



California Bar Examination

**Essay Questions
and
Selected Answers**

July 2015



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Doctor implanted a valve in Patient's heart in State A, where both Doctor and Patient lived. The valve was designed in State B by Valvco. Valvco was incorporated in State C, but had its headquarters in State D.

Patient was visiting State B when he collapsed due to his heart problems. Patient decided to remain in State B for the indefinite future for medical treatment.

Patient sued Doctor and Valvco in state court in State B for \$100,000, alleging that Valvco defectively designed the valve and Doctor negligently implanted it. Another patient had recently sued Valvco alleging that it defectively designed the valve, and had obtained a final judgment in her favor after trial on that issue.

Doctor and Valvco each moved the state court to dismiss the case on the ground of lack of personal jurisdiction. The state court granted Doctor's motion and denied Valvco's.

Valvco then filed a notice in federal court in State B to remove the case. Patient immediately filed a motion in federal court to remand the case to state court. The federal court denied Patient's motion.

Relying solely on the judgment in the other patient's action, Patient then filed a motion in federal court for summary adjudication of the issue that Valvco defectively designed the valve. The federal court granted the motion.

1. Did the state court properly grant Doctor's motion to dismiss? Discuss.
2. Did the state court properly deny Valvco's motion to dismiss? Discuss.
3. Did the federal court properly deny Patient's motion for remand? Discuss.
4. Did the federal court properly grant Patient's motion for summary adjudication? Discuss.

QUESTION 1: SELECTED ANSWER A

Did the State Court Properly Grant Doctor's Motion to Dismiss?

Doctor filed a motion to dismiss based on lack of personal jurisdiction. A motion to dismiss on jurisdictional issues is proper when, viewing the facts in the most favorable light to the defendant, the plaintiff has failed to satisfy the elements of personal jurisdiction. Failure to object to personal jurisdiction before answering or in a party's first 12(b)(6) motion waives the issue. There is no indication that waiver occurred here. Thus, the issue is whether the court in State B had personal jurisdiction over the Doctor.

Traditional Basis for Jurisdiction

Personal jurisdiction refers to the power of a court to adjudicate claims involving a particular party. Traditionally, personal jurisdiction is based on three concepts: **consent, presence, and domicile**. Here, there is nothing in the facts indicating that the doctor consented to personal jurisdiction. Moreover, there is nothing in the facts indicating that he was served while he was in State B or that he is a resident of state B. The facts indicate Doctor is a resident of state A. Thus, the traditional bases for jurisdiction are not met.

Long-Arm Jurisdiction/Constitutional Limits of Jurisdiction

Many states have adopted long-arm statutes to obtain personal jurisdiction over non-residents. While long-arm statutes can differ by state, jurisdiction under a long-arm statute must satisfy the constitutional requirements for the exercise of jurisdiction. Many states, like California, have adopted long-arm statutes which extend personal jurisdiction to the constitutional limits. In order to satisfy the constitutional requirements for personal jurisdiction, the defendant must have such **minimum contacts** with the forum state as to **not offend traditional notions of fair play and substantial justice**. In determining whether such minimum contacts are present, courts look to

three things: 1) the level of contacts with the forum state, 2) the relatedness of those contacts to the cause of action, and 3) whether the exercise of jurisdiction would be fair, taking into account private and public considerations.

Contacts

To determine whether a defendant has minimum contacts with the forum state to justify an exercise of personal jurisdiction, the court looks: 1) whether the defendant **purposefully availed** himself to the forum state and 2) whether the exercise of jurisdiction by the forum state would be **foreseeable**. Here, there is nothing in the facts to indicate that Doctor purposefully availed himself of the benefits and protections of State B. He did not travel to state B and he did not do business with state B or a company in state B. While the valve by Valvco was designed in state B, Doctor (or the hospital with whom he associates) likely dealt with Valvco through its headquarters in State D and purchased the valve through Valvco in State D. Thus, doctor has done nothing to purposefully avail himself of the benefits and protections of state B. It is not foreseeable that Doctor could be sued in State B because doctor did not conduct surgery in state B or take any action in state B. Moreover, Doctor did not interact with any State B residents. Patient was not a citizen of state B when doctor operated on him. While patient collapsed while in state B, such a fact, if considered foreseeable, would make doctor amenable to jurisdiction in any state, as it could be assumed that his patients could travel to any state and then fall ill. This is too tenuous of a connection to be considered foreseeable under the constitutional analysis. Thus, Doctor did not have sufficient contacts with the forum to satisfy the constitutional limits of jurisdiction.

Even though Doctor did not have sufficient contacts to warrant jurisdiction, the remaining elements are discussed for completeness.

Relatedness of Contacts

General Jurisdiction

The court looks to see whether defendant's contacts with the forum state are so extensive, as to find that the defendant is essentially at home in the forum state. If so, the court has general jurisdiction over the defendant and the defendant is amenable to a wider range of lawsuits in the state. Here, as stated above, Doctor did not have sufficient contacts with the state to show minimum contacts. Thus, he is not at home in state B.

Specific Jurisdiction

If general jurisdiction does not exist, the court looks to see whether the defendant's particular contacts with the state relate to or give rise to the particular cause of action. If so, the court has specific jurisdiction over the defendant. Here, the cause of action arises out of doctor's negligence in implanting the valve. This took place in State A. There is nothing to indicate that doctor's negligence extended to state B, except that B collapsed there. Thus, there is no specific jurisdiction over Doctor in State B.

Fairness

To determine whether jurisdiction is fair, courts look to a variety of public and private factors. Courts look to several factors, including the Plaintiff's interest in the chosen forum, a state's interest in providing redress for its citizens or for harms that occur in its state, and whether the exercise of jurisdiction would be so unfair as to offend traditional notions of fair play and substantial justice. Here, the forum state does have an interest in providing redress for its citizens. Patient is currently domiciled in state B. Domicile is determined by someone's physical location combined with an intent to stay. Here, the facts state that Patient is physical in state B and wishes to remain there or the indefinite future. Thus, Patient is a domicile of State B. However, he was a citizen of state A

when the negligence occurred. While some of the witnesses concerning the design of the valve may be in State B, the action against the doctor is for negligence. Thus, most of the evidence and witnesses, such as medical records, surgery staff, and nurses would be in State A. Thus, on the balance it is not fair to exercise jurisdiction in State B.

Conclusion

Based on the above analysis, since Doctor does not have any basis for traditional jurisdiction and since Doctor does not have such minimum contacts with the forum, as to make the exercise of jurisdiction not offend traditional notions of fair play and substantial justice, jurisdiction over D was not proper. Thus, the court properly granted his motion to dismiss.

Did the State Court Properly Deny Valvco's Motion to Dismiss?

Valvco filed a motion to dismiss based on lack of personal jurisdiction. A motion to dismiss on jurisdictional issues is proper when, viewing the facts in the most favorable light to the defendant, the plaintiff has failed to satisfy the elements of personal jurisdiction. Failure to object to personal jurisdiction before answering or in a party's first 12(b)(6) motion waives the issue. There is no indication that waiver occurred here. Thus, the issue is whether the court in State B had personal jurisdiction over Valvco.

Traditional Basis for Jurisdiction

As stated above, personal jurisdiction refers to the power of a court to adjudicate claims involving a particular party. Traditionally, personal jurisdiction is based on three concepts: ***consent, presence, and domicile***. Here, there is nothing in the facts indicating that Valvco consented to personal jurisdiction. Moreover, there is nothing in the facts indicating that it was served while he was in State B. For jurisdiction purposes,

a corporation is domiciled in the state of incorporation and the state of its principal place of business. The corporation's principal place of business is where its headquarters are or where its officers are located. Here, Valvco is incorporated in State C and has its headquarters in state D. Thus, it is domiciled in State C and D. Since the lawsuit is brought in state B, there is no basis for personal jurisdiction based on Valvco's domicile. Thus, the traditional bases for jurisdiction are not met.

Long-Arm Jurisdiction/Constitutional Limits of Jurisdiction

The requirements for long-arm jurisdiction are described in detail above. In order to satisfy the constitutional requirements for personal jurisdiction, the defendant must have such **minimum contacts** with the forum state as to **not offend traditional notions of fair play and substantial justice**. In determining whether such minimum contacts are present, courts look to three things: 1) the level of contacts with the forum state, 2) the relatedness of those contacts to the cause of action, and 3) whether the exercise of jurisdiction would be fair, taking into account private and public considerations.

Contacts

To determine whether a defendant has minimum contacts with the forum state to justify an exercise of personal jurisdiction, the court looks to two things: 1) whether the defendant **purposefully availed** himself to the forum state and 2) whether the exercise of jurisdiction by the forum state would be **foreseeable**. Here, Valvco used state B to design its valve. Thus, it availed itself of the labor force in State B and the privileges and benefits of operating a business location in state B. Thus, Valvco purposefully availed himself of State B. Moreover, the exercise must be foreseeable. Since the valve was designed in State B, it is foreseeable that someone injured by design of the valve may bring a lawsuit in state B for negligent design. Thus, Valvco has sufficient contacts for constitutional jurisdiction purposes.

Relatedness of Contacts

General Jurisdiction

The court then looks to see whether defendant's contacts with the forum state are so extensive, as to find that the defendant is essentially at home in the forum state. If so, the court has general jurisdiction over the defendant and the defendant is amenable to a wider range of lawsuits in the state. Here, Valvco's only activity in state B from the facts was designing the valve. This is likely not continuous or systematic activity which rises to the level of Valvco being "at home" in the forum state. Thus, general jurisdiction does not exist.

Specific Jurisdiction

If general jurisdiction does not exist, the court looks to see whether the defendant's particular contacts with the state relate to or give rise to the particular cause of action. If so, the court has specific jurisdiction over the defendant. Here, the cause of action arises out of Valvco's negligent design of the valve. The design took place in State B. Thus, there is specific jurisdiction over Valvco.

Fairness

To determine whether jurisdiction is fair, courts look to a variety of public and private factors. Courts look to several factors including Plaintiff's interest in the chosen forum, a state's interest in providing redress for its citizens or for harms that occur in its state, whether the exercise of jurisdiction would be so unfair as to offend traditional notions of fair play and substantial justice. Here, the forum state does have an interest in providing redress for its citizens. As discussed above, Patient is currently domiciled in state B. Domicile is determined by someone's physical location combined with an intent to stay. Here, the facts state that Patient is physically in state B and wishes to remain there or the indefinite future. Thus, Patient is a domicile of State B. Moreover,

witnesses concerning the design of the valve are likely in State B. State B also has an interest in ensuring products developed in its state are not defective to protect its residents and other foreseeable plaintiffs. Thus, on the balance it is fair to exercise jurisdiction in State B.

Conclusion

Based on the above analysis, since Valvco has such minimum contacts with the forum, as to make the exercise of jurisdiction not offend traditional notions of fair play and substantial justice, jurisdiction over Valvco is proper. Thus, the court properly denied its motion to dismiss.

Did the Federal Court Properly Deny Patient's Motion for Remand

Removal refers to a defendant's ability to remove a case brought initially in state court to federal court for adjudication. In order to remove a case, the case must have been one that could have originally been brought in federal court. Removal is proper to the federal district encompassing the location where the original action was filed in state court. Moreover, removal has to be timely--it has to be within 30 days of the last pleading giving rise to a removal action and cannot in any cases be more than a year since the filing of the lawsuit. Removal is not proper when a defendant is a resident of the state in which the action is brought and all defendants must join in the removal for it to be proper. If removal is not proper, then the plaintiff can file a motion to remand the case back to state court. A motion to remand must be filed within 30 days of the notice of removal.

Was Timing of Removal Proper

First, as a preliminary matter, removal has to be timely--it has to be within 30 days of the last pleading giving rise to a removal action and cannot in any cases be more than a

year since the filing of the lawsuit. There is nothing in the facts to explicitly indicate that the timing issue here was violated. However, the motion for removal was filed after Doctor and Valvco moved the court to dismiss on an issue of personal jurisdiction and the decision on the motion was returned. This likely took more than 30 days. Thus, removal after the motions to dismiss for lack of personal jurisdiction may not be timely. On these grounds alone, the court could grant Patient's motion for remand.

Is Any Defendant a Citizen of the State in Which the Action was Filed?

Removal is not proper when a defendant is a resident of the state in which the action is brought. Here, as explained above with respect to personal jurisdiction, Doctor is a resident of State A and Valvco is a resident of States C and D. Thus, this is not a bar to removal.

Did all Defendants Join in Removal?

All defendants must join in the removal for it to be proper. Here, the facts indicate that V filed a notice of removal in federal court. The facts do not indicate that D joined in this motion. However, at the time, D had been dismissed from the case. Thus, Doctor was no longer a defendant and was not required to join in the motion for removal. This was not a bar to removal.

Could the Case Originally Be Brought in Federal Court?

For removal to be proper, the case must be one that could have initially been brought in federal court. Federal courts are courts of limited jurisdiction. A federal court must have subject matter jurisdiction over the claims, meaning the court must have the power to adjudicate the dispute. The two most common bases for federal jurisdiction are federal question jurisdiction and diversity jurisdiction.

Federal Question Jurisdiction

Federal question jurisdiction refers to claims that are brought to enforce or decide a federal right. Here, the case brought was a defective design case against Valvco and a negligence claim against Doctor. These are both state law tort claims and do not invoke federal question jurisdiction. Thus, the case could not have been brought in federal court on the basis of federal question jurisdiction.

Diversity Jurisdiction

For diversity jurisdiction to exist, there must be diversity between plaintiffs and defendants and the amount in controversy must exceed \$75,000.

Diversity of Citizenship

Complete diversity between all parties is not required for diversity jurisdiction. However, there must be complete diversity between all Plaintiffs and all Defendants -- that is all Plaintiffs must be of diverse citizenship of all Defendants. Citizenship is determined at the time of filing of the action. For individuals, an individual can only have one citizenship--his or her domicile. Domicile is where a person is physically present with intent to permanently remain.

Here, the facts indicate that Doctor lives in State A. Thus, since no facts indicate he does not intend to remain there indefinitely, he is a citizen of State A.

Patient was a citizen of state A when the surgery occurred, but after he was injured he remained in state B with intent to stay there indefinitely. Thus, Patient became a citizen of state B. Plaintiff was a citizen of State B upon the filing of the lawsuit.

Corporations are considered domiciled where they have their principal place of business and where they are incorporated. The corporation's principal place of business is where

his headquarters are or where his officers are located. Here, Valvco is incorporated in State C and has its headquarters in state D. Thus, it is domiciled in State C and D.

Looking at the parties, the case is Patient (B) v. Doctor (A) and Valvco (C and D). Thus, diversity exists for federal jurisdictional purposes because the Plaintiff is of diverse citizenship from all defendants.

Amount in Controversy

The amount in controversy for diversity jurisdiction requirements looks at the amount from Plaintiff's well-pleaded complaint, irrespective of costs and fees. Here, the facts indicate that Patient sued Doctor and Valvco in state court for \$100,000. Aggregation of amounts in controversy against more than one defendant is proper if each defendant is jointly and severally liable for the full amount. Thus, if Patient's case seeks joint and several liability from Doctor and Valvco, jurisdiction is proper. However, if Patient was seeking \$50,000 from Doctor and \$50,000 from Valvco individually, the amount in controversy would not be satisfied for jurisdiction. There are not enough facts to determine how the damages may be allocated.

Conclusion

Since there is diversity of citizenship and the amount in controversy requirement is met, assuming joint and several liability, this is a case that could initially be brought in federal court under diversity jurisdiction.

Ultimate Conclusion

Since this is a case that could have originally been brought in federal court, Defendant is not a resident of the state in which the action was filed, and all defendants at the time joined in the removal, removal is proper. Thus, the motion to remand was properly denied. However, based on the timing of the notice of removal, if it occurred after 30

days from the last pleading raising a removable issue, Patient's motion to remand may be granted.

Did the Federal Court Properly Grant Patient's Motion for Summary Judgment?

Summary judgment is granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Summary judgment often comes up along with issues of claim preclusion or issue preclusion.

Claim Preclusion

The first issue is whether summary judgment can be granted due to claim preclusion.

Claim preclusion occurs when an identical claim was already fully litigated on the merits to a final judgment, by a court with jurisdiction, between the same parties. This prevents subsequent actions deciding the same claim that was already decided.

Here, the facts indicate that another patient recently sued Valvco alleging defective design of the valve and obtained a final judgment on the merits after a trial. With respect to Valvco, assuming it is the same valve in question, this is the same issue that is at issue in the present case. Thus, the identity of issues was met. The facts indicate that there was a judgment in her favor after trial, so there is a final judgment on the merits. Federal courts do not require all appeals be exhausted before using claim preclusion. However, claim preclusion requires identity of parties. Here, the prior action involved another patient and Valvco, not this Patient and Valvco. Thus, the requirements for claim preclusion are not met.

Issue Preclusion

The second issue is whether summary judgment can be granted based on issue preclusion.

Issue preclusion prevents an issue that was already fully litigated on the merits from being re-litigated. The requirements for issue preclusion are 1) the same issue, 2) actually litigated and decided, 3) a final judgment on the merits, 4) the issue was essential to the judgment and 5) in the cases of non-mutual issue preclusion, fairness.

Same Issue

Here, the facts indicate that another patient recently sued Valvco alleging defective design of the valve and obtained a final judgment on the merits. With respect to Valvco, assuming it was the same valve, this is the same issue that is at issue in the present case. Thus, the identity of issues was met.

Actually Litigated and Decided

The facts indicate that there was a judgment in her favor after trial, so issue was actually litigated and decided.

Final Judgment on the Merits

The facts indicate that there was a judgment in her favor after trial, and it wasn't based on a lack of jurisdiction or other decisions not on the merits, so there is a final judgment on the merits. Federal courts do not require all appeals be exhausted before applying issue preclusion.

Essential to the Judgment

It appears the decision was essential to the judgment, as the other patient brought a defective design case and won. There are no other facts indicating there were separate or alternative grounds for the other patient's success in the suit. Thus, a finding of negligent design is essential to the judgment.

Fairness/Non-Mutual Issue Preclusion

Traditionally, issue preclusion required the same parties to the prior lawsuit assert issue preclusion or at least parties in privity with each other. If that was the case, then issue preclusion could not be used here for the reasons explained above with claim preclusion.

However, many courts now allow non-mutual issue preclusion to be used if it is fair. Here, Patient is trying to use non-mutual offensive issue preclusion--that is, a Plaintiff is using it as a sword against a Defendant in a later action. Courts typically allow this if Valvco had the same or similar motivations to defend the prior suit and if it would not be unfair or unjust. Here, both actions were for defective design. Thus, Valvco had a similar motive to defend this prior lawsuit. Therefore, it is not inequitable for Patient to use issue preclusion.

Since there is issue preclusion and Valvco is precluded from claiming it is not negligent, there is no issue of material fact with respect to Valvco's negligent design. Thus, summary judgment should be granted for Patient. The court was proper in granting the motion.

QUESTION 1: SELECTED ANSWER B

1) State Court Properly grant Doctor's motion ("D") to dismiss?

The issue here is whether the State B court had personal jurisdiction ("PJ") over D. The plaintiff's place of residence or domicile is irrelevant to this issue.

Traditional Bases of PJ

Personal jurisdiction assesses whether the court has power over the defendant such that it may hear a case against him. There are three traditional bases that personal jurisdiction can be established over a defendant. If the defendant consents to the jurisdiction; is domiciled in the jurisdiction; or is served while present in the jurisdiction (although, not if served due to the fraud or deceit of the plaintiff, or, in federal court, if served while serving as a witness or party in a court case). For a person, domicile requires two elements be met: 1) presence in the forum state and 2) an intent to permanently remain in the forum state.

In this case, none of the traditional methods appear to be applicable. D was not served in State B nor did he consent to the jurisdiction of the court (if he did, he would not have brought the motion to dismiss). He also is not domiciled in State B. D lives in State A and is merely visiting State B for these court proceedings; he does not intend to stay permanently.

Long-arm Statute

If the traditional bases of PJ do not apply, we then must analyze the state's long-arm statute. A long-arm statute permits a state to have PJ over out-of-state defendants. There are two types of long-arm statutes--those that apply the minimum constitutional requirements of due process to establish personal jurisdiction and those that have

specific limitations beyond those prescribed by the Due Process clause. Here, we are not told of State B's long-arm statute; we are similarly not told of any restrictions the state has regarding PJ. Thus, it is likely (and will be assumed) that the state simply applies the constitutional analysis.

Constitutional Requirements

The Supreme Court has held that, for a state to have PJ over a defendant, the defendant must have sufficient minimum contacts with the state, such that traditional notions of fair play and justice are not offended by the use of jurisdiction over him. The Court has established a three-factor test to determine whether minimum contacts exist: 1) contact; 2) relatedness; 3) fairness.

Contact

Under the contact factor, courts ask whether the defendant purposely availed himself of the benefit and protections of the state's laws, and based on that availment, was a law suit foreseeable. Here, D has not purposely availed himself of the protections of State B's laws. He has not practiced medicine in State B, and there are no facts showing that he has even stepped foot in State B, other than for purposes of this lawsuit. As a result, a lawsuit against him in State B was not foreseeable. PJ would likely fail due to this factor.

Conclusion: Thus, the state court properly granted D's motion to dismiss for lack of personal jurisdiction.

2) State court Properly deny Valvco's ("V") motion to dismiss?

The issue here is whether the State B court had PJ over V.

Similarly to D, the traditional bases (domicile, consent, and personal service) of PJ will not work to acquire jurisdiction over V. A corporation's domicile includes both all of the states where it is incorporated as well as the location of its principal place of business--the place where the corporate's headquarters, officers, and main employees that operate the whole company are located. Here, V is incorporated in State C and its headquarters, which would likely comprise its principal place of business, is in State D. Thus, it is not domiciled in State B, it was not served in State B (based on the facts), and it clearly has not consented to PJ. None of the traditional bases works.

Additionally, the long-arm statute likely will apply the constitutional analysis. Thus, the three-factor test will be used here as well to determine if V had minimum contacts with State B to establish personal jurisdiction.

Contact

As mentioned above, under the contact factor, courts ask whether the defendant purposely availed himself of the benefit and protections of the state's laws, and based on that availment, was a lawsuit foreseeable in the state. Here, although the facts are somewhat unclear, it is likely that V has purposely availed itself of the benefits and protections of State B's laws. V designed the valve that purportedly injured Patient ("P") in State B. It likely has employees permanently located and working in the state. If so, it has purposely availed itself of the state's laws, and it was entirely likely that it could be sued in the state.

Relatedness

The relatedness factor identifies if one of two forms of jurisdiction exist--specific and general jurisdiction. Specific jurisdiction exists when the actions that the defendant took in the state are related/caused the cause of action to arise. Specific jurisdiction grants the court the PJ to hear only that case against the defendant. In contrast,

general jurisdiction asks whether the defendant has maintained a systematic and continuous presence in the forum state such that it is essentially at home. If so, a court can hear any case against the defendant.

Here, specific jurisdiction exists, and with additional facts, general jurisdiction could be shown to exist as well. V's conduct in the state, designing the valve, led directly to the cause of action at hand. As a result, the claim and its actions are related, and it establishes specific jurisdiction. General jurisdiction could also exist if the company has a factory or team of workers in the state that remain there consistently. However, specific jurisdiction is sufficient to establish PJ.

Fairness

The last factor simply asks whether exercising PJ in the forum state is fair. The court will look to both the defendant's and plaintiff's interests in having the proceedings in the state, as well as the state's interests in exercising jurisdiction. Here, it seems entirely fair that V will be subject to State B's jurisdiction. The employees that designed the valve are likely in State B, making it reasonable for the plaintiff to proceed in the state, and the plaintiff lives in the state. Thus, the plaintiff's interests are in favor of the proceeding. Additionally, State B has an interest in protecting its citizens from the potentially negligent acts of business in the state. Finally, the defendant's interests do not weigh so heavily in favor of the court not exercising PJ to justify dismissal. Only when the D's interest is gravely injured by the exercise of PJ should it be denied.

Conclusion: The state court properly denied V's motion to dismiss for lack of PJ.

3) Fed Court properly deny Patient's ("P") motion for remand

For the court's decision to be correct, it must have had subject matter jurisdiction, and V must have had the power to remove the case. If either of those elements were

not met, it should have remanded the case back to the state court. The first issue here is whether the federal court had subject matter jurisdiction ("SMJ") over P's claim, such that V could remove the case.

SMJ

Subject matter jurisdiction ("SMJ") determines whether a court has the ability to hear a case. SMJ can be established in one of three ways, although only two are relevant here--federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction applies when the plaintiff, in its well-pleaded complaint, raises a federal right or claim of relief--the federal claim cannot arise in another pleading, but must be clear from the complaint. If federal question jurisdiction exists, removal to a federal court is always appropriate. Here, P's complaint does not raise a federal issue--it is a state law tort issue--and as a result, federal question jurisdiction does not exist.

Diversity jurisdiction requires that two elements be met. First, there must be complete diversity between the parties--the case must involve citizens of different states or a citizen of the US and a foreign citizen, and all plaintiffs must be from a different state than all defendants. Diversity is determined at the time the case is instituted. A person is a citizen of the state he or she is domiciled (present and intend to permanently remain), while a corporation is a citizen where it is domiciled (incorporation and principal place of business). Here, complete diversity does exist. P is likely a citizen of State B at this moment. He is present in State B and intends to remain there for the indefinite future (however, even if he is a citizen of State A, diversity will still exist). V, on the other hand, is a citizen of both State C (incorporated) and State D (principal place of business). Thus, complete diversity exists.

To have diversity jurisdiction, the second element required is that the suit be for greater than \$75,000. Unless it is clear to a legal certainty that the plaintiff's amount is below \$75,000, the plaintiff's claim for relief that is made in good faith and greater than the threshold will establish the amount for diversity purposes. Typically, the amount

sued for applies only to one defendant; however, in the case of joint tortfeasors, the amount applies to all defendants. In this case, P sued D and V for \$100,000. Although D is no longer a party to the case (as a result of the motion to dismiss), the \$100,000 claim is applicable to V. As a result, the amount in controversy requirement is met.

Removal appropriate

The second issue is whether V met the requirements for removal and whether it was appropriate.

Removal must be made within 30 days of being served the complaint in a matter. The notice of removal must be sent to the federal court encapsulating the state court in question, and it must join all defendants currently in the matter. In this case, these initial requirements appear to be met. Although we are not given facts regarding the 30-day timeline, it seems to be met. Additionally, V filed the notice in the appropriate federal court--the State B federal court. Lastly, because D had been dismissed as a defendant, the notice included all required defendants. Thus, at first glance, the elements were met.

In a diversity case, however, removal may not be had in two situations. First, if the defendant is a citizen of the state where the state court sits, it is not appropriate, and removal should be denied. Second, removal may only be had within one year after service, and any removal actions sought after one year should be denied.

Here, as mentioned, V is not a citizen of State D; therefore, that limitation does not apply here. Second, although the facts are ambiguous, it would appear that the motion was timely brought within the one-year period. As a result, removal was properly granted, and P's motion for remand was properly denied.

Conclusion: P's motion for remand was properly denied by the Federal Court.

4) Fed Court properly grant P's motion for summary adjudication?

The issue here is whether issue preclusion should apply.

Summary judgment is appropriate when there are no genuine material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. It is at the court's discretion, however, as to whether it will grant the motion. The motion may be made any time prior to 30 days after the end of discovery. Both claim and issue preclusion can be used to establish that no genuine material issues of fact exist, such that summary judgment is appropriate. Additionally, if issue preclusion does not justify the granting of a total summary judgment, a court may grant a partial summary judgment as to that particular issue or permit additional time to prove up the other necessary facts.

Claim Preclusion (res judicata)

Claim preclusion is not applicable here. For claim preclusion to apply, the same two parties from a prior final judgment on the merits must be in a second proceeding, in which one party is seeking to relitigate a claim litigated at the first proceeding or one that should have been made at that proceeding. Here, P was not a party to the first proceeding, and as a result, the doctrine will not apply.

Issue Preclusion (collateral estoppel)

A party can be estopped from relitigating an issue that was litigated at an earlier proceeding if issue preclusion applies. Issue preclusion requires the following elements to be met: 1) a final judgment on the merits in a prior proceeding; 2) the issue sought to be estopped was actually litigated; 3) that issue was essential to the judgment; and 4) mutuality of parties. Here, the prior case involved V and another plaintiff. That plaintiff won the case based on the allegation that V had defectively designed the valve used in P's case. Thus, there was a final judgment on the merits of the case. Additionally, the

issue that P seeks to estop V from relitigating--the defective design--was actually litigated and essential to the court's judgment in the final proceeding.

The final determination is whether mutuality of the parties exists in this case. Although mutuality of parties used to require the same parties in both the prior and current proceeding, American courts have relaxed this requirement. Instead, defensive claim preclusion (used by a defendant) has been upheld in nearly all jurisdictions, and offensive claim preclusion (where the plaintiff seeks to estop the defendant) is gaining traction, and it has been used by the Supreme Court. Offensive issue preclusion is allowed if the party that will be estopped had a fair and equitable opportunity to litigate the issue at the prior proceeding. If that party had such an opportunity to litigate, then issue preclusion can apply notwithstanding the fact that the plaintiff was not a party in the prior proceeding.

Here, offensive claim preclusion should be allowed. V had a full and fair opportunity to litigate the defective design issue. It was in its best interest to put forth all of its efforts in winning that case. If not, and as seen here, other users of their products would likely start to sue them using the judgment to their advantage. It had the opportunity to call witnesses and cross-examine the other plaintiff's witnesses. It is fair and equitable that V should be estopped from relitigating the issue here.

Partial or total summary judgment

Although P may have shown a defectively designed product manufactured by V, he has not yet shown the other requirements of either a negligent design action (duty, causation, and damages) or a strict product liability action (causation, damages). As a result, total summary judgment is likely not appropriate in this matter. However, at the court's discretion, it could grant partial summary judgment as to the defective design issue, or give P additional time to prove up the additional elements, such that she could receive a total summary judgment. Thus, it should not have granted the total summary judgment as it did based on the facts at hand.

Conclusion: The state court erred in granting a total summary judgment; at best it should have granted a partial.

QUESTION 2

Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny “as joint tenants with a right of survivorship for so long as neither Martha nor Lenny make any transfer of Greenacre. In the event of such a transfer, Greenacre shall automatically revert back to Oscar.”

Subsequently, without Lenny’s knowledge, Martha conveyed all of her interest in Greenacre to Paul. She died shortly afterwards. Unaware of Paul’s existence, Lenny paid the property taxes.

Paul entered into a written lease of his interest in Greenacre with Sally for a two-year term at a rental of \$500 per month. At the end of the lease, Sally stopped paying rent, but continued to occupy Greenacre without Paul’s consent. After three months, Paul confronted Sally. Although they did not agree to a new lease, Sally paid Paul the three months’ rent she had not paid and resumed paying him monthly rent.

Lenny then attempted to sell his interest in Greenacre. He soon learned that Sally was occupying Greenacre and that Paul had acquired Martha’s interest.

Concerned about conflicting property interest claims regarding Greenacre, Lenny commenced a lawsuit seeking to quiet title against Oscar, Martha’s estate, Paul, and Sally, and to obtain from Paul an accounting and contribution for a share of the rent paid by Sally and for a share of the property taxes paid by Lenny.

1. What property interest in Greenacre, if any, is the court likely to find possessed by Oscar, Lenny, Paul, Sally, and Martha’s estate? Discuss.
2. Is Lenny likely to obtain an accounting and contribution from Paul? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Interests in Greenacre

To determine who has what interest in Greenacre (G), the validity and effect of each transfer/agreement must be determined. Generally, property may be transferred by sale, gift, will, or intestate succession. Leases may also create interests in possession of property.

Oscar

First, it must be determined what interest Oscar (O) had in the property. A fee simple is the largest property interest possible and O began with a fee simple interest in G.

Fee Simple Determinable

A fee simple defeasible is a fee simple interest that may be cut short by a subsequent event. When a fee simple defeasible contains terms of duration (e.g. as long as, for the time that, until, etc.), it is a fee simple determinable. A fee simple determinable will be a fee simple until a designated event occurs. Here, O's conveyance to Martha (M) and Lenny (L) was likely a fee simple determinable because it contained the phrase "for so long as." Thus, this conveyance conveyed a fee simple determinable interest to M and L.

Possibility of Reverter

The grantor of a fee simple determinable interest retains a possibility of reverter. Here, O's conveyance additionally contained explicit language that he retained a possibility of reverter. A possibility of reverter means that fee simple automatically reverts to the grantor at the time the designated event occurs. The grantor need not go to court to claim this interest; the interest automatically vests at the occurrence of the subsequent event. Here, O had a possibility of reverter. The event in question was if either M or L made any transfer of G. Thus, if his possibility of reverter was valid, O gained a fee simple interest in G at the time M transferred her interest in G to Paul (P).

Restraints on Alienation

However, the possibility of reverter here may not be valid because it may be an undue restraint on alienation. Generally, courts do not allow title instruments/conveyances that absolutely prohibit future transfer of the property. Restraints on alienation may be

allowed if the restraint is only conditional/for a moderate time period (e.g. does not transfer for the next 50 years). However, absolute restraints on alienation are invalid. Any language indicating such absolute restraint will be struck from the instrument, so the resulting interests will remain. Here, the proposed restraint was absolute--O conveyed to M and L so long as neither transferred G. There was no condition or limited time period on this restraint; it was absolute. So, this clause will be struck from the instrument and the remaining interests will exist. With this clause struck, there is no future event that gives O a possibility of reverter. Rather, it changes M's and L's interests to fee simple interests and strips O of his possibility of reverter. Thus, because of the striking of the invalid restraint on interest, O conveyed G in fee simple to L and M and retains no interest in the property. So, O has no interest in G.

Lenny

As discussed above, because the alienation language had to be struck, L received a fee simple interest with M in G from O.

Joint Tenancy

There are various forms of co-tenancies. Each form allows all co-tenants to possess the whole of the property, though each holds only a lesser, divided share of the property. A tenancy in common is the default form. A joint tenancy carries the additional right of survivorship between joint tenants. This right of survivorship means that when one joint tenant dies, the surviving joint tenant receives the deceased joint tenant's interest in the property automatically, and the deceased tenant's interest is no longer part of her estate and so cannot be passed through probate. A joint tenancy exists when property is conveyed by an instrument that indicates intent for the property to be held as a joint tenancy with a right of survivorship, and when the four unities of (1) possession, (2) interest, (3) time, and (4) title exist. Here, O conveyed G to M and L "as joint tenants with a right of survivorship." So, the explicit language indicating intent to convey as a joint tenancy and to convey a right of survivorship is present.

1. Possession

The unity of possession means that all joint tenants have equal right to possess the whole property. Here, although L and M (and P as M's successor) took various degrees of possession of G, there is no indication that any ousted the other at any time--i.e. no

tenant ever prevented the other from taking possession of the whole property. Thus, there was unity of possession.

2. Interest

Unity of interest means that each joint tenant must have an equal share interest in the property--i.e., for two joint tenants, each must have a 50 percent interest rather than, e.g., one having a 40 percent and one a 60 percent interest. Here, it is not indicated what interest each L and M had in G, so presumably each was conveyed a 50 percent interest in G. So, there was unity of interest.

3. Time

Unity of time means that each tenant must have acquired her interest in the property at the same time. Here, initially, both L and M acquired their interests in G at the same time--when O conveyed it to them. However, subsequently, M conveyed her interest to P. So, P acquired his interest in G at a different time than L (the remaining joint tenant), thus destroying the unity of time (discussed more below).

4. Title

Unity of title means that each tenant must have acquired her interest in the property by the same instrument. Here, as with the unity of time, L and M initially had unity of title because both originally acquired their interests in G by means of the grant from O. However, when M conveyed her interest in G to P, P then got title from M's conveyance while L still had title from O's conveyance. So the unity of title was also broken at that time.

Thus, while M and L originally were tenants in common because the four unities were present and the intentional joint tenancy and right of survivorship language was included in the relevant instrument, the joint tenancy ended when M conveyed her interest in G to P because this broke the unities of time and title.

Tenancy in Common

When any of the unities for a joint tenancy are broken, the tenancy reverts to a tenancy in common. A tenancy in common is the default form. Under a tenancy in common, each co-tenant has equal right to possess the whole of the property, but only a lesser divided interest in the property. Under a tenancy in common, each tenant may devise

her interest in the property or it will pass through intestate succession because a tenancy in common has no right of survivorship.

Here, because the unities of time and title were broken when M conveyed her interest in G to P, the tenancy reverted to a tenancy in common. So, at that point, L and P held G as tenants in common with no right to survivorship. However, each's interests in the property (i.e. 50 percent share) was not affected.

So, at the time of the action, L held a 50 percent interest in G as a tenant in common.

Paul

Next, it must be decided what interest P had.

Inter Vivos Transfer

P obtained his interest in G by an inter vivos transfer from M. It must be determined that this interest is valid. First, the provision in the conveyance from O that the property was conveyed to M and L so long as neither transferred it could prohibit the transfer. However, as discussed above, that provision of O's conveyance was an invalid absolute restraint on alienation, so must be struck from the instrument. Thus, M was not restrained from transferring by means of O's clause in his conveyance. Second, the nature of a joint tenancy may prevent M from transferring her interest. Generally a joint tenant may transfer her interest in the property without the consent of her joint tenants. The effect of the transfer is that it converts the joint tenancy to a tenancy in common, but permission is not required to make the transfer. By contrast, a tenancy by the entirety--which is a joint tenancy held by married spouses--requires that property interest cannot be transferred without consent of the other tenant-by-the-entirety. Here, there is no indication that M and L were married to each other, so no indication that this was a tenancy by the entirety rather than a joint tenancy. So, as a joint tenancy, M was not required to obtain L's permission to transfer to P. Third, as a transfer of interest in real property, the Statute of Frauds would ordinarily require that the conveyance be in writing. Here, it is not clear whether the conveyance was in writing, but the Statute of Frauds may nonetheless be satisfied by part performance if P did two of the three: took possession of the property, made payment for the property, or made improvements on the property. So, M's transfer to P was likely valid.

Tenancy in Common

As discussed above, thus, P holds a 50 percent interest in G as a tenant in common with L.

Lease to Sally

However, P has also entered a lease with Sally (S) that may affect his interests. There are three kinds of landlord-tenant leases--(1) tenancy for years, which is a lease for a definite period of time; (2) periodic tenancy, which is a lease for a definite period (e.g. one month) that automatically renews at the end of each period; or (3) tenancy at sufferance, which is a tenancy caused by the holdover of property by the tenant after a lease has ended. Generally, rental leases need not be in writing unless they are a lease for years for greater than a 1-year term (because the Statute of Frauds requires a writing for any contract that cannot be performed within one year). Here, the initial rental agreement was for 2 years, but was in writing. P initially rented G to S as a tenancy for years with a fixed two-year term. A tenancy for years automatically terminates at the end of the fixed period. So, here, this tenancy terminated at the end of two years.

A periodic tenancy is created by implication if a tenant pays rent and the landlord accepts it each period. Typically, a periodic tenancy is created at the end of a tenancy for years when the tenant pays rent and the landlord accepts. However, here, S stopped paying rent at the end of the two-year lease, but remained on G as a holdover. So, at that time, a Tenancy at Sufferance was created. However, when S subsequently paid P for those three months and resumed paying monthly rents, a periodic tenancy was created if P accepted those rents. There is no information to the contrary, so P presumably accepted those rents.

Thus, at the time of the action, P owned a 50 percent interest in G as a tenant in common, but leased possession of G to S as a periodic tenancy.

Sally

S's interest in G is only that granted her by her lease with P. Because P, as a tenant in common, has a right to possess the whole property, he may lease the whole property to a tenant. Further, as discussed above, at the time of the action, S and P had a periodic

tenancy by implication. Thus, S has an interest in possessing the whole of G (but no ownership interest) as a periodic tenancy.

Martha's Estate

Finally, as discussed above, M's inter vivos transfer to P was valid. Thus, that property was no longer in M's estate at the time she died. So, M's estate has no interest in G.

2. Likelihood Lenny Can Obtain an Accounting and Contribution from Paul

Next, it must be determined whether L can obtain an accounting and contribution from P, his tenant in common.

Rights to Third-Party Rents

Generally, tenants in common each have a right to possess the whole property. So, one tenant may not demand rent from her co-tenant because the co-tenant possesses the whole of the property exclusively. However, co-tenants may demand accounting for rents received from third parties. Here, P, a co-tenant, rented G to a S, a third party, and received rents from S. So, L may demand an accounting for the rents received from S in proportion to his interest in the property. Here, L had a 50 percent interest in G, so may demand 50 percent of the rents received from S.

Contribution for Operating Expenses

Generally, tenants in common are not entitled to contribution from other co-tenants for costs expended to repair or improve the property. However, they are entitled to contribution for basic operating expenses--which include property taxes. Here, L paid all property taxes on G after M died. Because property taxes are operating expenses, L is entitled to demand contribution from P for his share (proportionate to his interest in the property). Here, P had a 50 percent interest in G, so L may demand that P pay him contribution for 50 percent of the property taxes.

QUESTION 2: SELECTED ANSWER B

1. What Property Interests in Greenacre is the Court Likely to Find Possessed by Oscar, Lenny, Paul, Sally, and Martha's Estate

Oscar

Fee Simple Determinable and the Possibility of Reverter

The issue is whether Oscar has the possibility of a reverter interest in Greenacre. Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny as joint tenants with the right of survivorship, but included a fee simple determinable ("FSD"), so that if Martha or Lenny ever transferred Greenacre, the property shall automatically revert back to Oscar.

Thus, Oscar attempted to give Martha and Lenny an FSD, and leave for himself the possibility of a reverter. A possibility of reverter follows an FSD. A possibility of reverter means that the property automatically reverts back to the grantor upon the happening of an event, and thus, the grantor does not need to take any action in order to regain access to the property.

Improper Restraint on Alienation

The issue is whether Oscar's FSD to Martha and Lenny contained an improper restraint on alienation. If Oscar's FSD is found to be a complete restraint on alienation, then the condition will be removed and Martha and Lenny will own Greenacre in fee simple. Oscar will be left with no remaining interest in Greenacre.

An owner of property may grant interests in property subject to certain conditions. These are known as defeasible fees and include fee simples determinables ("FSD") and fee simples subject to conditions precedents ("FSCS"). A court will generally uphold such conditions, as long as they are reasonable restraints on use and not complete bars

on alienation. Public policy favors free alienability of property. Thus, a court will generally invalidate a FSD if the condition contains a complete restraint on alienation. A court will remove the condition, and leave the grantee with a fee simple absolute interest in the property.

Here, Oscar stated that neither Martha nor Lenny may make any transfers of Greenacre. Lenny and Martha's estate will thus argue that this condition is a complete bar on alienation, and thus invalid. The two will argue that in the event that they are to sell Greenacre, it will automatically revert back to Oscar. Thus, they will argue that this is a complete restraint on alienation because it does not require any action from Oscar to determine whether or not to take back Greenacre: it simply automatically reverts back to him upon any alienation of the property.

Oscar, however, will argue that this is not a complete restraint on alienation. He will argue that Martha and Lenny may do whatever they like with the property and may use it however they like; they may even rent it out to tenants, but their only restraint is that they may not entirely transfer the property. Thus, he will argue that when Martha transferred her interest in Greenacre to Paul, Greenacre automatically reverted back to him. However, this argument is a weak one, for it appears that the condition is one barring complete alienation.

Conclusion

If a court finds Oscar's argument persuasive, then Oscar has a fee simple absolute in Greenacre, for Greenacre reverted back to Oscar when Martha transferred Greenacre to Paul. If this is the case, then Paul, Lenny, Martha's Estate, and Sally have no interest in Greenacre. However, a court is more likely to find Oscar's restraint on alienation complete and unreasonable. Thus, a court is likely to find that Oscar transferred Greenacre to Lenny and Martha in fee simple absolute, and that Oscar retains no interest in Greenacre.

LENNY'S INTEREST IN GREENACRE

Joint Tenancy

The issue is whether Lenny owns Greenacre in fee simple, or as a tenancy in common with Paul. Oscar granted Greenacre to Lenny and Martha "as joint tenants with a right of survivorship." As discussed above, the condition that Oscar placed on Greenacre is likely an invalid restraint on alienation, and thus Oscar granted Lenny and Martha the land as joint tenants in fee simple. A joint tenancy gives the co-owners equal right and possession to the property. The right of survivorship, a unique aspect of a joint tenancy, allows one joint tenant's interest in the land to pass to the other joint tenant upon death. A joint tenancy is created with the four unities are present: the joint tenants must have equal interests, rights to possession, must have obtained title by the same interest, and must have obtained title at the same time. Thus, at the onset, Lenny and Martha owned Greenacre as joint tenants with a right of survivorship, in fee simple absolute.

Severance of a Joint Tenancy

A joint tenancy is severed when any one of the four unities discussed above is severed. A joint tenancy may be severed by one joint tenant conveying his interest to another. A severance can occur without the permission of the other joint tenant. When a severance occurs, the new owner of the land will take as tenants in common with the remaining joint tenant.

Here, Martha conveyed all of her interest in Greenacre to Paul. Thus, she severed the joint tenancy. When she severed the joint tenancy, Lenny and Paul became tenants in common.

Tenancy in Common

In a tenancy in common, the only unity that exists is the unity of possession. There is no right of survivorship. Thus, when Martha transferred her interest to Paul, Paul and Lenny became tenants in common, with equal rights of possession in Greenacre. Lenny lost his right of survivorship when Martha transferred her interest to Paul. Lenny

may argue that because he did not consent to Martha's transfer, when Martha passed away they were still joint tenants, and her interest passed to him through the right of survivorship. However, this argument will fail. As discussed above, consent of the joint tenants is not necessary for severance.

Conclusion

Thus, a court will likely find that Lenny has a fee simple absolute interest in Greenacre and that he is a tenant in common with Paul.

PAUL'S INTEREST IN GREENACRE

As discussed above, Martha conveyed her interest in Greenacre to Paul before her death. She therefore severed the joint tenancy. Paul thus takes the same as Lenny: he has a fee simple absolute interest in Greenacre, and is a tenant in common with Lenny.

MARTHA'S ESTATE'S INTEREST IN GREENACRE

A court is likely to find that Martha's estate has no remaining interest in Greenacre. Before Martha's death, Martha conveyed all of her interest in Greenacre to Paul. Thus, Martha has no remaining interest in Greenacre.

SALLY'S INTEREST IN GREENACRE

The issue is whether Sally created a new periodic tenancy when she resumed paying monthly rent to Paul. Paul, a co-owner of Greenacre, entered into a written lease of Greenacre with Sally for a two-year term at a rental of \$500 per month. At the end of the lease, Sally stopped paying rent but continued to occupy Greenacre without Paul's consent. After Paul confronted Sally, while they did not enter into a new lease, Sally paid Paul the three months' rent she had not paid and resumed paying him monthly rent.

A lease is a possessory interest in property whereby the tenant maintains a present interest in the property, and the landlord retains a future interest. There are four types of leases or tenancies: tenancy at will, tenancy at sufferance (a holdover tenancy),

periodic tenancy, and tenancy for years. Here, it seems as though initially, Sally and Paul entered into a tenancy for a term of two years. Thus, they had a tenancy for years, which was to terminate at the end of the two year period.

Holdover Tenant - Tenancy at Sufferance

When Sally stopped paying rent, but continued to occupy Greenacre without Paul's consent, Sally became a holdover tenant. When one stops paying rent but remains on the premises, one becomes a holdover tenant. A holdover tenant is one who was once properly on the landlord's premises, but has exceeded her permission to occupy the premises, and thus remains on the premises unlawfully. A landlord has the right to evict the holdover tenant and sue for past rent, or the landlord may create a new periodic tenancy, by operation of law, with the tenant.

Periodic Tenancy

Although they did not agree to a new lease, Sally and Paul entered into a new periodic tenancy by operation of law. It appears as though Paul accepted Sally's late payment of the three months' rent, and Sally resumed paying Paul monthly. Thus the pair created a new month-to-month periodic tenancy, where rent will be due every month. The periodic tenancy will require notice to terminate it. The amount of notice required will be one month, the time of one period under their lease. If Paul has indeed accepted Sally's three months' rent she has not paid and has accepted her next month's rent, then Sally is a tenant and Paul is her landlord.

Conclusion

Sally has a present possessory interest in Greenacre under a periodic tenancy. However, as long as proper notice is given, she or Paul may terminate the periodic tenancy at any point, and Sally will retain no interest in Greenacre.

2. Is Lenny Likely to Obtain an Accounting and Contribution from Paul?

The issue is whether Lenny may obtain a contribution from Paul for a share of the property taxes paid by Lenny and whether Lenny may obtain an accounting from Paul for a share of the rent money paid by Sally.

Contribution

A contribution is a payment from one co-tenant to another co-tenant to reimburse a co-tenant for necessary costs spent in maintaining the property. Co-tenants who do not presently occupy the property (live there or otherwise do business on the premises) are required to share the costs of necessary improvements, principle payments on the mortgage, and taxes paid on the property. If one co-tenant pays these costs up front, he is entitled to contribution from his co-tenants.

Here, Lenny paid taxes on Greenacre. Thus, he is entitled to contribution from Paul to reimburse him for half of the amount spent.

Accounting

An accounting is a sharing of the profits derived from the property that two tenants co-own. Co-tenants of a property are entitled to share in the profits gained from leasing the property to a third party.

Here, Paul leased the property to Sally. He obtained \$500 per month for two years, plus as discussed above, started a new periodic tenancy with Sally at the end of the two year period. Lenny is thus entitled to a receipt of half of the profits earned from the leasing of Greenacre to Sally.

Conclusion

Lenny is likely to obtain both an accounting and contribution from Paul.

QUESTION 3

Owen, a police officer, had a hunch that Dora might be selling methamphetamine from her house in the country. To learn more, Owen drove to Dora's house with a drug-detection dog and waited until she left.

Owen first walked the drug-detection dog around Dora's house. At his direction, the dog jumped up on the porch, sniffed the front door, and indicated the presence of methamphetamine.

Owen then propped a ladder on the back of the house, climbed to the top, and peered into a second-story bedroom window. He saw a small box on a bedside table, but could not read the label. He used binoculars to read the label, and saw that it listed ingredients that could be used to make methamphetamine.

Owen went back to his car, saw Dora return home, and then walked back to the house and crouched under an open window. He soon overheard Dora telling a telephone caller, "I can sell you several ounces of methamphetamine."

Dora was arrested and charged with attempting to sell methamphetamine.

Dora has moved to suppress evidence of (1) the drug-detection dog's reaction, (2) the small box, and (3) the overheard conversation, under the Fourth Amendment to the United States Constitution.

How should the court rule on each point? Discuss.

QUESTION 3: SELECTED ANSWER A

The Fourth Amendment of the US Constitution - incorporated to the states by the Due Process Clause of the 14th Amendment - protects citizens from unreasonable search and seizure. The touchstone of a search and seizure is reasonability. This means that to conduct a search, the police officer or agent of the state must have a valid search warrant. Where there is no warrant, the search will be unreasonable unless one of the valid warrant exceptions exists.

Exclusion Rule - Suppression Remedy

Evidence seized in violation of the fourth amendment will be suppressed at trial. Further, under the **fruit of the poisonous tree** doctrine, all evidence gathered as a result of an unlawful search will be suppressed as well unless the government can show that the taint of the unconstitutional activity has been sufficiently attenuated.

State Action

A "search" requires government action. Here, Owen is a police officer; thus, this requirement is met.

"Search"

A search only occurs where the government physically intrudes on the person's person, property or effects, or when the government intrudes on a person's "reasonable expectation of privacy" (REOP).

Because there is no indication that Officer Owen had a warrant for any of the activity discussed below, his actions are unreasonable if they constitute a "search" and if no valid warrant exception applies.

1. The Dog's Reaction

The issue here is whether the use of the drug-sniffing dog at the front porch was a search.

Government Action

As discussed above, the fourth amendment is only triggered by state action. Action by a police officer is sufficient. Here, Owen is a police officer. Thus, there is state action.

"Search"

A search exists where the government interferes with a reasonable expectation of privacy (REOP) or where there is a physical trespass into constitutionally protected space (persons, places or effects).

Trespass Theory

The Supreme Court recently held that bringing a drug-sniffing dog to the front porch of a home for the purpose of searching for drugs is a "search" under the fourth amendment. Although the front door is typically held open under implied consent doctrine, the use of a drug-sniffing dog exceeds this consent and is therefore a trespass. (Note: this is unlike the case of using a drug-sniffing dog at a traffic stop, which is reasonable under the fourth amendment.)

Here, Owen brought the drug-sniffing dog to the porch for the purpose of checking for drugs. He did not have a warrant to do so. Because Dora did not consent to this, this is a search under the trespass theory of the 4th amendment.

REOP

Dora could also argue this is a search under the REOP theory of the 4th amendment. A search occurs where state actors intrude on one's reasonable expectation of privacy. AN REOP exists where the person holds a subjective expectation of privacy and the expectation is objectively reasonable. There is always an REOP in one's own home. Here, the home belonged to Dora. Thus, Dora could argue that a person has an REOP in her front door in regards to drug-sniffing dogs.

The government would point out that the front door is a place where we have no REOP. This was not a search of the home per se. However, even if this is true, Owen also took the dog into the curtilage, where Dora does have an REOP.

Curtilage vs. Open Fields

Curtilage is the area immediately around a home and is intimately tied with the activities of the home. The Court has found an REOP to exist there. Areas that are not curtilage are considered "open fields" and there is no REOP in open fields.

The government will argue that the front door is not part of curtilage. However, the dog also walked around the house immediately next to it. This is likely considered curtilage, where the court has found REOP.

Sensory Enhancing Technology

However, even in the open fields, the government action is a "search" if they use "sensory enhancing technology" not available to the general public. Here, a drug-sniffing dog may meet this test (a plurality of the Supreme Court feels it does). Thus, even if the dog were kept in open fields, the use of a drug dog would still constitute a search.

Conclusion

Because there was a trespass in a constitutionally protected area without a warrant, and alternatively, because the drug-sniffing dog at the front door violated Dora's REOP, the court will find that a "search" occurred without a warrant and the evidence of the dog's reaction should be suppressed.

2. The Small Box

The legality of this evidence will turn on whether a search occurred and whether there was a warrant exception.

Government Action

There was government action (see rule statement above).

"Search" - REOP

The government will argue that no search occurred because the officer was in the open fields and only used binoculars. Dora will argue that the officer's presence in her back yard was an intrusion in the curtilage.

Open Fields vs. Curtilage

See rule statements above. Dora will argue that the officer was in the curtilage of her home because the ladder was propped against her home and he peered into the window. Not only was he in the back yard, but he was also peering into the second story window. This is not open fields because we do not expect people to be propped on a ladder in our backyard. This is clearly curtilage instead of open fields.

Sensory Enhancing Technology

Dora will also argue that the use of the binoculars constituted a search even if the government was properly in the window. The government will argue this was not a search because this technology is available to the public.

The Court has found that a search occurs where the government, even standing in open fields, uses sensory enhancing technology not available to the general public. This covers using heat-detecting technology, for example. Here, the officer used binoculars, which are available to the public. Because binoculars are readily available, the court will likely find that this, alone, will not transform this action into a search.

However, the court will likely find that a search occurred because of Owen's presence in the curtilage. Because it was a search, the evidence should be suppressed unless a warrant exception applies.

Plain View

The government will argue that even if a search occurred, a warrant was not required under the plain view exception. Plain View means that a warrant is not required when officers find evidence in "plain view". We do not require the police to close their eyes to incriminating activity (when walking by an open window, for example). For a search to fall within plain view, two elements must be met: (1) the officer must be lawfully in the place where he made the observation, and (2) the incriminating nature of the evidence must be readily apparent.

Lawfully in the Place

Here, Dora will argue that the officer could not be in the curtilage of her home. The government may argue first that Owen was merely in the curtilage, and so his presence was lawful (see discussion above). Additionally, the government could argue that the dog's reaction at the door provided probable cause for the officer to take a closer look at the house. The court will likely find that without a warrant, this presence in the window on the second story was not proper. The officer needed a warrant to come this close to the house. Thus, he was not here lawfully.

Incriminating Nature of Evidence

If the officer is there lawfully, the criminal nature of the evidence must be readily apparent to qualify under plain view. Here, the box could not be read from the window where Owen saw it - he required binoculars to see that the box contained ingredients used for methamphetamine. However, because binoculars are generally available, the court may find that this meets the "apparent" requirement. On the other hand, the fact that it had ingredients alone may not make it incriminating, unless those ingredients themselves are illegal. The court could find there was nothing apparently incriminating about this evidence.

Thus, the plain view doctrine does not apply.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine suppresses evidence seized as a result of an unlawful search, unless the taint of the illegality has been attenuated. Here, even if the plain view exception applies, Dora could argue that it should be suppressed because it was the result of the illegal use of the drug-sniffing dog at the front door. The government will argue that the taint has been attenuated.

Attenuation

Fruit of the poisonous tree can be admitted if the government can show the taint of illegality has been attenuated. This is often shown where sufficient time has gone by between the illegality and the discovery of the evidence, or where there is an independent source for the evidence, or where it would have been inevitably discovered.

Here, very little time went by. Owen went straight from using the dog to going to the backyard. Further, there is no independent source or reason for inevitable discovery. Thus, the evidence cannot be saved by attenuation and should be suppressed as poisonous fruit.

Conclusion

The court will find that the officer's activity constituted a search when he went into the curtilage of the home and that the plain view exception to the warrant requirement does not apply because the officer was not lawfully in the place where he made the observation and because even if he was, the incriminating nature of the evidence was not immediately apparent. Thus, the evidence of the small box should be suppressed.

3. The Overheard Conversation

State Action

See rule statement above. There is state action here.

"Search"

See rule statement above. Whether or not there was a search will turn on whether Dora had a reasonable expectation of privacy in her conversation with the window open.

Eavesdropping

Generally, there is no REOP in a conversation held in public. There is also no REOP for conversations held in private with another person. The theory is that when one speaks to another person, you assume the risk that that person may be a police informant. Police may not use electronic methods to eavesdrop on phone calls, but that is because there IS an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations. The court has held that there was not a search where officers stuck their ear to a wall to eavesdrop on conversations overheard in the next apartment over. There would be a search, however, if the officers used sensory enhancing technology, or wiretapping to overhear these conversations. Police may not use electronic methods to eavesdrop on phone calls, however, but that is because there IS an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations.

Here, the government will argue there was no search because the officer merely overheard the defendant making incriminating statements. She had her window open and made them loud enough for passers-by to hear. Even though the statements were made over the phone, the conversations were not overheard via electronic wiretapping. Nor was there sensory enhancing technology used. Thus, the court will find that Dora had no REOP in her conversation that was overheard outside.

Curtilage

Dora will again argue that this was a search because Owen was in the curtilage. However, the court has held that merely being on another's property is not curtilage. The area under the window in the front yard is probably not sufficiently connected to the intimate activities of the home to constitute curtilage (compared to peeping in the back,

second-story window, for example). We routinely allow officers to walk around the home.

Here, Owen was merely in the front yard and under an open window. We allow officers to make reasonable inquiries around the home. This will likely not be found to be curtilage. Thus, the court will find that Owen was only in the open fields, not the curtilage.

Warrant Exception?

If the court were to find that a search had occurred, the government would have to argue that a warrant exception applied. No warrant exceptions apply.

Fruit of the Poisonous Tree / Attenuation

Dora will argue this should be suppressed anyway as fruit of the poisonous tree. See rule statement above. The government may argue that even if the earlier search were unconstitutional, this evidence should not be suppressed because it was independently discovered by Owen overhearing in the front lawn. His overhearing had nothing to do with the drug-sniffing dog.

However, if the court finds that the earlier search was unconstitutional, and that Owen would not have been in front of the window but for that illegal search, then the criminality has not been sufficiently attenuated and should be suppressed.

Conclusion

Because there is no reasonable expectation of privacy in one's conversations overheard in public, the court will find that there was no search here and therefore the 4th Amendment was not implicated. Evidence of the conversation should not be suppressed. However, the court may find that it should be suppressed as fruit of the earlier unconstitutional use of the drug-sniffing dog.

QUESTION 3: SELECTED ANSWER B

Dora ("D") was arrested and charged with attempting to sell methamphetamine following several questionable search tactics implemented by police officer, Owen ("O"). D has moved to suppress the evidence under the Fourth Amendment to the United States Constitution. Despite Dora's involvement in rather exploratory drugs (meth), it appears she will prevail in the suppression of all evidence obtained against her by Owen.

FOURTH AMENDMENT RULES

The Fourth Amendment protects against unreasonable searches and seizures, and is incorporated against the states pursuant to the 14th Amendment due process clause. Here, the drug dog's reaction, the small box spotted with binoculars, and the conversation heard through the window all trigger issues with respect to unreasonable searches and the exclusionary rule.

Expectation of Privacy in the Home

A "search" occurs anytime that a police officer or state actor invades an area that a person has a reasonable expectation of privacy (e.g. home, automobile, or a bag in one's possession). The Supreme Court has long held that persons retain their expectation of privacy in their home; it is a sacred place. Conversely, the government's authority to conduct searches is at its zenith at the border. Here, the facts indicate that O conducted several searches at D's house in the country. Thus, Dora's expectation of privacy is very high in the areas search.

Unreasonable Searches and Seizures and the Exclusionary Rule

As a general rule, a search is unreasonable absent the existence of a warrant and probable cause. However, several exceptions to the warrant requirement exist (e.g. contraband items in plain view; persons committing a crime in plain view). If an exception applies, a search may be reasonable even absent a warrant. However, where no exception applies, any evidence discovered pursuant to an illegal and

unreasonable search should be excluded from evidence under the exclusionary rule. Finally, where an illegal search reveals subsequent incriminating evidence, that subsequent evidence discovered may also be excluded as evidence that is "fruit of the poisonous tree" - i.e., evidence that would not have been discovered but for the initial 4th Amendment violation. The only way such subsequent evidence may be admitted is if there is an independent source for that evidence (independent of the illegal search), or the evidence would have been inevitably discovered (despite the illegal search).

The aforementioned rules are applied below, but not restated.

(1) Suppressing Evidence of the Drug-Detection Dog's Reaction

No Warrant

Unless exigent circumstances arise (hot pursuit of a criminal; destruction of evidence), police need a warrant to conduct a home search. The warrant must clearly state facts on which the requesting officer has made a determination of probable cause, and approved by a neutral magistrate. Here, the facts do not indicate that O obtained a warrant before investigating D's house. Thus, the searches are presumptively unreasonable and violate the fourth amendment.

Probable Cause

The facts indicate that O drove to Dora's on a "hunch" that D might be selling methamphetamine, and further that O brought his drug-detection dog. The Supreme Court has held that probable cause, while need not be definitive, must be "more than a hunch." Instead, probable cause must be based on some "reasonable articulable suspicion" that criminal activity is likely afoot. Since no facts indicate what O's hunch was based on (and none are provided in a warrant application), the requirement for probable cause is not met.

Impermissible Dog Search

As stated above, a search occurs whenever police invade an area where a person has a constitutional expectation of privacy. The use of a drug-detection dog has been found to constitute a search by the Supreme Court, which has held that persons have an expectation of privacy both in their home and the surrounding curtilage. Thus, while dog searches are permissible in the automobile context (assuming no unreasonable delay), such searches are not permissible in the context of a home search without a warrant or probable cause.

Here, O walked the dog "around Dora's house." If O stayed off Dora's property, there is likely no 4th Amendment violation. For instance, O could have the dog sniff Dora's trash that was set out on the curb. Further, since D's house is "in the country," O might even have some leighway to search any open fields surrounding D's property, since such fields do not carry the same privacy interests as a residence. However, the facts indicate that O directed the dog to jump up on the porch, at which point the dog sniffed the front door, and indicated the presence of methamphetamine.

This clearly constitutes a search under the 4th Amendment. O brought the dog in proximity to Dora's actual place of dwelling, and ordered the dog to jump on the porch (technically, a trespass - which the court recently found to be one means of determining a search in the GPS car case). Thus, by violating Dora's privacy interests and property interests, and conducting a search without a warrant or any identifiable probable cause, the drug dog's reaction constituted an unconstitutional search.

Under the exclusionary rule, the drug dog's reaction thus cannot be admitted as evidence.

No Consent or Exceptions

It should be noted that warrant and a probable cause are not required where an officer obtains consent to search an area. Even then, any search is limited in scope by the degree of consent. Here, the facts clearly show that Owen "waited until [Dora] left"

before commencing the dog search. Thus, the absence of consent is apparent and does not apply. Similarly nothing in the facts indicates that O was in hot pursuit or that there was a risk of imminent destruction of evidence - to the contrary, it appears nobody was home when D left the house.

(2) Suppressing Evidence of the Small Box

Owen propped a ladder on the back of D's house, climbed to the top, and peered into a second-story bedroom window. After seeing a small box on a bedside table with a label he could not read, O used binoculars to determine that the listed ingredients could be used to make methamphetamine.

Unreasonable Warrantless Search

As discussed above, O had no probable cause or warrant and thus was not legally on the property. His action of using a ladder and placing it against the house is clearly a violation of Dora's property interest in her home (whether the ladder was his or Dora's) and by subsequently looking in her window, from the vantage point offered by the ladder, he effectively conducted a search. Similar to the facts discussed above, the fact that O did not physically enter D's house does not preclude the court finding an unreasonable search. Here, both Dora's property interest (to not have ladders placed against her home) and privacy interests (to not have cop's snooping in her second floor window from ladders they placed on her house) have been violated. Thus, the search was unconstitutional because, as discussed, no warrant or probable cause existed.

Dog's Search Did Not Create Probable Cause or Exigent Circumstances

The Prosecution may argue that following the dog's bark, the officer had probable cause with respect to the house containing methamphetamine. Even so, no exception to the warrant requirement applies and thus the search remains constitutionally impermissible. As noted, Dora was not at the house and the facts do not indicate that anyone else was present in the home. Further still, Dora apparently does not know about officer's presence on her property (otherwise she likely would not be gabbing so loud about a

drug deal through an open window). Thus, even if the dog-sniff were not illegal, the absence of a warrant would preclude O from searching D's home, where her expectation of privacy is at its highest.

Binocular Search

As a general rule, law enforcement's use of technology does not inherently transform police action into a search. However, police use of technology not widely available to the public may result in a search even where a person's physical interest in property was not violated (compare: thermal imaging vs. binoculars). Here, the officer used binoculars to look in D's window in order to read the ingredients of a small box on her bedside table. The use of binoculars in and of itself does not appear to be problematic - this is an item generally available to the public.

However, for the reasons stated above, O only got to a point where he could assess the need to look into the box in D's window by conducting an impermissible search (putting a ladder on the back of the house). Thus, O's "search" - vis-a-vis his use of binoculars to read the ingredients in the box - and the subsequent discovery of that information constituted either an illegal search, or the fruit of the initial illegal search. As such, this evidence should also be excluded.

NOTE: If Officer looked through Dora's window from a tree off of her property, police may have an argument that such a search was permissible and within "plain view." However, this is questionable given the reverence with which the Supreme Court has treated a person's expectation of privacy in his home.

(3) Suppressing Evidence of Overheard Conversation through Open Window

Reasonable Expectation of Privacy in Phone Call In House Made While Window Open

After D returned home, O "walked back to the house and crouched under an open window." He subsequently heard D make incriminating statements to a caller that she

could sell several ounces of methamphetamine. This is the closest call with respect to the three pieces of evidence offered.

On the one hand, while Dora made the comment in her home, and thus retained an expectation of privacy, the facts also indicate (1) that she made the comment to someone else on the other line and (2) that her window was open. While police may not generally use wiretapping as a means to conduct a search without a warrant, persons are said to assume the risk whenever they disclose information to a third party. Thus, if the overheard conversation is introduced by obtaining the person on the other end as a witness, no constitutional issue would arise (except that O only knew about the call via a potentially illegal search, which would not have been discovered but for that search). In any event, the fact the statement was made to a third party slightly reduces Dora's expectation of privacy.

The second important fact is that Dora's window was open. Officer will argue that the window was open, and Dora likely assumed the risk of her conversation being overheard. Thus, Officer will contend that no impermissible search occurred. However, Dora will argue that she lives "in the country," where houses are presumably far apart and foot traffic is minimal. Thus, she would say her expectation of privacy is not altered by an open window. Further, Dora will argue that the officer intentionally "crouched under an open window" and thus conducted an illegal search by being physically on her property and concealing his presence. Finally, Dora will argue that officer would not have even returned to her house but for the illegal searches discussed in items 2 and 3.

Given the clear violations of the first two illegal searches and subsequent chicanery by officer, it is likely that Dora will once again be able to prevail in the exclusion of this evidence, both as the product of an illegal search or as fruit of the poisonous tree (even if no search occurred - O would not have returned to the window but for the initial illegal searches).

QUESTION 4

In 2008, Henry and Wendy married in California. Neither had saved any money before marriage. At the time of the marriage, Henry had a monthly child support obligation of \$1,000, which was deducted from his salary, for a child from a prior relationship.

In 2010, Wendy accepted a job at Company. At that time, she was told that if she performed well, she would receive stock options in the near future.

In 2011, Henry inherited \$100,000. He used \$25,000 to buy a necklace that he gave to Wendy as a holiday present. He used the remaining \$75,000 to buy a municipal bond that paid him \$300 per month.

In 2012, Wendy was granted stock options by Company, which would become exercisable in 2014, in part because she had been a very effective employee. Later in 2012, Wendy was injured in a car accident and made a claim against the person responsible.

In 2013, Henry and Wendy permanently separated and Henry moved away.

In 2014, Wendy settled her accident claim for \$30,000. Later in 2014, Wendy exercised her stock options and earned a profit of \$80,000.

In 2015, Wendy filed for dissolution.

1. What are Wendy's and Henry's respective rights regarding:
 - a. The necklace? Discuss.
 - b. The car accident settlement proceeds? Discuss.
 - c. The stock option profits? Discuss.
2. Should Henry be required to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

QUESTION 4: SELECTED ANSWER A

1. Wendy and Henry's Rights at Divorce

General Principles

Henry and Wendy were married in California. California is a community property state. Property acquired during marriage is presumed to be community property (CP). Property acquired before marriage or after permanent physical separation is presumed to be separate property (SP). In addition, property acquired by gift, bequest, or devise, is that spouse's SP. The character of property is determined by tracing back to the source of funds used to acquire that property.

At divorce, each CP asset is divided 50/50 in kind, unless a special rule requires deviation from the equal division requirement or if the spouses agree in writing or by oral stipulation in court. Each spouse's SP remains that spouse's SP.

a. The Necklace

Characterization

Property acquired during marriage is presumed to be CP. A spouse can rebut this presumption by tracing back to the source of the property and showing that SP was used to purchase the property.

Here, the necklace was acquired in 2011, while Henry and Wendy were still married. Thus, the necklace is presumed to be CP. However, Henry will be able to rebut this presumption by tracing back to the source of the funds used to purchase the necklace. Henry used \$25,000 of his \$100,000 inheritance to purchase the necklace. Since an inheritance is SP regardless of when it was acquired, Henry will be able to

rebut the CP presumption by tracing his SP funds. The next issue is whether Henry and Wendy changed the character of the property when Henry gave the necklace to Wendy.

Transmutation

Spouses can change the character of any asset from CP to SP, SP to CP, or from one spouse's SP to another spouse's SP. This is called a transmutation. To be valid, there must be an express declaration in writing that is signed or assented to by the spouse whose property interest is adversely affected. The writing must expressly state that a change in the property ownership is being made.

Here, when Henry gave Wendy the necklace, no transmutation occurred because there was no express declaration in writing signed by Henry that stated that a change in the ownership interest in the necklace was being made. However, there is an exception to the transmutation rule for gifts of a personal nature.

Exception - Gift of Personal Nature

A transmutation is not necessary to change the character of an item when there is a gift from one spouse to another of an item of personal nature. For this exception to apply, the item must be of a personal nature, used primarily by the spouse who was gifted, and the item must not be substantial taking into account the circumstances of the marriage.

Here, the necklace is an item of a personal nature because it is jewelry that is worn by a person. Furthermore, Wendy, the spouse who was gifted with the necklace, is presumably the one who primarily uses the necklace. The issue here would be whether the necklace was substantial in value taking into account the circumstances of Henry and Wendy's marriage. The facts do not tell us about Henry's employment but we do know that he has a job. Furthermore, we know that Wendy has a corporate job. Nevertheless, the spouses came into the marriage with no savings and Henry had a

monthly child support payment. Considering that the necklace was \$25,000, it was most likely substantial taking into account the circumstances of their marriage. Therefore, the necklace would most likely remain Henry's separate property and did not change into Wendy's separate property.

Distribution At Divorce

At divorce, a spouse's SP remains his or her SP.

If the necklace was substantial in value taking into account the circumstances of Henry and Wendy's marriage, then the necklace would remain Henry's SP. If it was not substantial taking into account the circumstances of marriage, then the necklace was changed into Wendy's SP.

b. The Car Accident Settlement

Personal Injury Award

The character of a personal injury award is determined when the cause of action arose, not when the spouse receives a settlement or judgment. If the cause of action arose during marriage, then the personal injury award is CP. If the cause of action arose before marriage or after permanent physical separation, then it is SP.

Here, the car accident settlement arose out of Wendy getting injured in a car accident in 2012. Thus, the cause of action arose in 2012. Although there may be an issue as to whether the economic community ended in 2013 or 2015 (discussed below), the community was certainly continuing in 2012, and thus the personal injury award would be CP.

Division At Divorce

The general rule is that each CP asset is divided 50/50 in kind at divorce. One special rule that requires deviation from the equal division requirement is for personal injury awards. At divorce, a personal injury award will be awarded entirely to the injured spouse unless the interests of justice require otherwise.

Here, the personal injury award will be awarded to Wendy at divorce since she was the injured spouse. We would need more facts to determine whether the interests of justice would require that the community receive part of the award, such as where part of the settlement was reimbursement for medical expenses that were paid from community funds. As it is, the personal injury award of \$30,000 will be awarded entirely to Wendy at divorce.

c. The Stock Option Profits

The rents, issues and profits of community property are community property. Stock options get special treatment under the rules when the stock options are granted during the marriage but are not exercisable until after the marital community ends. It first must be determined when the marital community ended.

End of The Marital Community

The marital community ends when there is permanent physical separation and an intention not to resume the marriage. Intention not to resume the marriage by one spouse only is effective so long as it is communicated to the other spouse.

Here, Henry and Wendy permanently separated and Henry moved away in 2013. Thus, we have permanent physical separation. The issue is whether the spouses intended to resume the marriage. Henry moving away *permanently* is indication of an intention not to resume the marriage, but we would need more facts about intent to

make that determination. Wendy filing for dissolution in 2015 is certain evidence of an intention not to resume the marriage. Thus, it is certain that the economic community ended in 2015, but it most likely ended before that, in 2013 when Henry and Wendy permanently separated and Henry moved away.

Stock Options

The community interest in stock options depends on which formula is used. Which formula is used depends on what the intent of the employer was in granting the options. If the employer's intention was to reward the employee for past services, then the formula is: The numerator is the years that the employee was married until the economic community ended and the denominator is the years the employee was married until the options became exercisable. The community gets a larger percent under this formula because community labor is community property. If the employer's intention was to grant the options as an incentive to continue working for the company the formula is: The numerator is the date the option was granted until the economic community ends and the denominator is the date the option was granted until the date the options became exercisable. The fraction represents the community property interest.

Here, Henry would argue that the employer was granting the options as remuneration for past services because when Wendy was granted the options, it was in part because she has been a very effective employee. Wendy would argue that it was an incentive to keep working and doing a good job because she was told when she began working there that she would receive stock options in the near future if she performed well. Since it is a difficult determination on these facts, the stock options will be analyzed using both formulas.

Reward For Past Services

Here, when Wendy was hired in 2010, she was married to Henry. Henry and Wendy permanently separated in 2013, which is when the economic community ended. Thus the numerator is 3. The options became exercisable in 2014, so the denominator is 4 (2010-2014). Thus, the community interest in the stock option profits would be $\frac{3}{4}$.

Incentive

Here, the options were granted in 2012 and the economic community ended in 2013. Thus, the numerator is 1. The options were granted in 2012 and became exercisable in 2014, making the denominator 2. Thus, the community interest in the stock option profits would be $\frac{1}{2}$.

Division At Divorce

If the employer's primary intent in granting the options was to reward Wendy for past services, then the community interest in the \$80,000 stock profits is $\frac{3}{4}$, or \$60,000. The \$60,000 would be divided equally between Henry and Wendy; thus each would receive \$30,000 of the profit. Wendy would end up with \$50,000 (\$30,000 (her half of the CP) and \$20,000 (SP interest) and Henry would get \$30,000.

If the employer's primary intent in granting the options was to incentivize Wendy to keep working, then the community interest in the \$80,000 stock profits is $\frac{1}{2}$, or \$40,000. The \$40,000 would be divided equally between Henry and Wendy; thus each would receive \$20,000 of the profit. Wendy would end up with \$60,000 (\$20,000 (her half of the CP) plus \$40,000 (SP interest)) and Henry would end up with \$20,000.

2. Should Henry be required to reimburse the community for child support payments and if so, what amount?

Child Support Payments

Child support payments from a previous marriage are treated like a debt incurred before marriage. The CP is liable and the parent spouse's SP is liable. The other spouse's SP is not liable. The community is entitled to reimbursement for child support payments made with community funds to the extent that separate property was available and not used. A spouse's salary during marriage is community property.

Here, the child support payments were for Henry's child from a prior relationship so his SP is liable and the CP is liable. Henry paid \$1000 a month for child support payments from his salary. Henry's salary is community property because it is from his labor during marriage. Since CP funds were used to pay the child support payments, the issue is whether there was Henry's separate property available that could have been used instead.

Reimbursement

Here, the spouses had no money saved coming into the marriage in 2008. Henry received an inheritance of \$100,000 in 2011. Thus from 2008-2011, the community is not entitled to reimbursement because there was no separate property available. Henry tied up \$75,000 of the \$100,000 in a municipal bond and used the other \$25,000 for Wendy's necklace. Since the bond had profits of \$300 per month that went to Henry, that is SP that was available (as stated above, rents issues and profits of SP are SP, and this was SP because it was inherited). Thus, the community is entitled to reimbursement for at least \$300 of the \$1000 paid in child support until the economic community ended in 2013.

At Divorce

The community is entitled to \$300 a month from 2011-2013 (when the economic community ended). So the calculation is 24 months multiplied by \$300, which equals

\$7200. At divorce, the \$7,200 will be divided equally between Henry and Wendy. Wendy will get \$3,600 and Henry will get \$3,600.

QUESTION 4: SELECTED ANSWER B

1. Wendy and Henry's Respective Rights

California is a community property state. Property acquired during a valid marriage is presumptively community property ("CP"). Property acquired before marriage the spouse's separate property ("SP"). Further, property acquired during marriage by gift, devise, or bequest is SP, along with the rents, profits, and increases in value of the SP during marriage. At dissolution of the marriage, the court will divide CP assets equally in kind, absent an agreement to the contrary. At dissolution of the marriage, each spouse's SP will remain SP. The court will trace the asset back to its source to determine its ownership. California has also expanded its community property system to domestic partnerships between same sex couples and elderly couples who are receiving Social Security Benefits. Since Henry and Wendy married in California, community property rules govern.

End of the Economic Community

The community ends upon dissolution of the marriage or at permanent physical separation, with an intent not to resume the marital relation. The intent may be unilateral, provided it is communicated to the other spouse. Here, the facts state that Henry and Wendy permanently separated in 2013, and Henry moved away. While the facts do not state whether there was an express agreement not to resume the relation, Henry's moving away along with the fact that they permanently separated likely means that they intended not to resume the marital relation. Thus, the economic community ended in 2013, not at filing of dissolution in 2015.

1a. The Necklace

The issue is whether the community has an interest in the necklace Henry gave to Wendy. Since the necklace was acquired during the marriage, it is presumptively CP. However, Henry can trace the funds used to purchase the necklace to his inheritance of \$100,000 in 2011. Since property acquired by inheritance is SP, the funds used to purchase the necklace are SP.

Spouses may agree to change the character of ownership during the marriage by transmutation. Prior to 1985, oral agreements were sufficient to transmute an asset from SP to CP, or from CP to SP. However, after 1985 the court requires an express agreement in writing, stating that the nature of ownership is changing, and signed by the adversely affected spouse. There is an exception, however, for gifts made to a spouse during marriage that are not substantial taking into account the economic circumstances of the marriage.

Here, Henry gifted Wendy a necklace purchased with \$25,000 of his SP. There is no evidence of an express agreement, in writing, signed by Henry to change the ownership of the asset. Wendy may argue that since the necklace was a gift of SP, she owns the necklace as her SP. However, the facts state that neither Henry or Wendy had saved any money prior to marriage, and Wendy had accepted a new job the year before. Therefore, it is likely that \$25,000 was substantial in value considering the circumstances of the marriage. Given that the necklace is worth \$25,000, Henry and Wendy appear to be just starting out their careers, and there is no express transmutation agreement, the court will likely award the necklace to Henry as his SP, and Wendy does not have an interest in the necklace.

1b. The Car Accident Settlement Proceeds

A judgment obtained by a spouse for a cause of action arising during the marriage is presumptively CP. While Wendy settled the claim for \$30,000 in 2014, after the end of the economic community, the accident occurred in 2012, prior to the permanent physical separation. Thus, the community would have an interest in the recovery during marriage.

However, the court will award the judgment to the injured spouse at dissolution of the marriage, absent circumstances which would be inequitable to the other spouse, such as if medical expenses were paid from the community or the noninjured spouse quit her job to care for the injured spouse. Here, however, there is no indication that it would be inequitable to award the settlement to Wendy, though the community may be entitled to reimbursement for any medical expenses. Therefore, the court will award the

settlement proceeds to Wendy at dissolution, and Henry has no interest in the proceeds.

1c. The Stock Option Profits

In determining whether stock options are CP or SP, the court will determine whether the options were granted as deferment of wages, or as a future incentive to continue working for the company. As a spouse's labor during marriage, in the form of wages, is CP, the community will have a greater interest in options that are granted as deferred wages. The court will conduct a proration to determine the CP interest in the stock options, dividing the years of employment during marriage over the years for the option to become exercisable. In this case, the court will take the years of employment during the marriage (2010-2013) divided by the years of employment until exercise (2010-2014). The community will have a 3/4 interest in the stock options under this approach, so Henry and Wendy would each have a 1/2 interest in \$60,000 of the profits, and Wendy would own \$20,000 as her SP. Thus, Henry would take \$30,000 at dissolution, and Wendy would take \$50,000.

Alternatively, if the options are granted as a future incentive, the court will divide the years of employment during the marriage after the option is granted by the years the option is granted to becoming exercisable. Thus, the court would divide the years of marriage from the grant of the option (2012-2013) divided by the option's grant to its being exercisable (2012-2014). In this case the community would have a 1/2 interest, so Henry and Wendy would each own 1/2 of \$40,000, and Wendy would have \$40,000 as her SP. Thus, Henry would take \$20,000, and Wendy would take \$60,000.

Since Wendy was told that "if she performed well" at Company, she would receive stock options in the near future, it appears that the options were granted as deferred wages, earned by Wendy's labor during the marriage. Further, at the time they were granted, Company stated they were because she "had been" an effective employee, pointing to her labor during the marriage as providing the basis for the options. Thus, the court will likely use the first approach, and Henry will take \$30,000, and Wendy will take \$50,000.

2. Reimbursement for Henry's Child Support Payments

Debt incurred prior to marriage is the spouse's SP, but CP may be used during marriage to fulfill the debt obligations. The nondebtor spouse may choose to keep her earnings in a separate checking account, to which the other spouse does not have access, to avoid her wages from being reached. At dissolution, the debt will be assigned entirely to the debtor spouse. Since Wendy did not appear to isolate her earnings in a separate checking account, the child support obligations could be paid by the CP.

However, the community may be reimbursed at dissolution if the support obligation was paid by the community when separate property was available. Since Henry paid the child support obligation of \$1000 per month from his earnings, which are CP, during the marriage, the community paid for the obligation during marriage. As Henry and Wendy did not have SP coming into the marriage, Wendy will be unable to show that SP was available prior to 2011. However, in 2011, Henry inherited 100K, investing 75K to buy a municipal bond paying \$300 per month. While the bond was acquired during marriage, and is thus presumptively CP, the court will trace the funds to the 75K inheritance, which was SP. As profits from SP during marriage are also SP, the \$300 per month was Henry's SP. Since there was \$300 per month of SP available from 2011 to 2013, and Henry paid the obligations from his earnings, or CP, the community is entitled to reimbursement of \$300 per month during 2011 and 2012, since the parties separated in 2013. Thus, Henry is to reimburse the community \$7,200 for the SP that was available.

QUESTION 5

Online, Inc. was duly incorporated as an Internet service provider. Its articles of incorporation authorized issuance of 1,000 shares of stock at \$1,000 par value.

Online initially issued only 550 shares to its shareholders as follows: Dick and Sam each received 200 shares and Jane received 150 shares. Online's Board of Directors (composed of Jane, Sam, and Harry) named Jane as the Chief Executive Officer and named Harry as General Counsel.

Online's business grew substantially in the following months. Still, Online was short on cash; as a result, instead of paying Jane \$10,000 of her salary in cash, it issued her 50 additional shares with the approval of its Board of Directors.

Looking to expand its operations, Online sought to enter a strategic partnership with LargeCo, Inc. Jane had learned about LargeCo through Harry's wife, who she knew was the majority shareholder of LargeCo. Jane directed Harry to negotiate the terms of the transaction with LargeCo. In the course of Harry's negotiations with LargeCo, LargeCo offered to acquire the assets of Online in exchange for a cash buy-out of \$1,000,000. Harry telephoned Jane and Sam; Jane and Sam agreed with Harry that the offer was a good idea; and Harry accepted LargeCo's offer.

Two days after completion of the transaction, LargeCo announced a joint venture with TechCo, which was solely owned by Harry. The joint venture was valued at \$10,000,000. In its press release, TechCo described the joint venture as a "remarkable synergy of LargeCo's new technology with TechCo's large consumer base."

The following week, Dick learned of LargeCo's acquisition of Online's assets. An expert in technology matters, he was furious about the price and terms of the acquisition, believing that the value of Online had been seriously underestimated.

1. What are Dick's rights and remedies, if any, against Jane, Sam and/or Harry? Discuss.
2. What ethical violations, if any, has Harry committed? Discuss. Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

1)

Directors of corporations owe fiduciary duties to the corporation. Among these duties are the duties of care and the duties of loyalty. If a director breaches either of these duties, affected shareholders may bring either a direct action or a derivative action against the director, based upon the nature of the injury the shareholder suffered.

Duty of Loyalty.

Directors owe a fiduciary duty of loyalty to the corporation, which requires the director to act in the best interest of the corporation, to refrain from self-dealing with the corporation, and to refrain from usurping business opportunities from the corporation.

Harry's Breach of the Duty of Loyalty as a Director:

One aspect of the duty of loyalty is that it requires the director to refrain from self-dealing with the corporation. Here, the facts indicate that Harry negotiated the terms of a transaction with LargeCo., of which Harry's wife is the majority shareholder. Self-dealing extends not only to the director or businesses in which the director has a financial interest, but also those of the director's family. Here, because LargeCo is mostly owned by Harry's wife, the acquisition of Online's assets by Online was a self-dealing transaction.

In order not to be liable for a breach of duty regarding a self-dealing transaction, the terms of the deal must be objectively fair to the company, or the decision must be ratified at a meeting by a majority of disinterested directors who are fully informed about the conflicting interest and the terms of the agreement. (Or, by unanimous written consent of disinterested directors, if no meeting). Here, Harry provided no notice for a special meeting of the board of directors. There was no vote by the disinterested investors (Jane and Sam). Harry's telephone call to Jane and Sam, and Jane and Sam's subsequent agreement was insufficient to ratify the transaction.

Furthermore, the facts indicate that the acquisition was not fair to the company. LargeCo. offered \$1,000,000 for all of the assets of Online. However, two days after completion of the transaction, LargeCo announced a joint venture with TechCo, valued at \$10,000,000. This suggests, but is not conclusive, that the \$1,000,000 acquisition offer may have been lower than fair market value for the acquisition.

Harry also arguably breached the duty of loyalty by usurping a corporate opportunity. TechCo, owned solely by Harry, entered into a joint venture with LargeCo two days after the completion of the acquisition of Online by LargeCo. A director may not obtain business opportunities for his own benefit at the expense of the corporation. Whether a business opportunity is one that should first be offered to the corporation is usually determined by the corporation's business, and whether the corporation is in the same general business as the opportunity. It is unclear from the facts whether the joint venture with LargeCo was a business opportunity that TechCo usurped from Online, but, if TechCo and Online conduct similar business, Harry likely violated the duty of loyalty in this aspect as well.

Harry, Jane, and Sam's breaches of the duty of care.

Corporate directors also owe the fiduciary duty of care to the corporation, which requires directors to act as reasonably prudent directors and in good faith when making corporate decisions. Under the business judgment rule, a court will not disturb a director's business decisions, and will find compliance with the duty of care, if a director takes reasonable steps in becoming informed, bases decisions on a reasonably rational basis, acts in good faith, and refrains from self-dealing with a corporation.

Under this standard, Harry, Jane, and Sam have breached the duty of care, and will not be afforded the protection of the business judgment rule. The facts indicate that Jane knew that LargeCo was largely owned by Harry's wife, yet Jane directed Harry, a director she knew to be interested, to negotiate the terms of a transaction with LargeCo. This was likely unreasonable; a reasonable director would have had a disinterested

party negotiate the terms of a possible acquisition. Furthermore, Jane and Sam failed to take reasonable steps in becoming informed about the deal. The facts indicate that Harry, again an interested party, telephoned Jane and Sam, and that Jane and Sam agreed that the offer was a good idea. This is not sufficient; Jane and Sam undertook no independent investigation to determine if the terms of the proposed acquisition were fair to the corporation. Sufficient steps would have included, for example, obtaining an independent audit of Online's value as a business. Here, there are no facts Jane and Sam took **any** steps in becoming informed about the deal. Therefore, they have both breached the duty of care in this respect.

Finally, Harry's negotiations with LargeCo. were not in good faith. Harry's wife was the majority shareholder of LargeCo. Furthermore, mere days after the completion of the transaction, LargeCo entered into a \$10,000,000 joint venture with Harry's solely owned company. Both of these facts indicate that Harry was acting not in the best interest of the corporation, but in his own best interests.

Issuance of the Stock For Less Than Par Value.

Dick may also bring a derivative suit on behalf of the corporation to recover for the issuance of the stock to Jane. Par value sets the minimum price for which stock may be issued. Here, Online Inc's stock has a par value of \$1,000. This means shares cannot be issued for less than \$1,000. The facts indicate that Online, short on cash, issued Jane 50 shares of Online stock, in lieu of \$10,000 salary she was owed. This was improper. The board, Jane, Sam, and Harry, are liable to the corporation for the difference between the par value of the 50 shares (\$50,000) and the price paid (\$10,000). This is known as the "water." Jane is also personally liable as the party who received the stock, because, as a director with knowledge of the par value, she was aware that the stock was being issued to her below par value.

Failure to provide Notice and Obtain Shareholder Vote for Acquisition of Substantially All of Online's Assets.

Certain major events in a corporation must be put to a shareholder vote. These include a merger or an acquisition of substantially all of the corporation's assets. Before disposing of substantially all of a corporation's assets, there are procedures that must take place. First the board must pass a resolution, either during a meeting or by written consent, agreeing to the acquisition. Appropriate notice must then be given to shareholders, informing them of the terms of the transaction and the date of the shareholder's meeting for purpose of the vote. At the meeting, a quorum must be present, and a majority of shares voted must be in favor of the acquisition.

Here, none of these procedures took place. Dick, as a shareholder, was uninformed of the acquisition, which was agreed to solely by the directors, Harry, Jane and Sam, and accepted solely by Harry.

Derivative Action.

Here, Harry would be able to bring a derivative action on behalf of Online Co against Harry, Jane, and Sam, for the above violations. Normally, a shareholder must make a demand upon the board of directors, before bringing the action on its behalf. Here, however, demand will be excused, because the action would be against all members of the board of directors, who would be defendants in the action. Harry will likely be able to recover, for the corporation, the "water" from the stock issued to Jane, and damages for breaches of the duties of loyalty by Harry, Jane and Sam. Furthermore, Harry, again, on behalf of the corporation, may be able to rescind the acquisition, because the proper procedures for the acquisition of Online's assets were not followed. If he is successful in his derivative action, Harry will be entitled to attorney's fees and costs of suit.

2) Harry's Ethical Violations

Duty of Loyalty:

Harry has also violated his ethical duty of loyalty. Under both the ABA and CA rules, an attorney must always act in good faith and in the best interest of the client.

An attorney may not represent a client where the attorney's representation creates either a possible or actual conflict of interest. Under the ABA, an attorney may represent a client if the attorney reasonably believes he will be able to represent the client without a conflict, and the client provides informed written consent. In California, there is no reasonableness standard, but the attorney must receive informed written consent in the case of a possible conflict and again if the conflict ripens into an actual conflict.

Here, Harry has a conflict of interest in representing Online Co. with respect to its transaction with LargeCo. LargeCo's majority shareholder is Harry's wife, so Harry has a financial interest that is directly in conflict with Online Co's interest. Harry failed to disclose the conflict to Jane and Sam (it is immaterial that Jane knew this on her own; Harry still has a duty to inform), and Harry failed to obtain written consent from the company. Having violated this duty, Harry is subject to discipline.

Business Deal with the Client:

When entering into a business deal with the client, the deal must meet four specified criteria. First, the deal must be on objectively fair terms to the client. Second, all terms of the deal must be clearly and thoroughly disclosed in writing to the client. Third, the client must be advised that outside counsel is recommended. Fourth, the client must provide written consent.

Here, Harry has failed to meet these requirements. By entering Online into a deal with LargeCo, of which his wife is majority shareholder, Harry is essentially entering into a business deal with Online. The facts suggest the deal is not fair, because 2 days later Harry enters into a joint venture with LargeCo for 10x the price paid to Online. The terms of the deal were not fully disclosed in writing, because the deal was discussed

over telephone. Harry did not advise Online that it should have independent counsel. Finally, Harry did not receive written consent by Online for the deal.

Accordingly, Harry has violated his duties regarding this deal, and is subject to discipline.

Duty of Competence

An attorney has a duty of competence in his representation of a client. An attorney must exercise reasonable skill while representing the client. Reasonable skill is determined by a number of factors, including how long the attorney has practiced, the attorney's expertise, the amount of time the attorney put into becoming informed, and the ability to associate with more knowledgeable counsel. Here, the facts indicate that Harry, as general counsel of Online, breached numerous fiduciary duties. Harry approved the issuance of stock for significantly below par value, resulting in liability to himself, the other directors, and Jane, in her role as purchaser. Furthermore, Harry represented Online in a transaction in which he knew he had a personal financial interest. Finally, Harry accepted LargeCo's offer, without proper board approval and approval by shareholders. These actions suggest that Harry did not exercise reasonable skill in his representation of Online Inc.

While each of these may subject Harry to discipline under the ABA, California requires a repeated, reckless, or intentional failure to exercise reasonable skill, in order to be subject to discipline. Even under the California standard, it is likely that Harry could be disciplined, due to both his intentional conduct in violating the duty of loyalty, and in his repeated failure to exercise reasonable skill in the issuance of stock and acceptance of LargeCo's acquisition offer.

QUESTION 5: SELECTED ANSWER B

1. What are Dick's remedies?

Direct Remedies

Dick will likely be unsuccessful in bringing direct action in his own right as a shareholder, as he likely cannot succeed in suing for oppression. In a closely-held corporation, with a small number of shareholders, when one shareholder owns a majority of the shares, that shareholder may not take actions to oppress the minority shareholders and deprive them of their ability to exercise their rights as shareholders, such as voting, or unreasonably deprive them of dividends.

Here, Online Inc. is probably a close corporation, as it has only three shareholders: Dick, Sam, and Jane. However, Dick will probably be unable to argue for oppression because he owns 200 shares, which is equal to Sam's holdings, and after Jane received an additional 50 shares, she is also a holder of 200 shares. Therefore, because the shareholders own equal portions of Online, there is no majority shareholder oppression here, and Dick will need to take action in a shareholder's derivative suit on behalf of the corporation to obtain relief for the acts of Sam, Jane, and Harry.

Derivative Suit

Dick will be able to sue on behalf of Online Inc, in a shareholder's derivative suit. To bring a derivative suit, the shareholder must first petition the board of directors, and be rejected by the board. However, many states now do not require this step if the petition would be futile (i.e. where a majority of the board would be defendants in the derivative suit). Here, because the entire board would be defendants, it would be futile, and Dick would be able to bring his shareholders' derivative suit.

a. Jane

i. Watered Stock

When a corporation is incorporated, it can include a par value for its shares in the articles of incorporation. A par value is the minimum value that the share can be issued for. A share issued for below par is called "watered." A shareholder who takes knowing of the water may be liable for it, and the board of directors will be liable to the corporation for the "water": the difference between the par and the issued value.

The issue here is whether the board issued watered stock to Jane when it gave her 50 shares in the place of a \$10,000 salary payment. A corporation may exchange shares for anything of value, including real property and wages, but that exchange must still meet the par value. Here, Online's par value for its shares was \$1,000 per share. Thus, 50 shares would be worth \$50,000 par. The board of directors voted to issue Jane \$50,000 worth of stock for \$10,000 worth of labor, creating \$40,000 of water. Therefore Dick could sue on behalf of the corporation to recover the value of the water from either Jane, who took the shares with knowledge of the water, and also voted to issue them as a board member, or the other two directors for the water as well.

ii. Breach of Duty of Loyalty

All directors of a corporation owe fiduciary duties of loyalty and care to the corporation. A director must not deal with the corporation as an outsider, and must not engage in transactions where the director is interested in the transaction. Here, Jane breached the duty of loyalty by issuing herself the watered stock. Thus, she took advantage of her position as a board member, and obtained stock at below par in exchange for her services.

iii. Breach of Duty of Care

All directors owe a corporation a duty of care. A director must conduct business as a reasonably prudent director in the same or similar circumstances. A director may rely upon experts when voting on decisions, and may also rely upon other members of the board, but only if they are reasonably qualified to give that advice. A director will not be held liable for good faith business judgment decisions. Here, in voting on the decision to sell Online, Jane "agreed with Harry" that the offer was a good idea, and Harry accepted the offer. This deal was for the sale of the entire company,

and Jane did absolutely no due diligence whatsoever to ensure that the deal was in fact a good one. Importantly, she relied only upon Harry, an attorney, and not upon Dick, who was an expert in technology matters, and who would have been a better resource on the value of the company. Jane could argue for the business judgment rule, but because she did so little in the way of due diligence, she will not be able to argue good faith successfully. This is especially true because she knew of Harry's marital relationship with the majority shareholder of LargeCo.

Therefore, Jane will be liable for a breach of the duty of care.

b. Sam

i. Watered Stock

Sam will be liable as a board member for the "water" on the stock issued to Jane, for the same reasons Jane was liable as a board member.

ii. Breach of the duty of Care

Sam will be liable for a breach of the same duty of care as Jane, because he too relied solely upon Harry when agreeing to sell Online to LargeCo.

c. Harry

i. Interested Director/Breach of Loyalty

The same duty of loyalty applies to Harry as a director as applied to Jane. A director is part of an "interested director transaction" where the director is personally part of the opposite side of a deal with the corporation, or is in a close relationship with a majority owner or board member of the other corporation. In this situation, any transaction may be voidable and the director may be held liable for the damages.

Here, Harry was an interested director. He was engaged in negotiations with LargeCo, in which his wife was the majority shareholder. He had a duty to disclose that to the board. He did not, and thus breached his duty. Harry could argue that Jane knew of the relationship, and thus the board was aware of the interest he had. That argument will fail because he had a duty to inform the entire board, not just rely on one member.

Thus, Harry will be liable for the deal between LargeCo and Online.

ii. Duty of Care

Harry also breached his duty of care, by not doing any due diligence on the deal, and by accepting an offer that undervalued the company. The same reasonably prudent director standard applies here. Because Harry alone negotiated the deal, did not do any research into the value of the company, and took a low offer, Harry breached his duty of care.

d. Fundamental Corporate Change

Dick will also have a successful action against all three board members together for a failure to put a fundamental corporate change to a vote of the shareholders. A fundamental corporate change includes the sale of all, or substantially all of the corporation's assets. A fundamental corporate change must be approved by a resolution of the board, at a board meeting, and then submitted to the shareholders, who must approve it by a majority vote.

Here, the board agreed to a fundamental corporate change when it allowed the cash buy-out of all Online assets for \$1 million. Thus, they were required to hold a board meeting to approve the change and submit it to the shareholders. They did not. A board meeting must be an in person meeting, and a special meeting requires written notice to all board members. Neither occurred here, only a phone call, without an actual vote. More importantly, the change was not submitted to the shareholders for a vote. In fact, the non-board shareholder Dick was not informed at all.

Therefore, the board will be liable to the shareholders for damages on the fundamental change.

2. Harry's Ethical Violations

Potential Conflicts

Under the California rules, an attorney may not represent a client where the representation would be directly adverse to another client in the same matter, or where there is a significant risk that the representation will be materially limited by the lawyer's representation of another client, or the lawyer's own personal interests. A lawyer may still take on a representation under the California rules if the lawyer believes that he can

still competently represent both clients, all affected clients give informed, written consent, and the representation is not prohibited by law or ethical rule. California extends the written notice requirement to potential conflicts, while the ABA does not. The ABA rules also include a "reasonable lawyer standard" where a lawyer must reasonably believe he can competently represent both parties.

Here, a potential conflict existed when Harry sat on the Board and was also General Counsel. He put himself into the position where he may have been interested in taking an action on the board for his own personal financial gain, that may not have been in the corporation's best interest. Thus, in California, he would have had to give Online written disclosure of this potential conflict, and under the ABA and CA rules, would have had to get informed, written consent if the conflict became actual. Harry did not do this, and therefore violated the rules.

Actual Conflicts

Harry also engaged in actual conflicts of interest when he negotiated the deal with LargeCo. Here, under the California rules, Harry's personal interest with his wife, the majority shareholder, was likely enough on its own to trigger a conflict. Because Harry's relationship with his wife would lead him to be more willing to make a deal unfavorable to his client, Online, an actual conflict existed when he began negotiating. Under the ABA, the conflict is a bit more remote, as Harry is not *personally* interested in the transaction, but it would probably still be enough that his wife is the majority shareholder. Therefore, Harry was in a representation where he had an interest that was probably directly adverse to his client, or at the least posed a significant risk that it would materially limit his ability [to] represent Online. Thus, Harry would have had to obtain informed written consent, and did not. Further, it is possible that this conflict could be non-consentable under the CA and ABA rules, as it seems unlikely that *any* lawyer would advise a client to allow an attorney to negotiate a deal with a company majority-owned by that attorney's wife. Therefore he violated both the ABA and CA rules.

Duty of Loyalty

An attorney owes the highest duty of loyalty to a client, and may not take any actions directly adverse to the client's interests. An attorney can enter into regular business transactions with client, so long as those transactions are fair and are in the client's usual course of business. Any other business transactions between a lawyer and client where the lawyer is adverse, the lawyer must give the client an opportunity to obtain independent counsel, and get informed consent to the deal in writing.

Here, Harry did not disclose his own company TechCo, which put his interests in the sale directly adverse to Online, as he could then negotiate a deal with LargeCo for a greater sum. TechCo, which was owned by Harry, eventually negotiated with Harry's wife's company for a deal 10x more valuable than the one he negotiated for his client, Online. Because Harry did not inform Online of the opportunity to seek independent counsel, or obtain informed consent, Harry violated both the CA and ABA rules.

QUESTION 6

City Council (City) amended its zoning ordinance to rezone a single block from “commercial” to “residential.” City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Several property owners on the block brought an action to challenge the amended ordinance.

In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.
2. Property Owner B, who had spent \$1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.
3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Was each ruling correct? Discuss.

QUESTION 6: SELECTED ANSWER A

Constitutional Protection

The Constitution prohibits wrongful government/state action, not private action. State action allows constitutional protections to arise.

State Action

The state action here is the City Council amending its zoning ordinance.

Takings Clause

The power of the government to take private property for public use is known as eminent domain. The takings clause of the 5th Amendment to the US Constitution provides "no property shall be taken for public use without just compensation." The government must provide just compensation for any property taken for a public use. Since the *Kelo* decision the US Supreme Court has interpreted a public use broadly and deemed a public use to even include "economic development" as well as the classic highway, military base, etc. The Takings Clause applies to states and local entities through the 14th Amendment. Regulations are not usually considered takings but can be in certain circumstances.

Here there was no physical taking of any land by the government for a 'public use'. The City Council amended the zoning ordinance to change a block from commercial to residential. The property of the block was not actually seized, but rather the activity on the property was regulated. The property owners will argue this regulation constitutes a regulatory taking.

Regulatory Taking

A regulatory taking is that which deprives the owner of the economic use of his property. A regulatory taking is often found when a regulation deprives the owner completely of any substantial economic use. A regulatory taking analysis can be applied to the states and local entities through the 14th Amendment. (See Florida Water District.)

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

1. Property Owner A

Property Owner A will argue the City Council's amended zoning ordinance constituted a regulatory taking violated the right to a Non-conforming use.

Regulatory Taking of the Restaurant

See Rule above

To determine if a regulatory taking occurred Property Owner A will demonstrate the economic impact of the regulatory taking on the property. Here the Owner operated a popular restaurant on the premises. The impact of the regulation on the land is severe as location is vital for [a] popular restaurant. The actual economic impact of the ordinance on the property value itself would need to be determined if there is value in land that has a restaurant on it and must be remodeled or rebuilt to conform with the residential requirement.

Property Owner's reasonable expectation on the return on investment for the property. If the owner has a popular restaurant and has been there for a long period of time then the economic return expected out of the property to be achieved can be argued to have occurred then the court decision is supported. However if the restaurant is newly open and popular for this reason, the owner has likely not achieved the expected return on investment for the restaurant. Restaurants are capital intensive and it takes time to recoup the capital costs.

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street. The government will argue it only had to show a rational basis for the decision.

Non-Conforming Use

A non-conforming use occurs when a business or residence is in existence and within the proper use of a city ordinance, at which point the ordinance subsequently changes and the current use of the property becomes in violation of the current code. The non-conforming use must be permitted to continue unless substantial threat to public safety/health is at stake. The non-conforming use may continue as long as the business or use does not cease or a change in ownership of the property occurs.

In this case the restaurant business can only operate as a non-conforming use. Owner A should have been permitted to continue using the property as a popular restaurant. There was no significant threat to public safety or health. In fact the restaurant was likely feeding many residents due to its popularity. Traffic hazards are not necessarily related to the commercial uses on the property.

Conclusion: The Court was incorrect in ruling that the property owner had no right to continue that use. There was no emergency or threat to public safety to not permit a non-conforming use.

2. Property Owner B

Property Interest

A party that makes substantial investment and obtains the necessary permits for a development based on the current zoning ordinance is entitled to complete the project within a reasonable amount of time even if the zoning ordinance changed in the meantime. Once the government has granted the permission, and the party has then relied on that permission it may not be taken away arbitrary by new ordinances. If such action occurs the party may rely on the governing zoning and ordinances at the time the project was permitted and began.

In this case Property B substantially relied on commercial zoning ordinance based on his investment of \$1 million on engineering and marketing studies. This investment was for the undeveloped land based on the commercial zoning ordinance. This is a significant sum, and the Owner may even claim he detrimentally relied on the previous ordinance, but such an argument would not be upheld.

The courts often require there be some permission granted or approval of a project by a review board before a developer can be found to substantially rely on the zoning ordinance. It is not enough to have a good faith belief that your use will be permitted in [the] future, some certainty must be acquired by permit or council approval. Unfortunately for Property Owner B the facts do not indicate he submitted his plan for the undeveloped property to local official for review. No applications submitted, and unfortunately the owner will be unable to mitigate losses if all the studies were based on commercial use.

Conclusion: The court's ruling was likely correct based on the Property Owner B's failure to obtain government permission for future investment. Owner B is not entitled to any protection as he would have been if permits were granted before the City Council amended the zoning ordinance.

3. Property Owner C

Regulatory Taking

See Rule Above

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

Economic Impact

The economic impact of the residential zoning ordinance on Owner C's property is significant. There was 65% drop in value because of the new ordinance. This is over

half of the value. However, even with a severe economic drop in value the property maintains some viable economic use if it retains 35% of its value. The courts when granting a regulatory taking prefer to see no economic benefit from the property because of the regulation. Based on these facts the economic impact to the ordinance favors the City Council.

Expectation on Investment Return

This analysis depends on Property Owner C's reasonable expectation on the return on investment for the property. This is a fact specific analysis. Given the fact that the property value decreased by 65%, this was not likely an expectation of the Owner. Even in a severe economic recession property losing over half of its value is substantial and not reasonably expected.

This factor supports the lot owner's claim.

Burdens Distributed

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street.

Conclusion: The court should have ruled that the lot owner suffered a regulatory taking if the reduced expectation on investment and distributed burdens were severe enough.

QUESTION 6: SELECTED ANSWER B

Zoning Powers

The Supreme Court has historically granted great deference to municipalities engaged in creating zoning ordinances. (See *Euclid v Ambler Realty*). Generally, local government has the police power to enact zoning ordinances so long as they are reasonably related to a legitimate government purpose, namely, that they relate to protecting the general welfare, safety, or health of the community.

Here, the city enacted the zoning amendment to change a commercial to residential area in response to traffic that may have endangered children. Clearly, the zoning ordinance is related to a legitimate government interest in protecting children pedestrians. On these grounds, it would most likely be upheld.

However, the facts indicate that the ordinance only applies to "a single block." This raises the specter of spot zoning, which may be impermissible if used to single out landowners or make a handful of landowners bear a disproportionate burden that the public at large should have to bear. In contesting zoning that appears to unlawfully inhibit a landowner's use of his property, a landowner may bring a takings claim challenging the constitutionality of the zoning ordinance on its face or as applied. As demonstrated in *Euclid*, a facial challenge is bound to fail--zoning has been upheld for decades. But an "as-applied" challenge can be viable, and is discussed below.

Takings

Under the 5th amendment and applied to the states via the 14th amendment, the government may not take private property without just compensation. Typically, a government taking is through eminent domain, where the government must show a valid public purpose for the taking and compensate the landowner for the land the government takes for the public purpose.

Here, the ordinance does not employ eminent domain, and as such is analyzed under takings jurisprudence.

Physical Takings

Any government statute that incurs a physical occupation of a landowner's land or real property (including airspace) must be compensated (*Lorretto Teleprompter*). Here, however, the ordinance does not install or require imposition of any government presence within any property owner's physical space, so this strict rule is unavailable to the plaintiffs.

Regulatory Takings

Courts have held that an ordinance that is so burdensome, or that unduly burdens a single landowner in order to benefit the public at large, may be a regulatory taking, and must be compensated. Under *Lucas*, a regulation that incurs a "total economic wipeout", meaning that it deprives a landowner of any economically beneficial use of his land, is a regulatory taking and must be compensated. The one exception to the total wipeout rule is if the ordinance is based on preexisting common law in the state (*Lucas*).

Here, the ordinance rezones the use of land from commercial to residential, and is thus most likely not based on common law principles. In *Lucas*, the court recognized an argument that an ordinance restricting beach development could be based on common law principles, if it sought to mitigate nuisance. But the facts here are not analogous. Nonetheless, the ordinance has also not incurred a total economic wipeout. Property owners A, B, and C all may still make use of their property in economically beneficial ways, even though those uses are not the ones they anticipated.

Because *Lucas* is unavailing, a takings analysis would go to the *Penn Central* multi-factor balancing test, in which the government determines if an ordinance incurs a taking based upon: the government interest to be advanced, the nature of the government regulation, and the degree of interference with the landowner's "investment back expectations."

Variances and Amortization

Lastly, landowners may also seek relief through variances and amortizations if they do not wish to bring a constitutional claim under *Penn Central*. A variance can be Area or Use. An area variance allows a nonconforming use to vary by the area used; a Use variance allows a nonconforming use in an area that is not zoned for that purpose. Use variances are typically harder to secure, and the landowner must show an undue burden if the use variance is not granted.

An amortization allows a nonconforming use to persist until ownership of the property changes, and prohibits the owner from expanding or changing his permitted nonconforming use. Amortization works to mitigate the impact of a sudden zoning change, which could deprive the landowner of economic use of their property and also reduce the likelihood of a takings lawsuit.

Application to Property Owners A, B, and C

Property Owner A

Here, the court has granted the property owner a mere 3 month period to move out of the premises or change it. Under *Lucas*, the property owner most likely does not have a claim. He has not experienced a total economic wipeout because he can still sell the land for residential development.

Under *Penn Central*, he has a stronger claim. The government interest in protecting children is strong, but it zones a single block, thus making property owner A largely bear this burden rather than the community as a whole. Further, the restaurant is popular, viable, and most likely has significant investment backed expectations--namely, its physical assets and cooking equipment. Although the government does not need to ensure that the new restaurant location is equally as profitable, the strict and narrow application of the zoning amendment gives the restaurant a factual advantage if it chooses to bring a takings claim.

To avoid a takings challenge under *Penn Central*, the court would have been wise to issue a use variance just for the property or an amortization, allowing the owners to continue operating until they finally closed by their own accord. As is, only allowing 3 months to move and in light of an ordinance that appears to single out the owners, the court risks a viable takings claim.

Conclusion: the court can uphold the ordinance and three-month grace period because the zoning appears to be a valid government action. But these are draconian measures and a three month grace period is very short. It might consider permitting an amortization or use variance to avoid a takings claim under *Penn Central*. An amortization would reduce the economic impact while allowing the area to gradually conform to the zoning the city enacted.

Property B

Here, the property owner has an undeveloped lot, so his loss is minimal. Under *Lucas*, he can probably sell the lot and earn a profit, and based on the jurisprudence in *Euclid*, a zoning ordinance is still viable even if it changes the permissible uses and devalues a property significantly.

But the owner has also invested \$1 million in assessing his lot in "good faith" prior to the amendment. *Euclid* makes it clear that the zoning ordinance can still be upheld. However under *Penn Central*, this huge investment backed expectation gives serious weight to a takings claim. As mentioned above, the government objective is valid--public safety--but the nature of the government action is targeted and intrusive because it only applies to a single block. By contrast, in *Penn Central*, the court upheld a development restriction on a historical building because it found that the owner could build elsewhere, and moreover, everyone else in New York was equally burdened by the restriction. Here, only the block is burdened; a handful of landowners are bearing a burden for the whole city, but they are not being compensated. Because *Penn Central* is a fact-based inquiry, and the investment backed expectations here are so high, the landowner has a fairly strong case.

Nonetheless, the court's decision is valid--the owner is not entitled to relief, despite his investments because he can still sell his land. But in the interest of precluding a subsequent takings claim, the court might permit the owner to submit an area variance to the zoning board. Depending on what he had planned to use the lot for, the traffic impacts of that use, and how that lot would conform with surrounding uses and traffic, an area variance may still achieve the city's goals while avoiding a costly takings lawsuit and providing relief.

Property C

Here, the court properly ruled that the landowner did not suffer a regulatory taking. There has been no total wipeout, so the land is still valuable for residential uses. Further, the facts indicate that there are not investment-backed expectations. As such, the Penn Central analysis merely considers the impact--65% reduction in value--as well as the valid government interest in protecting children. Overall, there is no valid regulatory claim.

Lastly, *Euclid* is directly on point and confirms the court's holding. A city may enact zoning using its police powers and to further the general safety, welfare, or health of the community, even when the ordinances greatly reduce the value of property owner's land. In *Euclid*, the owner's land was greatly devalued because he could not use it for industrial purposes, but the supreme court nonetheless upheld the zoning ordinance. Here, there was no regulatory taking. It is also unclear if a variance of any kind would provide relief, as the facts do not indicate the type of harm the property owner has experienced or his current use of the land.