

MODEL ANSWER - QUESTION I - FEBRUARY 2007

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) will not be answered here.

MODEL ANSWER - QUESTION II - FEBRUARY 2007

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MODEL ANSWER - QUESTION III - FEBRUARY 2007

1. Standing

In order to establish standing to seek declaratory relief, a plaintiff must allege at least the threat of an injury in fact to some protected interest. *Richards v. Town of Norwich*, 169 Vt. 44. (1999). A mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the party is to evaluate the problem, is not sufficient by itself to render a party "adversely affected." *Sierra Club v. Morton*, 405 U.S. 730, 739-740 (1972).

In light of these principles, Paula Penurious cannot establish her standing by relying upon her involvement as an advocate against the new legislation or her general interest in school funding issues. Nor can she rely on the fact that, although she is not subject to this particular tax, she is a taxpayer; except in certain Establishment Clause cases, a plaintiff's status as a taxpayer alone does not generally give her standing to challenge a law's constitutionality. If Penurious alleged a more individualized harm—such as an impact upon the resale value of her property as a result of the extra tax burden on a class of potential purchasers-- she may be able to establish standing. On the basis of the given facts, her claim would be tenuous.

Ned Newcomer clearly has standing to challenge the law, as he faces a direct, individualized financial harm as a result of the tax assessment required by this law.

2. Constitutional Claims

The new law selectively taxes land purchasers on the basis of their residency, including the length of their residency in Vermont. This law potentially runs afoul of several provisions of the United States and Vermont constitutions, as set forth below.

a. United States Constitution, 14th Amendment- Equal Protection Clause

The Equal Protection Clause provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has applied three levels of scrutiny to equal protection clause claims, depending upon the nature of the claim:

State law distinctions among persons that implicate a fundamental right, or that rest upon a suspect classification, are subject to "strict scrutiny." A classification subject to strict scrutiny will only be upheld if it is narrowly tailored to serve a compelling governmental interest.

Classifications that neither burden a fundamental right nor target a suspect class are constitutional as long as the legislative classification bears a "rational relation" to a "legitimate" governmental end. *Romer v. Evans*, 517 U.S. 620 (1996).

(Certain other classifications, such as classifications by gender— have been afforded "intermediate scrutiny," meaning the classification in question must be supported by an "exceedingly persuasive justification," must serve "important" governmental objectives, and must be "substantially related" to the achievement of those objectives. *United States v. Virginia*, 518 U.S. 515 (1996)).

In this case, strict scrutiny may apply because the classification in question burdens the fundamental right to travel. See, for example, *Zobel v. Williams*, 457 U.S. 62 (1982) (striking down Alaska law allocating state benefits on the basis of length of residency). If so, the State must articulate a compelling governmental interest, and must demonstrate that its distinction between persons who have resided in Vermont for less than a year and longer-term residents is narrowly-tailored to promote that interest. The State's generic interest in limiting growth and development does not likely rise to the level of "compelling;" moreover, the state's differential treatment of longer-term residents purchasing (and potentially developing) property and newer migrants is not likely sufficiently narrowly tailored to satisfy the strict scrutiny.

b. United States Constitution, Article IV, § 2- Privileges & Immunities Clause

The Privileges & Immunities Clause provides that the "Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." This clause applies to activities that are sufficiently basic to livelihood of the nation so as to fall within the purview of the clause, and bars restrictions depriving nonresidents of a protected privilege if the restriction is not closely related to the advancement of a substantial state interest. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

Owning land is likely sufficiently basic to the livelihood of the nation to qualify as a privilege and immunity. To the extent that Ned Newcomer is still a nonresident, he can only be subjected to the new tax if the law's differential treatment of non-residents is closely related to the advancement of a substantial state interest. The relationship between the law's distinction between non-residents and longer-term residents is not closely related to the State's interests, so application of the law to Newcomer would likely violate the Privileges & Immunities Clause.

c. United States Constitution, Article I, §8 – "Dormant Commerce Clause"

The Commerce Clause empowers Congress to regulate interstate commerce. The United States Supreme Court has recognized that by implication, the Commerce Clause regulates laws that burden interstate commerce, or impede its free flow. *Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994). The Court has recognized two lines of analysis: First, if a law

discriminates against interstate commerce on its face, the law is per se invalid unless the state can demonstrate, under "rigorous scrutiny," that it has no other means to advance a legitimate local interest. Second, if a law imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits," it will not survive constitutional scrutiny. *Id.*, at 390-392.

In this case, the Vermont statute arguably embodies the sort of discrimination against interstate commerce in favor of local business or investment that the Commerce Clause forbids. Since it discriminates against interstate commerce on its face, it may run afoul of the Commerce Clause.

d. Vermont Constitution, Ch. I, article VI – Common Benefits Clause

The Common Benefits Clause embodies the Vermont Constitution's equality protections. That Clause provides, "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men."

The Vermont Supreme Court has adopted a flexible, multi-part analysis to Common Benefits Clause claims. *Baker v. State*, 170 Vt. 194 (1999). First, the Court defines what "part of the community" has been disadvantaged by a particular law. Second, the Court looks at the government's purpose in drawing a classification that includes some members of the community but excludes others. Finally, the Court considers the connection between the nature of the classification and the State's claimed objectives to determine whether omission of a part of the community from the law in question bears a reasonable and just relation to the governmental purpose. Specific factors the Court considers may include: (1) the significance of the benefits and protections of the challenged law; (2) whether omission of members of the community from the benefits and protections of the law promotes the government's stated goals; and (3) whether the classification is significantly under-inclusive or over-inclusive. *Id.*

In this case, the classification in question imposes significant financial disadvantages on new residents and non-residents. Doing so may marginally advance the state's goal of limiting growth and development, but in a manner that is both over-inclusive and under-inclusive. Much development is likely initiated by longer-term Vermonters who are not subject to the tax in question; many new residents do not likely significantly contribute to development but, rather, purchase existing homes. For that reason, the classification in question is likely unconstitutional under the Common Benefits Clause.

MODEL ANSWER - QUESTION IV - FEBRUARY 2007

(1) Can Landlord retain all or any portion of the security deposit and apply it to the unpaid rent and/or to the damage she has identified to the unit?

Under Vermont law, Landlord and Tenant had a rental agreement regarding the use and occupancy of the unit. A "rental agreement" means all agreements, written or oral, embodying

terms and conditions concerning the use and occupancy of the dwelling unit and premises. 9 V.S.A. §4451(8). Therefore, Landlord and Tenant are subject to the statutory provisions addressing residential rental agreements.

In absence of local ordinance, state statute, 9 V.S.A. §4461(b)(1), allows a landlord to retain all or a portion of the security deposit for non-payment of rent. This same provision allows use of the security deposit for damage to the property, unless the damage is the result of normal wear and tear or actions or events beyond the control of the tenant. In this case, the security deposit is \$1500. Landlord may retain \$1000 for two months' non-payment of rent.

Landlord probably also has the right to retain a portion of the security deposit to repair the scratch on the refrigerator door. It is doubtful that Landlord has the right to retain monies for the damage to the carpet, since this appears to be the result of normal wear and tear. Similarly, Landlord probably cannot retain a portion of the security deposit to account for the mildew and rot to the small deck since this situation is likely beyond the control of Tenant.

Landlord has an obligation under the statute to return any remaining portion of the security deposit to Tenant within 14 days from the date on which Tenant vacated or abandoned the unit, with a written statement itemizing any deductions. 9 V.S.A. §4461(c). It is critical that Landlord promptly hand-deliver or mail this statement and any required payment to Tenant's last known address. §4461(d). If Landlord fails to return the security deposit with a statement within 14 days, she will forfeit the right to withhold any portion of the security deposit. §4461(e). Further, if the failure is willful, Landlord is liable for double the amount wrongfully withheld, plus reasonable attorney's fees and costs. *Id.*

(2) What can Landlord do to protect or create an ownership interest in the potential Rockwell sketch?

Landlord must give written notice to Tenant's last known address of his possession of the sketch. 9 V.S.A. §4462(c). Tenant shall have up to 60 days to claim the property, and during that period Landlord must keep the sketch in a safe, dry, secured location. If Landlord complies with her obligations, and Tenant does not provide a reasonable written description of the property and pay any reasonable storage costs and related expenses within 60 days, then the sketch would be considered abandoned and an ownership interest would lie with Landlord.

(3) If Tenant does return looking for the Rockwell sketch can he lawfully enter his old unit in an effort to recover his property?

No. Tenant's actions would likely constitute the tort of trespass and may also give rise to a prosecution for criminal trespass. Tenant's actions by leaving in the middle of the night and not leaving any notice as to his whereabouts, Landlord's attempt to locate Tenant and discern his intentions in conjunction with Tenant's failure to pay rent for a period of months, would likely constitute an abandonment of the tenancy, thereby Tenant loses his privilege to re-enter or occupy the unit. 9 V.S.A. §4462(a). See *Sawyer v. Robson*, 2006 VT 136 (2006).

A person who intentionally enters or remains upon land in possession of another without privilege to do so is subject to liability in tort for trespass. *Harris v. Carbonneau*, 165 Vt. 433 (1996); Restatement (2nd) of Torts, §158. In this case, having failed to pay rent and abandoned the property, Tenant is not privileged to enter his former unit. If he does so, he is likely liable in tort.

Such actions by Tenant may also give rise to criminal liability. A person is guilty of criminal trespass in violation of 13 V.S.A. §3705(d) if he or she "enters a dwelling house, whether or not a person is present, knowing that he is not licensed or privileged to do so." If Tenant were to break a lock to gain entry to the unit, he may also be guilty of unlawful mischief and/or burglary, particularly if the Landlord's ownership interest in the Rockwell sketch has "ripened." Unlawful mischief occurs when a person intentionally damages property, having no right to do so or any reasonable ground to believe he has such right. 13 V.S.A. §3701. Burglary occurs when a person enters any building or structure knowing that he is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault or unlawful mischief. 13 V.S. A. §1201.

It would behoove Landlord to place a sign on Tenant's unit's front door notifying Tenant that Landlord has treated Tenant's leaving as abandonment of the property and Tenant no longer has any right to re-enter the property.

(4) Can Landlord now enter the unit and show it to a prospective tenant?

Whether or not Tenant has abandoned the property, Landlord has the right to enter the premises to exhibit the dwelling to prospective tenants. If Tenant has not abandoned the premises then 48 hours' notice must be given to Tenant and entry can only be during regular hours of 9:00am to 9:00 pm. 9 VSA §4460

(5) Can Landlord cut down the tree or any part of it to prevent the shade on Landlord's property?

Landlord cannot cut down the tree, as it is on Neighbor's property. If she does so intentionally, knowing that the tree does not belong to her, then she would be liable for treble damages. 13 VSA §3606. Landlord can cut any branches on the tree that overhang Landlord's property. *Cobb v. Western Union Tel Co.*, 90 Vt. 342 (1916).

MODEL ANSWER - QUESTION V - FEBRUARY 2007

1. What are the legal theories under which Mary may bring tort claims against Fred? Explain the different elements of each such claim and defenses to each such theory.

Products Liability-unreasonably dangerous product—strict liability.
Negligence-breach of duty-comparative negligence.

2. If Fred is the sole defendant named by Mary in an action filed in a Vermont Superior Court, explain what pleading he may file that would cause Burgers and National Supply to be brought

into the action as a party. Explain whether Fred should include in this pleading his claim against National Supply for the flooring damages.

Third Party Complaint. Under Rule 14, Third Party Complaint is brought only if Third Party Defendant is sought to be held liable for all or part of Plaintiff's claim; therefore Fred should not include its claim for flooring damages. That should be the subject of a separate action.

3. Please explain whether Vermont courts can assert personal jurisdiction over Burgers.

Yes, through minimum contacts and Vermont's long arm statute.

4. Under Vermont law, explain whether Fred may obtain either contribution or indemnity from Burgers or National Supply, and explain what Fred must show to successfully pursue any such claim.

Under Vermont Law, there is no claim allowed for contribution amongst joint tortfeasors. However, Fred may seek indemnity by claiming that he was not the active wrongdoer, that he only passed along in the stream of commerce the product made by others that was the source of the plaintiff's complaint.

5. Under Vermont law, if Mary had brought suit and recovered judgment against Fred, Burgers and National Supply in the full amount of her claimed damages, explain whether Mary may collect the full amount of that judgment from any one of those three defendants.

Yes. There is joint and several liability of all tortfeasors in Vermont, meaning that any one defendant found liable is liable for the full amount of the damages. Here, there was no reduction of the damages sought by plaintiff, meaning no issues presented as to whether plaintiff was more negligent than any one of the parties against whom judgment was entered. Any one of the three judgment defendants may be held liable for the entire amount of the judgment.

MODEL ANSWER - QUESTION VI - FEBRUARY 2007

1. The oral and written exchange between Frank and Nancy raises several issues regarding the validity and enforceability of the lease between them. First and foremost is that a lease for land falls within the Statute of Frauds, 12 V.S.A. § 181(5), and must be in writing in order to be enforceable. The Statute of Frauds will prevent the use of parole evidence to prove the existence or terms of a contract that are not evidenced in a signed writing. The general effect of the rule is to require that contracts concerning real estate be in writing. It does not, however, require that the agreement be in a single writing, merely that the terms to be enforced be in a writing signed by the party to be charged.

In this instance, Nancy and Frank entered into an oral lease for land. Nancy prepared a written note to Frank setting forth certain terms. In her note, she included price (\$500 per year), subject matter (the easterly 50 acres of her land), and duration (10 years). The note is a writing evidencing the contract signed by and enforceable against Nancy. After receiving Nancy's note,

Frank wrote Nancy, thanking her (for what, he does not expressly say), and saying that when the sugaring season is over he would bring her "some" syrup. Under these circumstances, there is a valid and enforceable lease between Nancy and Frank. The note from Nancy constitutes the writing evidencing the terms of the lease, satisfies the Statute of Frauds and makes the lease enforceable against Nancy. The note written and signed by Frank is an acknowledgment of Nancy's writing, satisfies the Statute of Frauds and makes the lease agreement enforceable against Frank.

Although the date of payment is not set forth either note, the lease was entered when Frank sent his note to Nancy, on or about November 20, 2004. The initial payment was made on December 1, 2004. Payment for the following year was not made until April, 2006, but there is no specific term provided for when payment is to be made. The intent of the parties may be construed, however, by their conduct on subjects on which the lease is silent. *Cray v. Bellows Falls Ice Co., Inc.*, 108 Vt. 190 (1936). In this instance, the initial payment under the lease was made on December 1, 2004. Although the lease does not indicate when the lease term is to begin, absent other evidence the lease began on the date the parties entered into the lease, November 20, 2004. Since the first lease payment was not made until December 1, 2004, the conduct of the parties does not indicate when lease payments are due.

2. In light of the application of the Statute of Frauds to this lease, the question whether the lease includes a term that requires that Frank provide Nancy with maple syrup will similarly be determined by the writings. Nancy's note sets out the essential terms of the agreement and fails to mention maple syrup. Had Nancy regarded this as a term to the lease, you would have expected her to include it in her note. This is an indication that she did not consider this to be a lease term. Although Frank's note does state that he will provide Nancy with maple syrup "at the end of the sugaring season," he does not state how much he would give her, nor does he state that he would do it at any other time in the future. There is no conduct by the parties that would support maple syrup as a component of the rent due under the lease.

As in any contract, a court may resort to parole evidence to interpret an ambiguous term in a lease. The parole evidence rule bars, however, the admission of evidence of a prior or contemporaneous oral agreement that varies or contradicts the terms of the written agreement. *Southface Condominium Owners Ass'n, Inc. v. Southface Condominium Ass'n, Inc.*, 169 Vt. 243, (1999). The question is whether Frank's statement about maple syrup is ambiguous, or a gratuitous statement unrelated to the lease. It was discussed prior to entering into the lease, and Frank mentions it in his note. That evidence does not, however, support maple syrup as a payment term. Although the discussion between Nancy and Frank did include an amount of syrup (10 gallons), it did not include that Frank would provide that amount every year. Moreover, the fact that Frank did not mention an amount in his note suggests that he either reconsidered, or that he did not consider maple syrup a term of the lease. Thus, the prior discussions and the explicit terms of the written lease will not support maple syrup as an additional payment term under the lease.

3. Like the lease for land, the guarantee that Nancy signed for Frank's purchase of the evaporator is governed by the Statute of Frauds. 12 V.S.A. §181(2). In this instance Nancy was not being paid to act as a surety. As such, her duty must be strictly construed. McClure

Newspapers, Inc. v. Brown, 146 Vt.180, 184 (1985)(Justice Allen dissenting). Her undertaking, being strictissimi juris, cannot be extended further than the very terms of his contract. Stern v. Sawyer, 78 Vt. 5, 14 (1905). All doubts concerning the extent of such a surety's obligation are to be resolved in his favor. McClure Newspapers, Inc, supra.

At the time Nancy signed the agreement it appears it would have been enforceable. After Nancy entered into the guaranty agreement, Frank returned to Sam's and purchased an additional \$1,000 in parts for the evaporator. Later in summer 2005, Sam's extended the time for payment of the evaporator by 6 months. The first issue is whether the 6 month extension of time to repay the agreement is a valid and enforceable modification of the credit agreement, and if so, what is the effect on Nancy's obligation as guarantor. In general, an extension of time to an agreement to pay money will act to discharge the obligations of a guarantor. In this instance, however, Vermont law provides that any extension of time to an agreement that is secured by a surety is subject to the Statute of Frauds and unenforceable unless it is in writing. 12 V.S.A. §183. Since the extension of time to pay for the evaporator under the credit agreement is not a valid agreement, Nancy would remain responsible as guarantor to the original terms of the credit agreement.

The second issue is whether by adding the additional parts to the credit agreement Sam created a new valid agreement between Sam's and Frank. Any alteration of the underlying contract between creditor and principal, without a surety's assent, discharges the surety. Stern v. Sawyer, 78 Vt. 5, 14 (1905). Nevertheless, in order to effectively discharge the surety, an agreement between the creditor and principal that changes the terms of the underlying contract must be a valid, binding agreement. The surety is not released if any agreement between creditor and debtor does not bind the creditor. McClure Newspapers, Inc, supra. at p. 183.

Thus, the question is whether the credit agreement created a separate agreement, or created an addition to the evaporator agreement that is binding on Frank. The facts indicate that Sam's added the additional evaporator parts to the original credit agreement. As such, Frank and Sam agreed to create a new agreement incorporating the evaporator parts into the agreement. This new agreement attempts to increase Nancy's obligation and risk under her guaranty by \$1,000. Since any valid and enforceable change to the underlying agreement that would increase Nancy's obligation, will act to discharge Nancy from her guaranty, Nancy may claim that she has been discharged and that Sam has no recourse against her.

Since the additional parts were purchased at a later time, however, and are a clearly identifiable separate transaction, that purchase may stand alone as a separate agreement. That may leave Nancy obligated as guarantor to the original evaporator agreement, but not a guarantor to the later "additional parts" agreement.

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