

February 2013 - Vermont Bar Examination

Model Answer – Question 1 - February 2013

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website www.ncbex.org at a later date.

Model Answer – Question 2 - February 2013

PLEASE NOTE: QUESTION 2 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website www.ncbex.org at a later date.

Model Answer – Question 3 - February 2013

1. Was there an enforceable contract between Phoenix and Fly-By-Night? Explain.

There was an enforceable contract between Phoenix and Fly-By-Night.

Vermont has adopted the Uniform Commercial Code ("Code"), which applies here, as this is a sale of goods. The Code, at 9A V.S.A. § 2-204 (1), sets out liberal standards for contract formation: "A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract."

In this case, Fly-By-Night submitted a purchase order for 500 lamps. This conduct by Fly-By-Night was sufficient under Code Section 2-204(1) to constitute an offer. Phoenix's production of

the first 250 lamps was sufficient to constitute acceptance of the offer, thus creating an enforceable contract.

The fact that the purchase order did not specify a particular date for delivery does not make the contract invalid. Code section 2-204(3) makes clear that, “Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.” The parties, by their conduct, clearly intended to make a contract and there is a reasonable basis for a remedy in that Phoenix has identifiable costs associated with delivering the first 250 bulbs and beginning manufacture of the remaining 250 bulbs.

Further, to the extent that 2-201, the Code’s Statute of Frauds provision, applies here, that provision is satisfied. That provision provides that a contract for the sale of goods over \$500 has to be in writing to be enforceable. Here, there are two arguments for why the contract would be enforceable under 2-201. First, under 2-201(1), the purchase order is a “writing” that is presumably “signed by the party against whom enforcement is sought,” i.e. Fly-By-Night. Second, under 2-201(3)(a), the goods are “specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business,” and the seller “has made ... a substantial beginning of their manufacture.”

2. Assuming there was an enforceable contract, what damages could Phoenix claim and what defenses does Fly-By-Night have that might reduce these damages? Explain.

The Code, at Section 2-708, provides for the seller’s damages for non-acceptance or repudiation. The measure of damages set out in the Code is either the difference between market price at the time and place for tender and the unpaid contract price together with any incidental damages **OR** the profit which the seller would have made from full performance by the buyer. Lost profit is used as the measure of damages in those situations where the market price method would be inadequate to put the seller in as good a position as performance. The “incidental damages” provided in the Code at Section 2-710 include: “any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.”

With regards to the non-customized bulbs, these could presumably be sold on the open market, so the measure of damages would be the market price minus the contract price. With regards to

the customized bulbs, Phoenix has a strong argument that there is no standard resale market for the bulbs they specially manufactured for Fly-By-Night making the market price method unworkable. As the market price method will not put Phoenix in as good a position as performance, the measure of their damages should be the profit they would have made from full performance by Fly-By-Night.

Fly-By-Night may be able to reduce the damages award by claiming a failure to mitigate. Vermont recognizes the duty to mitigate damages in breach of contract cases subject to the UCC. Here, a year after the breach, Phoenix still had all 500 lamps in its warehouse, which is likely to be found to be commercially unreasonable. While Phoenix cannot readily re-sell the bulbs it manufactured and customized for Fly-By-Night as they were made with unique modifications meant for a particular purpose, Phoenix could possibly resell the lamps that had yet to be customized. Phoenix's losses would likely be reduced by the amount that Phoenix would have saved had it sold the non-customized lamps.

3. Is Fly-By-Night's claim against Golden time-barred? Explain.

Fly-By-Night's claim against Golden is not time-barred.

There are two possible statutes of limitations applicable to this case: the four year statute applicable to the sale of goods, set out in the Code at Section 2-725 AND the six year statute applicable to civil actions. The Code statute only applies where the contract at issue predominantly or essentially relates to the sale of goods.

The breach in this case occurred in December of 2007 when Golden contracted with a different lighting manufacturer and walked away from its contract with Fly-By-Night. If the four-year Code statute of limitations applies, the claims would be time-barred as the statute would have run in December of 2011. However, where, as here, the contract involves both the sale of goods and the provision of services (the design and manufacture of the bulbs), the Court must determine whether the sale or the services is the predominant factor.

In this case, it seems likely a Court would find that this contract predominantly concerned the rendition of services. Golden contracted with Fly-By-Night to design, manufacture, and install the interior aircraft lighting system. While the contract called for the provision of goods, it seems the predominant purpose was more than manufacturing; it also included design and installation. This would mean the contract between Golden and Fly-By-Night was controlled by

the six-year statute of limitations for civil actions and the action could be timely filed until December of 2013.

Model Answer – Question 4 - February 2013

Question 1: Is Flanders' contemplated lawsuit against SoakRight precluded by the case he litigated against Pure Powder? Discuss.

Probably not. The issue is whether Flanders' contemplated action against SoakRight is barred by issue preclusion and/or claim preclusion.

Analysis of Possible Claim Preclusion

In general, public policy favors an end to litigation, with parties bound by the result. Claim preclusion, also known as *res judicata*, applies when the case has previously been decided.

Claim preclusion applies:

- (1) when there has been a final judgment on the merits;
- (2) in a case between the same parties or parties that are in privity; and
- (3) the claim was, or could have been, resolved in the first proceeding. *Iannarone v. Limaggio*, 2011 Vt. 91, 190 Vt. 272.

In *Iannarone*, the Court indicated that the trend is towards broadly defining what constitutes the same claim/cause of action, so as to require plaintiffs to address in one lawsuit all injuries flowing from an incident.

SoakRight will argue:

1. That the jury's verdict was a final judgment on the merits;
2. That it was in privity with Pure Powder; and
3. That Flanders could have brought his products liability claim at the same time that he sued Pure Powder in negligence.

Flanders will argue that the products liability suit raises an entirely different claim than the negligence action he filed against Pure Powder and, therefore, that there has not been a judgment on his claim. He will also try to show that Pure Powder and SoakRight were not in

privity. Finally, he will argue that he had no reason to suspect that he should sue SoakRight until after he had already commenced suit against Pure Powder.

SoakRight, in turn, will argue the converse: (1) that Flanders could have brought his claim in the original action (see answer to question # 4 below), (2) as the Court has indicated, plaintiffs should bring in one suit all claims arising from a single transaction, and (3) that SoakRight is not in privity with Pure Powder.

Resolution will turn on (1) whether a court concludes that the trend towards broadly defining the same claim or cause of action precludes Flanders from bringing a products liability claim against the hot tub manufacturer that he could have brought in connection with a previously filed negligence claim against the hot tub's operator, and (2) whether SoakRight and Pure Powder are found to be in privity.

While it is likely that privity exists between Pure Powder and SoakRight (a direct contractual relationship between purchase and buyer supports privity), given that a products liability claim could not have been stated against Pure Powder (who did not manufacture the hot tub), it is likely that SoakRight's assertion of claim preclusion will fail.

Analysis of Possible Issue Preclusion

Issue preclusion, also known as collateral estoppel, precludes the subsequent litigation of an issue that has been decided. It applies:

- (1) when the party against whom it is asserted was a party or in privity with a party to the earlier case;
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as one raised in the subsequent action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) precluding the issue from being litigated again is fair. *In re R.H.* 2010 Vt. 95, 189 Vt. 15

While SoakRight may allege that each factor has been met, Flanders has a stronger argument that subsequent litigation is not precluded. The issue of whether SoakRight should be held liable under a strict theory of products liability was neither raised, litigated, nor decided in the first action, and it would not be fair to preclude Flanders from litigating this claim in a subsequent suit.

Question 2: if Flanders sues SoakRight, what procedural mechanism might SoakRight use to attempt to bring Pure Powder in as a party to the case?

If Flanders sues SoakRight, SoakRight may file a third party complaint against Pure Powder to bring it into the case. Third Party Practice

Under V.R.C.P. 14, “[a]t any time after commencement of an action in a superior court, a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.”

Therefore, SoakRight, as Third Party Plaintiff, may file a Third Party Complaint against Pure Powder, as Third Party Defendant, in order to assert indemnification and other possible claims against Pure Powder.

Although joinder of Pure Powder under V.R.C.P. 19 (Joinder of Persons Needed for Just Adjudication) may seem like a possibility, Vermont’s rules against contribution among joint tortfeasors precludes such an action. In Vermont, unlike many other states, joint tortfeasors may not bring in other defendants to share the pain of liability. In Vermont, a plaintiff gets to decide who they want to name as a defendant and who they do not (bearing the risk in the process, of course, of being precluded from bringing a subsequent suit against another defendant later, in the event of an unsatisfactory resolution to their first action).

Question 3: Would SoakRight’s claim against Pure Powder be precluded by Flanders’ prior suit against Pure Powder? Discuss.

No. Neither issue nor claim preclusion apply in this instance.

As noted in the response to Question #1 above, claim preclusion applies:

- (1) when there has been a final judgment on the merits;
- (2) in a case between the same parties or parties that are in privity; and
- (3) the claim was, or could have been, resolved in the first proceeding. *Iannarone v. Limaggio*, 2011 Vt. 91, 190 Vt. 272.

There has been no final judgment on the merits on a claim of indemnification or other likely claims that Soak Right would bring against Pure Powder in a Third Party Complaint. Moreover, SoakRight was not a party to the Flanders/Pure Powder lawsuit, and therefore Pure Powder could not argue that SoakRight is precluded from bringing its third party

complaint. Finally, the third party claims of indemnification and breach of contract (for example) are not claims that could have been resolved in the first proceeding between Flanders and Pure Powder as Flanders filed only a negligence claim and did not have the basis for those claims against Pure Powder.

Similarly, issue preclusion, also known as collateral estoppel, precludes the subsequent litigation of an issue that has been decided. It applies:

- (1) when the party against whom it is asserted was a party or in privity with a party to the earlier case;
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as one raised in the subsequent action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) precluding the issue from being litigated again is fair. *In re R.H.* 2010 Vt. 95, 189 Vt. 15

An argument for issue preclusion fails on the first prong. SoakRight was not a party to the earlier action. Also, depending on the theories asserted in the third party complaint (indemnification, breach of contract, products liability, for example), it is likely that a final judgment on the negligence claim did not resolve the third party claims on the merits, and that no full and fair opportunity was therefore afforded to litigate these theories in the earlier action (especially as SoakRight was not a named party). Finally, while SoakRight likely had a privity relationship with Pure Powder, where Pure Powder chose not to bring SoakRight into the original action, it would seem unfair to now allow it to benefit from its earlier strategic choice.

Question 4: Could SoakRight have been brought in as a party to Flanders's prior suit against Pure Powder? Discuss if so and by whom.

Yes.

First, Flanders could have named both Pure Powder and SoakRight as co-defendants in his initial complaint. Assuming Flanders did not name SoakRight as a defendant when he sued Pure Powder, he might have amended his complaint once he learned of the defect in the hot tub covers. V.R.C.P. 15 allows a plaintiff to amend a complaint once as a matter of course before

responsive pleading is served, or, upon leave of court, or written consent of adverse party, thereafter.

Pure Powder could not have moved to join SoakRight as a defendant because of Vermont's rule barring contribution among joint tortfeasors. See response to #2 above. However, Pure Powder, as a Third Party Plaintiff, could have brought SoakRight in as a Third Party Defendant. See response to #2 above.

Model Answer – Question 5 - February 2013

1. Wendy and Harry can require Big Bank to participate in foreclosure mediation. With its summons and complaint, Big Bank must include a notice regarding the opportunity to mediate the foreclosure action. See 12 V.S.A. § 4632. If Wendy and Harry request mediation, “the court shall refer the case to mediation . . .” *Id.* § 4632(a). Assuming Wendy and Harry are eligible for mediation, they will meet with an authorized representative of Big Bank and a neutral mediator to explore ways Wendy and Harry can save their home. During mediation, the parties will “consider available foreclosure prevention tools . . .” 12 V.S.A. § 4633(a)(1).

Wendy and Harry can also raise two different defenses in the foreclosure action.

First, they can argue that they hold the Property as tenants by the entirety. “In Vermont, tenants by the entirety are viewed as being individually vested, under a legal fiction, with title to the whole estate. . . . Neither spouse has a share which can be disposed of or encumbered without the joinder of the other spouse.” *Evans v. Wolinsky*, 347 B.R. 9, 11 (D. Vt. 2006) (quoting *Bellows Falls Trust Co. v. Gibbs*, 148 Vt. 633, 534 A.2d 210 (1987)). However, in this case, the mortgage deed and promissory note are between Harry and Big Bank only. Since property that is held as tenants by the entirety can only be encumbered by both spouses, Big Bank cannot go after the Property because Wendy did not join in the encumbrance of the Property. See, e.g., 9 V.S.A. § 2285(2)(C) (“Asset” means property of a debtor, but the term does not include: . . . (C) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.)

Second, Wendy and Harry can argue that the mortgage deed is invalid. “Under Vermont law a valid mortgage deed requires 1) the signature of the mortgagor; 2) the acknowledgement of the mortgagor before a notary public or other authorized official; and 3) the recording of the deed and acknowledgement in the town clerk’s office. Vt. Stat. Ann. Titl 27, § 341(a)(2006).” *Stanzione v. Bank of America, N.A.*, 404 B.R. 762, 765 (D. Vt. 2009). “A ‘deed that is improperly . . . acknowledged is invalid’ for failure to provide constructive notice.” *Id.* (quoting *Lakeview Farm, Inc. v. Enman*, 166 Vt. 158, 164 (1997); citing 27 V.S.A. § 342). Here,

the facts state “the notary indicated that Wendy was the mortgagor”. Since Wendy was not the mortgagor, there is a strong basis to claim the mortgage deed is improperly acknowledged and, therefore, invalid and fails to provide constructive notice. *See id.* at 764.

2. If Wendy and Harry were to decide to file for bankruptcy protection, they should do so under Chapter 13, assuming they meet the income requirements. By filing under this chapter, individuals can stop foreclosure proceedings and may cure delinquent mortgage payments over time. Here, Wendy and Harry want to save their Property. Since, Harry is now employed, has regular income, and he and Wendy can pay their regular mortgage payment going forward, they can propose a Chapter 13 plan of reorganization, which will propose to pay their mortgage arrearages over a three-to-five year plan. If Wendy and Harry do not qualify to file under Chapter 13 because of income requirements (*i.e.*, their income level is too high), they may qualify to reorganize their finances under Chapter 11 of the Bankruptcy Code.

Chapter 7 is a liquidating chapter, where a case trustee marshals all of a debtor’s nonexempt assets, which the trustee liquidates to pay off creditors. Since, Wendy and Harry are interested in keeping their home, they do not want liquidation. Also, they need the plan period to pay off their mortgage arrearage to the Bank.

Under Chapter 11, Wendy and Harry would have to present a three-to-five year plan under which they would have to pay their mortgage arrears in addition to their regular monthly mortgage payments. However, there is a much higher filing fee for a Chapter 11 case, in addition to more reporting requirements, which may be too burdensome for Wendy and Harry. There are insufficient facts to determine if Chapter 11 is an option for Wendy and Harry.

Chapter 9 is not available to Wendy and Harry; it is designed for the adjustment of debts of municipalities. From the fact scenario, it appears that Chapter 12 is not available to Wendy and Harry, which is designed specifically for family farmers or fishermen and which Wendy and Harry are not.

3. Wendy and Harry will have to complete credit counseling within 180 days prior to filing to bankruptcy relief. They will need to file a certification stating they each completed this required counseling. In addition, they will have to file a petition, various schedules (including a schedule of monthly income and a schedule of monthly expenses), a statement of financial affairs, a statement of intent (regarding whether they will retain or

relinquish certain property), a means test (which determines whether they are eligible to file under Chapter 13 and the term of their plan of re-organization), verification of their social security numbers, and copies of pay stubs within the last 60 days. Wendy and Harry will also have to pay the required filing fee or an application to pay in installment or to waive that fee. In addition, they must provide a creditor matrix, which lists all their creditors with their respective addresses, to provide those creditors with notice of the bankruptcy filing. Wendy and Harry will also need copies of their tax returns for the last two years, as well as copies of the mortgage deed and promissory note, for review by the case trustee. Wendy and Harry are required to file their proposed plan of reorganization within 14 days of filing their petition.

Model Answer – Question 6 - February 2013

1. While a third party not employed by Bucketco could likely establish the elements of the tort of negligence on these facts, because Betty was employed by Bucketco, and was reporting for work when she was injured, Vermont's Worker's Compensation Statute will operate as a bar to Betty's tort claims against Anne. 21 VSA § 622. The Worker's Compensation Statute is a complete defense to claims against an employer for personal injuries arising out of and in the course of employment. See Garger v. Desroches, 2009 VT 37 (owner of business cannot be sued individually in tort by employee for workplace injuries as the employer owes her employee a non-delegable duty to maintain a safe workplace). Thus, Betty's negligence claims against Bucketco will be dismissed and Betty's sole remedy is to pursue a Worker's Compensation claim.

2. Charlene is a third party not employed by Bucketco. Therefore, Bucketco (and Anne) owe Charlene a duty to maintain the Bucketco premises in a reasonably safe condition. See *e.g. Perry v. Green Mountain Mall*, 2004 VT 69 (owner of premises is liable for injuries which arise from unsafe conditions of which it knew or reasonably should have known, and against which it failed to provide reasonable safeguards). The facts indicate that Anne is solely responsible for maintaining the safety of the walkways inside the plant, and she did not place any warnings near the water and snow. Anne was likely unreasonable in failing to take these precautions, because based on her experience in maintaining the building's walkways, she knew or should have known that water and snow would accumulate in the lobby of the building after inclement weather. However, the facts also state that the accumulation was clearly visible to Charlene. Under Vermont's comparative negligence statute, a party may recover for her injuries against another if her percentage of fault is not greater than that of the defendant or defendants. See 12 V.S.A. § 1036. Thus, if the fact finder concludes that Anne was at least 50% negligent in causing Charlene's injury, Charlene will be awarded \$3,000.00 in damages.

3. Under the Uniform Commercial Code (UCC), a seller who is a merchant of “goods of the kind” may be held liable in strict liability for damages resulting from defects in a product that he sold, even if he did not manufacture the product. *See* 9A V.S.A. §§ 2-314, 2-318. The facts indicate that David sold the bookshelf to Anne in a private sale. An individual’s private one-time sale of a household item does not make him a “merchant” for purposes of strict products liability under the UCC. Further, even if David were a “merchant” under the statute, section the UCC does not allow for recovery in strict liability for damages to personal property as opposed to bodily injury. Since the facts indicate that Charlene’s only damages were her broken vase, she will not be able to recover damages in an action for strict products liability.

4. Vermont’s statute of limitations bars claims for personal injury not brought within three years of the date of the injury. *See* 12 V.S.A. § 512(4). Since Anne’s injuries were the result of a car accident that occurred over three years ago on January 1, 2010, her claims will be dismissed as untimely. While the limitations period is tolled until the date of discovery of the injury, there are no facts here to indicate any delay in Anne’s discovery of her injuries.