a governmental function because it promotes the common good and in spite of negligence in performing this function, the City would have immunity from a tort claim. Fenon v. City of Norfolk 203 Va. 551 [1962] & Bialk v. City of Hampton 242 Va. 56 [1991].

(iii) Count III City & Garbage Truck Driver

Notice Issue:

The facts do not reveal that the required notice was given as to the errant garbage truck. More than six months have gone by since the incident. The City would have a good defense to this claim for Sam's failing to give notice.

Immunity Issue:

Applicant should discuss the governmental versus proprietary functions. If the collection of garbage is a governmental function, (promoting the common good) then the City & the employee would enjoy immunity. If it is a proprietary function, then there would be no immunity for either the City or the employee. [cases cited above]

We do not think VBBE expected a discussion of whether Sam has committed a misjoinder of causes of action by combining three separate claims that did not arise out of the same transaction or occurrence. See §8.01-281(A) and Rule 1:4(k).

5. (Domestic Relations) 02/12 Mark and Sally, both residents of Norfolk, Virginia, met and started dating in 2005. Mark was a physician employed by a medical clinic where Sally worked as a nurse practitioner.

They talked frequently about getting married eventually. Mark, having gone through an acrimonious divorce, said repeatedly that he would never marry Sally unless she signed a prenuptial agreement, and Sally agreed she would do so when the time came. Anticipating marriage, Mark and Sally purchased a house in Norfolk in September 2006. In making application to the bank for a loan to finance the purchase, they were each required to make extensive financial disclosures, including tax returns for three years, earnings history, investments in real estate, securities, brokerage accounts, and the like. They discussed their disclosures and reviewed the documents with the bank's loan officer in the presence of each other. It was clear to both of them that Mark's assets were far greater than Sally's. They took title to the house as tenants in common.

At Christmas in 2006, Mark presented Sally with an engagement ring. They set May 31, 2007 as the wedding date, and they selected the Eastern Shore of Maryland as the site for the wedding. In January 2007, Mark gave Sally a copy of a prenuptial agreement drawn up by his lawyer and told her she should take it to a lawyer of her own and get independent advice. The agreement provided in relevant part that,

> The parties enter into this agreement in consideration of marriage. Each agrees that all property, real and personal, that (i) each brings into the marriage, (ii) is acquired by each of them during the marriage, and (iii) is titled separately in each one's name, is and shall remain the separate property of each. If the marriage should terminate by reason of divorce, each party waives and disclaims any claim to such separate property that he or she might have under the laws of the Commonwealth of Virginia or any other jurisdiction; provided, however, that upon divorce Mark shall pay Sally $1,000 per month as spousal support until her death or remarriage.

The agreement was otherwise silent as to applicable law, venue, jurisdiction, enforcement and the like.

Over the following months, whenever Mark asked Sally about signing the agreement, she demurred, saying she hadn't had time to talk to a lawyer about it. Finally, on May 30, 2007, as they were driving to the Eastern Shore of Maryland, Mark signed and gave Sally a copy of the same agreement he had given her earlier and asked her to sign it. Sally said she still hadn't talked to a lawyer about it, but that she trusted Mark. When they arrived at their hotel in St. Michaels Island, Maryland, Sally signed the agreement and handed it back to Mark.

After the wedding, Mark and Sally returned to the Norfolk house. They both continued to work at the medical clinic and pooled their earnings to pay their living expenses. They deposited the balance in a joint savings account. Mark used the funds in the joint savings account to make investments in property that turned out to be quite lucrative. With Sally's knowledge, Mark took title to that property in his own name.

By 2011, the marriage grew rocky, and in June, Sally and Mark separated. In July 2011, Sally sued for divorce in Norfolk Circuit Court. She sought to set aside the prenuptial agreement on the ground that it was inherently unfair and she prayed for equitable distribution of all property acquired during the marriage irrespective of whose name it was titled in. Sally requested a jury trial on the issues of equitable distribution and spousal support and asserted that the court should apply Maryland law in all respects.

Mark answered, denying the allegation that the prenuptial agreement was unfair and asserting the affirmative defense that Sally's claim for equitable distribution was barred by the prenuptial agreement. He opposed Sally's request for a jury trial and asserted that the court should apply Virginia law in all respects.

The laws of Virginia and Maryland are virtually identical on the issue whether and to what extent prenuptial agreements are enforceable. Maryland law, however, provides that, even though the agreement may be generally enforceable, the court may modify it, applying equitable principles to insure that both parties are treated fairly.

(a) How should the Circuit Court rule on the issue of which state's law applies? Explain fully.

(b) How should the Circuit Court rule on Sally's request for a jury trial? Explain fully.

(c) How should the Circuit Court rule on Sally's request to set aside the prenuptial agreement and Mark's defense that Sally's claim for equitable distribution is barred by the

prenuptial agreement? Explain fully.

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(a) The judge should rule that the law of Maryland applies. Unless the parties clearly intended for the prenuptial agreement to be governed by the laws of a specific jurisdiction, the validity of that agreement - as with any other contract- is governed by the jurisdiction where the agreement was executed, unless the substantive law of that jurisdiction is contrary to Virginia's established public policy. Black v. Powers 48 Va. App. 113 [2006]

(b) The applicant should recognize that the starting point on the question of access to a jury in an equitable claim is that generally litigants do not have any right to a jury to decide fact issues when litigating an equitable claim.

Our thinking is that it was probably not necessary, for full credit, to discuss whether Sally would be entitled to have an advisory jury impaneled, just recognize the general rule. No juries in equitable claims.

(c) Sally's request to set aside the prenuptial agreement should be denied. Under §20-151 , a premarital agreement is not enforceable if:

(i) It was not voluntarily executed; or

(ii) The agreement was unconscionable when it was executed and before execution of the agreement: the party contesting it (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and (b) the party contesting it did not voluntarily and expressly waive, in writing, any right to disclosure beyond the disclosure provided.

Sally does not allege that the agreement was not voluntarily signed. She alleges that the agreement was inherently unfair. Equating "fair" with "unconscionable", Sally has not met the two prongs of the unconscionability rule. She was provided fair and reasonable disclosure of Mark's property and financial obligations. In fact, she had the agreement four months before the wedding, ample time to review it and to have it reviewed by counsel.

Mark's defense that Sally's claim for equitable distribution is barred by the prenuptial agreement is granted in part and denied in part. Sally has waived the right to equitable distribution of property that falls under the terms of the prenuptial agreement, but she has not waived equitable distribution as to other property. For example, marital property is still subject to equitable distribution. Their joint savings account is marital property. Money taken from that account by Mark to purchase investments in property is marital property, despite the fact that the investment property was titled in his name only. Once Mark's earnings (presumably "property acquired by each of them during the marriage," - under the prenuptial agreement) were deposited in a joint savings account, they lost their separate character. Only if Mark could trace payments back to his separate funds (unlikely with a bank account in which the earnings of each are pooled and out of which living expenses are paid) would it be separate property not subject to equitable distribution.

6. (Criminal Law) 02/12 Tom and Jerry, charged with possession of marijuana with intent to distribute in violation of the laws of Virginia, were being tried in non-jury trials in the Circuit Court of the City of Norfolk. The charges were based on their arrests under the following circumstances:

Detective Smith ("Smith"), an undercover narcotics officer of the Norfolk Police Department, undertook to set up a "sting," in which the plan was to catch Tom in a major drug transaction. Tom was suspected of regularly dealing drugs in the Frog Hollow neighborhood of Norfolk, but he had never been charged or convicted of any such offense. Jerry occasionally used marijuana recreationally, which he purchased in very small quantities from Tom. On one occasion, Smith caught Jerry smoking a joint in his car while parked in the local Grab 'n Go parking lot. When questioned by Smith, Jerry told him he had purchased the joint from Tom.

Smith told Jerry that he could be arrested and prosecuted for felony use and possession of marijuana but that if Jerry would "cooperate" with him in setting up a sting, Smith would "forget about" having caught Jerry smoking. What Smith did not tell Jerry was that the most he could be charged with was a minor infraction.

Under the sting plan, Smith, pretending to be a marijuana dealer named Smitty, would approach Tom and offer to supply 25 kilos of the "good stuff" at a bargain price and to deliver it through Jerry at a prearranged time and place. Jerry, who, aside from the occasional use of marijuana, was a law-abiding citizen, reluctantly agreed to go along with Smith's plan. He was fearful that if he did not, Smith would make good on the threat of a felony prosecution.

Smith, impersonating Smitty, made contact with Tom and described the "deal" he was willing to make on 25 kilos. Tom had bought large quantities of marijuana for distribution before, but never from sources that were not well known to him. He was suspicious of Smitty's deal and at first refused even to consider it, protesting that he did not want to get involved with violating the law. Smitty persisted and offered to drop the price even more. Inasmuch as the price was good and the delivery was to be made by Jerry, with whom Tom was already acquainted, Tom agreed to the transaction.

Smith alerted the Narcotics Division of where and when the "deal was going down" and arranged for other narcotics officers to stake out the site and be prepared to make the arrest. Smith, in order to preserve his cover, did not intend to be at the sting site. Smith did not inform the other narcotics officers about Jerry's role. However, expecting that Jerry would be arrested along with Tom, Smith planned after the sting to disclose to the arresting officers that Jerry was an innocent participant.

The delivery and exchange of money took place as planned. The arresting officers arrested both Tom and Jerry. Earlier in the day, Smith, working on another undercover drug assignment, had been shot and killed by a dealer who had discovered that Smith was a police detective. Thus, Smith did not have the chance to communicate to the arresting officers Jerry's innocent role, and the officers did not believe Jerry's protestations of innocence.

What defense is suggested by the foregoing facts, and are Tom and Jerry each likely to prevail on such a defense? Explain fully.

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Tom should raise the defense of entrapment, defined as " is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer". On these facts, entrapment is probably not going to be a successful defense. Tom was already in the business before Detective Smith came up with his plan. While Tom at first refused to do the deal, it was because he was not sure of the reliability of Smitty, not because he didn't want to break the law, that he continued in the transaction because of the reduction in price. Johnson v. Commonwealth 211 Va. 815 [1971], Wood v. Commonwealth 213 Va. 363 [1972], Schneider v. Commonwealth 230 Va. 379 [1985]

Jerry should also raise the defense of entrapment. He obviously has the problem of Detective Smith being deceased and there being no evidence, other than Jerry's testimony, as to the circumstances. If the judge believes that Detective Smith had misrepresented the seriousness of the offense that he saw Jerry commit and promised him he'd forget the matter if Jerry co-operated the facts make a good case for the defense of entrapment and that he lacked the requisite criminal intent.

7. (UCC Sales) 02/12 Romeo Dickerson, a resident of Virginia Beach, Virginia, was an avid sport fisherman and was in the market for a new boat. He wanted one that could cruise at speed of 30 miles per hour because in that area of Virginia a typical offshore fishing site is about 90 miles from the coast. It was important that the boat could cruise at that speed in order to get out to the fishing grounds and still leave enough time in the day for fishing. Specifically, he was interested in a Trophy Convertible manufactured by Marineliner, Inc. In Virginia Beach, Marineliner's exclusive dealer was Tidewater Boats, Inc.

Romeo met with Tidewater's salesperson and told him that he was interested in a new Trophy Convertible and asked what the cruising speed of such a boat was. The salesperson said he was unsure

what cruising speed such a boat could achieve, but gave Romeo a page from Marineliner's manual, which contained recommended propeller sizes, gear ratios, engine sizes, and maximum speeds for each model made by Marineliner. The Marineliner Model 3486 Trophy Convertible was listed as having a cruising speed of 30 miles per hour when equipped with a "20x20" or "20x19" propeller and with only certain limited optional features that would not increase the weight of the boat and thereby reduce the cruising speed. Tidewater's salesperson also gave Romeo a brochure published by Marineliner that depicted a 3486 Trophy Convertible rigged for offshore fishing, accompanied by the statement that this model "delivers the kind of performance you need to get to the offshore fishing grounds."

Romeo purchased a new 3486 Trophy Convertible from Tidewater for $120,000. The boat he purchased was equipped with a "20x17" propeller, and the specifications prescribed by Romeo included several "after market" items not offered by Marineliner, such as an extra generator, icemakers, navigation system, and air conditioning and heating units, to be installed by Tidewater. The purchase contract between Romeo and Tidewater contained no language about warranties.

Romeo took delivery of the new fully-loaded boat and almost immediately discovered that the boat's maximum cruising speed was 15 miles per hour. Romeo promptly returned the boat and reported the problem to Tidewater, which worked diligently to address the issue, but was unable to achieve a speed greater than 22 miles per hour. Romeo sent a letter to Marineliner and Tidewater tendering return of the boat, requesting return of the purchase price, and saying that he was unable to use the boat for offshore fishing because of its inadequate speed and that he would not have purchased the boat if he had known that its maximum cruising speed was 22 miles per hour. Romeo received no response to his letter. Tidewater has since gone out of business.

Romeo timely filed a complaint in the Circuit Court of the City of Virginia Beach against Marineliner, alleging breach of express warranties and of implied warranties of fitness and merchantability.

Marineliner's general counsel asks you, as the company's outside counsel for court cases filed in Virginia, how the Circuit Court is likely to rule on each of Romeo's claims and why:

(a) Breach of express warranties? Explain fully.

(b) Breach of implied warranty of merchantability? Explain fully.

(c) Breach of implied warranty of fitness for a particular purpose? Explain fully.

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(a) Breach of express warranties.

Marineliner, the manufacturer, is liable for breach of any warranty made to Romeo, the ultimate buyer, notwithstanding lack of privity (Va. Code Ann. 8.2-318). Marineliner made an express warranty through the manual that the salesman gave Romeo (Va. Code Ann. 8.2-313(b)). However, Marineliner did not breach its express warranty because the specifications of the boat Romeo purchased were different from those specified in the manual. The language of the brochure probably did not create an express warranty because a Virginia court would likely consider them to be mere words of opinion or commendation (Va. Code Ann. 8.2-313(2); Bayliner Marine Corp. v. Crow, 257 Va. 121, 509 S.E.2d 499 (1999)).

(b) Breach of implied warranty of merchantability

Marineliner, the manufacturer, is liable for breach of any warranty made to Romeo, the ultimate buyer, notwithstanding lack of privity (Va. Code Ann. 8.2-318). Marineliner is a merchant who deals in goods of that kind (Va. Code Ann. 8.2-104) and thus made an implied warranty of merchantability with the sale of the boat to Romeo (Va. Code Ann. 8.2-314(1). However, given these facts, a Virginia court would likely hold that the boat was fit for the ordinary purpose of fishing, even offshore fishing (Bayliner Marine Corp. v. Crow, 257 Va. 121, 509 S.E.2d 499 (1999)).

(c) Breach of implied warranty of fitness for a particular purpose

Romeo failed to make known to either the manufacturer, Marineliner, or the retailer, Tidewater Boats, his particular interest in wanting a boat able to cruise at 30 mph. No warranty of fitness for a

particular purpose arises if the seller doesn't have such knowledge. (Va. Code Ann. 8.2-315; Bayliner Marine Corp. v. Crow, 257 Va. 121, 509 S.E.2d 499 (1999)).

8. (Real Estate) 02/12 In 1995, when Sue Johnson and her husband, Don, separated, Sue purchased a residence in the Tall Oaks community in Richmond, Virginia. She took title in her name as her sole and separate equitable estate. Sue and Don never divorced.

In July 2009, Sue listed the residence for sale, and Wilton agreed to purchase it for $400,000. One of the things that made the area attractive to Wilton was the large, indoor swimming pool at the nearby Tall Oaks Country Club, which had been developed by the same developer who built the Tall Oaks residential subdivision.

During the negotiations for the house, Sue told Wilton that ownership of the house carried with it the right to use the swimming pool, which Sue said she had used several times a week since 1995. Sue gave Wilton a copy of the contract by which she had purchased the house from the developer. That contract contained the following language: "Use of the Tall Oaks Country Club swimming pool shall be available to purchaser and her family." The deed from the developer to Sue, however, made no reference to the right to use the pool.

At the closing of the sale from Sue to Wilton, neither their contract of sale nor Sue's deed to Wilton made any reference to the right to use the pool. After the closing, Wilton moved into the house, and when he tried to use the pool he was denied access by the Country Club proprietor, who told Wilton that they had let Sue use the pool as an accommodation.

Sue died intestate in November 2011, leaving Don, as her sole heir at law. In the process of administering Sue's final affairs, Don discovered for the first time that, back in 1995, Sue had withdrawn $100,000 from their joint investment account and had used that money to buy the Tall Oaks house.

In January 2012, Wilton was transferred by his employer to manage the company's plant in New Mexico. Wilton put the Tall Oaks house on the market and accepted a $500,000 offer from Thomas.

At about that time, Wilton received a call from Don, who told him that he believed Sue's conveyance to him (Wilton) was invalid. Don explained his discovery of Sue's use of their joint funds to purchase the house and claimed that he therefore retained an interest that he would assert to block any sale by Wilton. He offered, however, to quitclaim his interest if Wilton paid him $100,000. Wilton refused.

Thomas, aware of the foregoing, asks the following questions:

(a) Can Wilton convey good and marketable title to Thomas? Explain fully.

(b) Can Wilton convey the right to use the swimming pool? Explain fully.

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(a) Yes. Wilton can convey marketable title to Thomas. Wilton is a bona fide purchaser. Title obtained by fraud is voidable, not void, and cannot be challenged if the property is in the hands of a bona fide purchaser.

(b) No. The covenant is "in gross and does not run with the land. At best, Sue owned a license. One cannot convey what one does not own.

9. (Equity) 02/12 Apex Chemical Co. (Apex) had a manufacturing plant on land it owned near the small town of Paint Bank in Craig County, Virginia. Apex was the largest employer in the area and had operated the plant since the early 1970s. The surrounding area was highly productive grassland purchased by the Paint Bank Land Co. (Land Co.) in 1980. The land was leased to local farmers to graze their organically grown cattle. The grazing leases produced between $70,000 and $75,000 annually for Land Co. In addition, Land Co. derived $50,000 a year from the Town of Paint Bank (the Town) for supplying the Town's municipal water system with water from deep wells on Land Co.'s land.

Increasingly the farmers had begun to complain to Land Co. that some of their cattle were

becoming sick, and the problem appeared to be getting worse. Since 2009, Land Co. has been unable to lease the land because the farmers have not wanted to expose their cattle to the problem.

In 2010, Land Co. tested the water in the several ponds on the property that furnished the water for the cattle and found evidence of chemical contamination. The contamination was traced back to leaks of toxic materials that were leaching into the ground water from a deteriorating underground pipeline system maintained by Apex.

Periodic annual tests of the well water for the municipal water system also revealed low levels of contamination from the same chemicals. Each year the level of contaminants increased slightly but had not yet reached levels that were harmful for human consumption.

Efforts by Land Co. and the Town to persuade Apex to voluntarily remediate the problem have failed. Apex's studies show that to stop the chemicals from leaching into the ground would require it either to dig up and repair the pipeline or replace it with an above-ground system. Either way, the cost would be in excess of $5,000,000. Moreover, it would have to curtail production at the plant for at least eight months, costing it several millions in lost profits and putting about 25 of the 100 employees, all residents of the Town, out of work for the duration.

Land Co., on the other hand, could line the cattle ponds with impermeable material and replenish them periodically with water hauled by truck from a reservoir 40 miles away. The cost of lining the ponds would be about $100,000, and the cost of hauling the water and maintaining the ponds would be approximately $20,000 per year.

The Town has no other feasible way of getting water for the municipality. Its system was connected directly to the wells on Land Co.'s land, and to build a pipeline to the distant reservoir and buy the water from that source would be prohibitively expensive.

Land Co. and the Town both want to obtain an injunction requiring Apex to dig up and repair or replace the pipeline system.

(a) On what legal theories may Land Co. and the Town each base a suit for injunctive relief? Explain fully.

(b) As between Land Co. and Apex, what remedy, if any, would the court be likely to grant? Explain fully.

(c) As between the Town and Apex, what remedy, if any, would the court be likely to grant? Explain fully.

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(a) Land Co. should seek an injunction based on the theory of private nuisance (alternatively, trespass). The Town should seek an injunction based on the theory of public nuisance. Private nuisances adversely affect one person's use and enjoyment of his property in ways that the general public is not affected. Public nuisances affect many in the same way or the public generally

(b) Land Co. should argue that it will be significantly damaged unless an injunction is granted; that the nuisance is a continuing one; that Virginia has a strong policy of allowing landowners to enjoy their land without interference by outsiders; and that the balance of equities favors it. Apex should argue that Land Co. has an adequate remedy at law in the form of measurable damages; that the damages it would suffer if the injunction is granted far surpass any damages to Land Co. if the injunction is denied; that the balance of equities favors it; and that public policy favors not shutting down the plant and putting Town residents out of work.

An alternative remedy is to award it damages for the cost of lining the ponds but issue an affirmative injunction requiring Apex itself to undertake the hauling of the water.

We think that what is most important in answering this part is a full description of the above considerations (and an understanding of the differences between a public and private nuisance)

and not a particular ruling by the trial court, and while either decision by the trial court might be within its sound discretion, our sense is that the better conclusion is a denial of the injunction to Land Co. on the grounds that it has an adequate remedy at law.

(c) The Town should argue that the balancing of equities is in its favor; that while contamination levels are not presently harmful to human consumption, the Town should not have to wait until they are to require that the circumstances be remedied; that the Town and its citizens have no alternative source of water; and that public policy favors insuring a proper water supply. Apex should argue that the balancing of equities favors it because of the hardship that shutting down the plant, losing profits and ending jobs will have; that there are at present no harmful levels of contamination and no certainty that they will arise; and that the cost to remedy the problem is enormous.

We think that what is most important is a discussion of such issues more than a particular ruling by the court, although in this instance it seems that the preferred conclusion is a ruling granting the injunction on grounds of the importance of a healthy water supply for the Town.

[NOTE: if a student raised the issue of whether the Town had standing, the student should also dismiss that argument on the grounds that the Town's interest in its water supply provides that standing.]

Cases supporting the analysis above: Levisa Coal Company v. Consolidation Coal Company 276 Va. 44 [2008], White v. Town of Culpepper 172 Va. 630 [1939], City of Newport News v. Hertzler 216 Va. 587 [1976], City of Virginia Beach 239 Va. 353 [1990]