

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 27, 2010

**Type your answer to Question #1 BELOW the words
"Answer-to-Question-1_"**

1. Myrtle Davis, a widow, died in June 2010 in a nursing home in the City of Poquoson, Virginia. She was survived by her two sons, Dean and Ronnie, and a daughter, Nancy Jo.

Until January 2008, when she was admitted to the nursing home, Myrtle continued to live at Ketan House, the home she and her deceased husband had occupied on the Chesapeake Bay in Hampton, Virginia. Ketan House sat on 50 acres overlooking one of the widest, most accessible parts of the bay and was a prime location for development. Over the years, many developers approached Myrtle about buying the property, but Myrtle refused to sell the house and property even though she lacked resources to support herself.

Myrtle's children respected her decision not to sell, and, in 1999, the children and Myrtle entered into a written contract agreeing: that Ketan House and the adjoining property would not be sold prior to Myrtle's death; that the children would advance Myrtle money to support herself; that each of the children would contribute in such amounts as they were able; that Myrtle would provide at her death that Ketan House and the surrounding property would be sold, the advances that the children made would be repaid to them, and the balance distributed equally among the three children. Over the next ten years each of the children made various cash contributions to their mother's support. The children recently had the house and property appraised at approximately \$3.5 million dollars.

After Myrtle's death, a will signed on April 1, 2008 by Myrtle and attested before two officers of a local bank, was found in Myrtle's safe deposit box at the bank. The will contained provisions disposing of various articles of tangible personal property, leaving Ketan House and the adjoining property to Dean, and the remainder of Myrtle's property consisting of stocks and investment accounts equally to her three children. The stocks and investment accounts were maintained in a brokerage account in Richmond, Virginia. The will did not have self-proving provisions, and it named Nancy Jo, now a resident of New Orleans, Louisiana, as the executor.

- (a) **In what jurisdiction should the estate be administered? Explain fully.**
- (b) **What is the effect of the written agreement among Myrtle and her three children on the disposition of Ketan House and on the April 1, 2008 will? Explain fully.**
- (c) **Is the will entitled to probate, and, if so, what must be done to have it admitted to probate? Explain fully.**
- (d) **Can Nancy Jo qualify as executor of Myrtle's estate? Explain fully.**

Reminder: Make sure you typed your answer to Question #1 BELOW the words "Answer-to-Question-1_" and ABOVE the section with the divided lines.

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**Type your answer to Question #2 BELOW the words
"Answer-to-Question-2"**

2. Peter and Paula Pane, residents of Virginia, owned a two-acre lot in the prestigious Robinson Forest subdivision in Fairfax County. In January 2007, they entered into a builder's standard form home construction contract with Home America Corporation ("HAC"), a national homebuilder, for the construction of a home on their Robinson Forest lot. HAC is a Delaware corporation, the executive offices of which are now located in Washington, D.C. Until 2005, HAC's headquarters had been in Baltimore, Maryland.

The Panes claim that prior to execution of the contract, HAC's salesperson told them that the exterior finish of the house would be "conventional stucco that requires little to no maintenance." The construction contract stated, among other things, that the "interpretation, validity and construction of the terms and conditions of this contract shall be governed by the laws of the State of Maryland." The contract specifications provided that "the exterior finish of the house shall be conventional stucco." In fact, the home was actually constructed using a synthetic stucco product for the exterior finish. Synthetic stucco, which is inexpensive to buy and install, has an unfortunate history of water infiltration problems.

The Panes' home was completed on July 1, 2007, and on that date HAC turned over occupancy to them. The Panes did not realize that synthetic stucco had been used, although the HAC home warranty book, which was given to them on July 1, 2007, plainly stated that the exterior finish of the home was synthetic, not conventional, stucco and that homeowners are responsible for inspecting the exterior every three months and for caulking the seal around the exterior finish of the house, when needed.

Within a few months after the Panes took occupancy, the home began to experience serious water infiltration problems, which HAC was unsuccessful in remediating. The water infiltration caused mold, and the Panes both experienced for the first time debilitating migraine headaches.

On July 20, 2010, the Panes filed a complaint against HAC in the Circuit Court for Fairfax County, setting forth counts for breach of contract and fraud and seeking to recover \$450,000 in compensatory damages. The Maryland statute of limitations for breach of contract is three years and for fraud it is two years.

HAC's in-house general counsel has just reviewed the Panes' complaint, which was served on HAC today, and asks for advice on the following questions.

- (a) **If it is assumed that the Circuit Court in Virginia would enforce the choice of law provision in the home construction contract, which state's contract statute of limitations will the Virginia court apply, and will it bar the Panes' claim for breach of contract against HAC? Explain fully.**
- (b) **If it is assumed that the Circuit Court in Virginia would enforce the choice of law provision in the home construction contract, which state's fraud statute of limitations will the Virginia court apply, and will it bar the Panes' claim for fraud against HAC? Explain fully.**

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- (c) Without regard to the assumptions stated in parts (a) and (b), above, will the Circuit Court in Virginia enforce the choice of law provision in the home construction contract? Explain fully.
- (d) Are there grounds HAC can assert to transfer the case to a federal district court, and, if so, what steps must HAC take, and within what time limit, to accomplish the transfer? Explain fully.

Reminder: Make sure you typed your answer to Question #2 BELOW the words "Answer-to-Question-_2_" and ABOVE the section with the divided lines.

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**Type your answer to Question #3 BELOW the words
"Answer-to-Question-_3_"**

3. Percival Purchaser ("Purchaser") was an avid collector of coins, which he believed to be a better investment than stocks and bonds. While traveling through Virginia, Purchaser came upon a stamp and coin store owned by Stanley Seller ("Seller") in Farmville. In the course of browsing around the shop and talking to Seller about fishing and various military bases on which both had served, Purchaser saw a set of coins minted in 1955. The set included a penny, a nickel, a dime, a quarter, a half-dollar, and a silver dollar, all encased in a single plastic display box. In the lower left-hand corner of the plastic box was a small brass plaque engraved with these words: "1955 Coin Set, Mint Condition, Uncirculated."

Purchaser believed the set would be a great addition to his collection, so without discussing the condition or value with Seller, Purchaser paid Seller's asking price of \$5,000. When Seller put the coin set in a carry-out bag for Purchaser, he also included a slip of paper on which the following words were inscribed:

This is our estimate for insurance purposes only of the present retail replacement cost of items and is not necessarily the amount you might obtain if the articles were offered for sale:
One set of U.S. coins minted in the Denver Mint, uncirculated, and in mint condition, appraised to be worth \$12,500.

A few weeks later, at a gathering hosted by Purchaser for fellow coin collectors, he was proudly showing off his newly acquired 1955 set. One of the guests, who was a known and respected appraiser of collectible coins, examined the set carefully. He told Purchaser that, although the coins were in very good condition, they had actually been circulated and, on the market were worth little more than their face value, which was in fact true.

When Purchaser tried to return the coins to Seller and get a refund of the \$5,000, Seller just laughed and said, "So, sue me. You bought those coins 'as is.' You didn't rely on me, and I didn't make any warranties to you."

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What UCC sales warranties, if any, might Purchaser reasonably assert that Seller made and breached? Explain fully.

Reminder: Make sure you typed your answer to Question #3 BELOW the words "Answer-to-Question-_3_" and ABOVE the section with the divided lines.

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Type your answer to Question #4 BELOW the words "Answer-to-Question-_4_"

4. Irene Star (Irene) owned a valuable diamond and emerald necklace that she desired to sell to obtain cash for a business venture. Angela Blake (Angela) was an independent rare gem broker in Wise, Virginia. Irene and Angela entered into a written contract, under which Angela agreed to take possession of the necklace for the purpose of selling it at a price no less than \$75,000, and Irene would pay Angela a 10% commission.

Angela had been invited to an elegant gem show at the upscale Inn at Wise, which she knew would be attended by leading jewelers from around the country. To show off the necklace, she wore it at the gem show. As anticipated, she got several inquiries as to its availability and received an offer of \$100,000 for it. She told the offeror she would get back to her within a week.

Feeling a bit woozy after having drunk several glasses of champagne being served at the gem show, Angela retired to the ladies lounge to refresh herself. She took off the necklace and laid it on the counter while she dabbed her face with cold water. She absent-mindedly walked out of the ladies lounge without the necklace. She left the show and headed for home without realizing that she had left the necklace behind.

In the meantime, Grace Milan (Grace), a housekeeping employee of the Inn at Wise who had gone into the ladies lounge to clean up, saw the necklace lying on the counter. She had no idea of its value, but she recognized it as the one Angela had been wearing and went searching for Angela. Someone told Grace that Angela had just left, so Grace put the necklace in her purse, intending to telephone Angela to tell her that she had the necklace and would return it to her. She put her purse on a shelf in the employees' coatroom. When Grace finished her work shift, she retrieved her purse and discovered that the necklace was missing – someone had stolen it. She reported the series of events to her manager.

When Angela got home, she suddenly realized that she had left the necklace at the gem show, and, just as she began to panic, the phone rang. It was the manager of the Inn at Wise calling to tell her that Grace had found the necklace but that, unfortunately, someone must have stolen it out of her purse because, when Grace went to retrieve her purse from the employees' coatroom at quitting time, the necklace was missing.

Irene sued both Angela and the Inn at Wise for the loss of the necklace, basing the claim against each on a breach of duty as a bailee of the necklace.

- (a) **What must Irene prove to establish a *prima facie* bailment case against Angela, and is it likely that she will prevail in her suit against Angela? Explain fully.**

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- (b) What must Irene prove to establish a *prima facie* bailment case against the Inn at Wise, and is it likely that she will prevail in her suit against the Inn at Wise? Explain fully.
- (c) To which Virginia court would an unsuccessful litigant in the suit brought by Irene appeal?

Reminder: Make sure you typed your answer to Question #4 BELOW the words "Answer-to-Question-_4_" and ABOVE the section with the divided lines.

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**Type your answer to Question #5 BELOW the words
"Answer-to-Question-_5_"**

5. Sylvia, an undercover narcotics detective for the Carroll County Sheriff's Department, made arrangements with Jay to meet him at a restaurant parking lot in Hillsville, Virginia, for the purpose of purchasing one-half pound of marijuana for the price of \$950. She also arranged for a squad of other officers to be nearby in an unmarked car, ready to make the arrest at her signal.

When Jay arrived at the meeting site, he parked his pickup truck near Sylvia's unmarked vehicle and beckoned with his hand for Sylvia to come over to his vehicle. Sylvia walked over to Jay's pickup, leaned in the passenger side window, and asked to see the "product," that is, the marijuana. Jay told Sylvia get into the truck so he could make the exchange inside the passenger compartment. She refused at first, but after several requests by Jay, she opened the passenger-side door. At the same time, she gave the signal for the other officers to spring into action. They rushed up to Jay's pickup and arrested him.

While one of the officers was handcuffing Jay, an unloaded handgun slipped out from under Jay's waistband. At that moment, an accomplice of Jay named Red, who had been hiding under a tarpaulin in the cargo bed of Jay's pickup, jumped up and started running away. One of the other officers apprehended him. The officers searched Jay and Red and the entire pickup, but found no marijuana or other contraband.

The officers read Jay his Miranda rights, after which Jay spoke freely. He said, "I wanted to get Sylvia inside my truck. Then, I would hand her a bag with some dry leaves in it and tell her to give me the money. If she refused, the plan was for Red to poke his head in through the rear window to scare Sylvia into surrendering the money. I intended to show her the handgun only as a last resort."

Jay was subsequently charged with attempted robbery and attempted use of a firearm while attempting a robbery. The Commonwealth is offering Jay a plea bargain with a significantly reduced sentence.

- (a) Assuming that at trial the Commonwealth's Attorney can prove each of the foregoing facts beyond a reasonable doubt, do the facts support each of the elements of the crimes of (i) attempted robbery and (ii) attempted use of a firearm while attempting a robbery? Discuss fully.

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- (b) Explain what an “Alford” plea is and explain fully whether or not, based on the facts, it would be advantageous for Jay to enter such a plea? Discuss fully.

Reminder: Make sure you typed your answer to Question #5 BELOW the words “Answer-to-Question-_5_” and ABOVE the section with the divided lines.

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END OF SECTION ONE