

VIRGINIA BOARD OF BAR EXAMINERS
Norfolk, Virginia - February 28, 2012

You MUST write your answer to Questions 1 and 2 in WHITE Answer Booklet A.

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

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

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

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

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

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

VPC moved for summary judgment on the issue of liability, relying, over Southern’s

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

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

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

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

Reminder: You MUST answer Question #1 above in the WHITE Booklet A.

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

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

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

On May 9, 2010, George signed a contract as president of Dirtco providing for the purchase of an airplane from Aviation Sales for \$500,000. Beverly, as secretary, signed and delivered a document certifying to Aviation Sales that the Dirtco board of directors had earlier approved the execution of this contract by its president George in a resolution validly passed at a duly called

meeting of the board. The certificate included the text of the corporate resolution. Beverly frequently signed such certificates as part of her duties as corporate secretary.

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

- (a) Can Truckco recover damages for breach of contract from Dirtco, Inc. and/or George? Discuss fully.**
- (b) Can Rentco recover damages for breach of contract from Dirtco and, if so, does Dirtco have a cause of action against George? Discuss fully.**
- (c) Can Aviation Sales recover damages for breach of contract from Dirtco? Discuss fully.**

Reminder: You MUST answer Question #2 above in the WHITE Booklet A.

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>>>Now MOVE to the YELLOW Answer Booklet B<<<

You MUST write your answer to Questions 3 and 4 in YELLOW Answer Booklet B.

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

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

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

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

Wesley and Andrew met in private for an hour and a half.

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

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

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

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

Reminder: You MUST answer Question #3 above in YELLOW Booklet B.

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

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

While Sam was in the hospital, his neighbor, Nancy, who happened to be the secretary to the City's Public Works Director, came to check on him at the hospital. Sam told Nancy what had

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

Upon returning home from the hospital, Sam discovered that his car had been hit by a City of Norfolk garbage collection truck that was picking up the garbage bins in front of Nancy's house. His car was a total loss. Nancy had seen the accident and reported to Sam that the garbage truck driver admitted that he had failed to put chains on the tires despite icy conditions and that he was driving faster than usual because he was late in finishing his route. Sam was furious and decided that he would definitely sue the City for all that had happened to him.

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

The City did not respond, so ten months later, Bob filed in the Norfolk Circuit Court a complaint seeking personal injury and property damages on Sam's behalf, naming the City and the garbage truck driver as defendants. The complaint included three counts and alleged (i) in Count I, that the City was guilty of gross negligence causing the accident at the library; (ii) in Count II, that the City was negligent in the operation of the snowplow, which collided with the ambulance; and (iii) in Count III, that both the City and the City employee driving the garbage truck were grossly negligent in causing the damage to Sam's parked car.

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

Reminder: You MUST answer Question #4 above in YELLOW Booklet B.

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>>>Now MOVE to Tan Answer Booklet C<<<

You MUST write your answer to Question 5 in Tan Answer Booklet C.

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

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

loan officer in the presence of each other. It was clear to both of them that Mark's assets were far greater than Sally's. They took title to the house as tenants in common.

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

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

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

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

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

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

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

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

- (a) How should the Circuit Court rule on the issue of which state's law applies? Explain fully.**
- (b) How should the Circuit Court rule on Sally's request for a jury trial? Explain fully.**
- (c) How should the Circuit Court rule on Sally's request to set aside the prenuptial agreement and Mark's defense that Sally's claim for equitable distribution is barred by the prenuptial agreement? Explain fully.**

Reminder: You MUST answer Question #5 above in Tan Booklet C.

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END OF SECTION ONE