

VIRGINIA BOARD OF BAR EXAMINERS
Norfolk, Virginia – February 25, 2014

GREEN BOOKLET - Write your answer to Question 6 in the GREEN Answer Booklet 6

6. Following a business dispute, Mike sued Trey in the Circuit Court for the City of Bristol, Virginia for breach of contract, claiming damages in the amount of \$250,000. Mike filed an appropriate request for a jury trial. The trial commenced on June 20.

During voir dire, the judge allowed wide latitude to both sides in questioning the jury panel. In questioning Reba, it was revealed that she was Trey's sister. Mike moved to strike Reba for cause. The judge denied the motion, and noted Mike's objection. Mike's lawyer then used one of his peremptory challenges to strike Reba.

In questioning Page, it was revealed that he was a partner with Trey in a business that was unrelated to the business involved in the current lawsuit. Page admitted that he had talked to Trey about the subject matter of the lawsuit and was very familiar with the facts in dispute. When asked if he would benefit in any way if the jury were to return a verdict in favor of Trey, Page responded, "Not directly, but it might free up some money that Trey could then invest in our partnership." Mike's lawyer moved to strike Page for cause. The judge denied the motion, noting Mike's objection. Again, Mike's lawyer used one of his peremptory challenges to strike Page.

During his questioning of the panel, without objection from Mike's lawyer, Trey's lawyer prefaced many of his questions with remarks such as, "Do you think this carpetbagger coming from upstate will affect your judgment?" "Does it bother you that Mike is asking you as residents of Bristol to find against one of your fellow residents?" "Mike comes to town with this high-priced lawyer from upstate to try to scare you into believing Mike's cock and bull story."

At the conclusion of the trial, the jury returned a verdict in favor of Trey. On July 1, the judge entered a final judgment on the verdict. Thirty days later, on July 31, Mike filed a motion in the Circuit Court to set aside the verdict on the ground that the evidence did not support the verdict. The judge declined to entertain the motion.

Later the same day, Mike filed a notice of appeal in the Circuit Court, specifying that he intended to take his appeal to the Court of Appeals of Virginia, where he subsequently timely filed his petition for appeal. The grounds on which Mike based his appeal, were that the Circuit Court erred by (i) denying his motions to strike Reba and Page from the jury for cause, and (ii) allowing Trey's lawyer to ask the jury panel questions (which were set out in detail in Mike's brief) calculated to "poison their minds and create unfair bias." Trey immediately filed a motion requesting the Court of Appeals to dismiss Mike's appeal.

- (a) Did the circuit judge err in declining to entertain Mike's motion to set aside the verdict? Explain fully.**
- (b) Should the Court of Appeals dismiss Mike's appeal? Explain fully.**
- (c) If Mike's appeal were properly before an appellate court, how would the court be likely to rule on each of the grounds asserted by Mike? Explain fully.**

* * * * *

PURPLE BOOKLET - Write your answer to Question 7 in the PURPLE Answer Booklet 7

7. Bob owned in fee simple a farm in Montgomery County, Virginia, which fronted on a state highway. In 2008, Jane purchased an adjoining farm that had no highway frontage and could be reached only by a county road, which led a mile and a half to the highway. Recognizing that it would shorten the access to her farm, Jane asked Bob to sell her an interest that would allow her to use the existing dirt road across his farm, which led from her house more directly to the state highway. Bob, in the spirit of being a good neighbor, refused to accept any payment but gave Jane a validly executed deed that described the dirt road and recited her right to use it. Nothing in the deed limited the duration of this right.

Jane did not record the deed, but she used the dirt road for access continuously thereafter. Jane's house and the dirt road that commenced at the front of her house and continued across Bob's farm were plainly visible to anyone on Bob's farm.

In 2012, Tom visited Bob's farm and offered to purchase it. Bob sold the farm to Tom for \$200,000 and conveyed the property in fee simple by a General Warranty deed containing English covenants of title. This deed did not mention the right that Bob had previously deeded to Jane, and a title search conducted on Tom's behalf revealed no such encumbrance on the property.

When Tom moved onto the farm, he installed and locked a gate across the dirt road. Jane explained that Bob had granted her the right to use the dirt road, but that she had lost the deed. When Tom asked Bob about it, Bob confirmed that he had granted Jane the right and that he had forgotten to mention it in his deed to Tom.

- (a) **What are the respective rights of Jane and Tom regarding Jane's right to use the dirt road, and which of them would be likely to prevail in the dispute? Explain fully.**
- (b) **Is Tom entitled to prevail in a suit against Bob for breach of covenant based on:**
- (i) **The General Warranty provisions of the deed? Explain fully.**
 - (ii) **The English covenants of title contained in the deed and, if so, which one(s)? Explain fully.**

* * * * *

GOLD BOOKLET - Write your answer to Question 8 in the GOLD Answer Booklet 8

8. Fred and Ethyl, who are husband and wife, were residents of the City of Virginia Beach, Virginia, where Ethyl personally owned and operated a yoga studio as a retail business. Fred is an avid surfer and a stay-at-home dad. He has never worked, other than as a part-time lifeguard, and he has no business experience.

In June 2011, Ethyl, accompanied by Fred, attended a meeting at the offices of Lessor, Inc., a Virginia corporation, which owns the building in which Ethyl's business was located, for the

purpose of executing a commercial lease agreement. The commercial lease agreement was in Ethyl's name only, and Ethyl alone signed the lease agreement.

During the course of the meeting, Fred was handed a typed document titled "Guaranty" and told he had to sign the document or Ethyl would not be able to obtain the lease for the studio. Fred was given no explanation as to the contents of the "Guaranty" or the terms of the underlying commercial lease agreement. Nor was Fred advised that by signing the "Guaranty" he was signing a document that purported to make him individually liable to a greater degree than Ethyl would be on the commercial lease agreement. Fred was unsure of what he was signing, but signed the "Guaranty" anyway so his wife could obtain the lease for her studio. Neither Fred nor Ethyl was advised by an attorney, and neither negotiated any of the terms of the documents, which were offered on a "take it or leave it" basis.

Among other provisions, the "Guaranty" signed by Fred contained the following provisions:

- "... the liability of the Guarantor is primary and shall not be subject to any deduction for any claim of offset or defense which Tenant . . . may have against Lessor."
- "... this Guaranty shall not be terminated or impaired by reason of any extension of time or indulgence granted by Lessor to Tenant . . ."
- "This Guaranty shall be absolute and unconditional and shall remain in effect as to any renewal, extension, amendment, assignment, transfer or other modification of the Lease, whether or not currently expressed in the Lease, and whether or not Guarantor has notice thereof."

The yoga studio's business suffered, the studio's rent went unpaid for 6 months, and Ethyl's studio lease was declared in default by Lessor. Ethyl left Fred in December 2013 and moved to Argentina with her new boyfriend.

On February 10, 2014, Lessor, Inc. filed a complaint in the Circuit Court of the City of Virginia Beach against Ethyl for breach of the commercial lease agreement and against Fred on the "Guaranty" in order to recover unpaid rent, attorney's fees and related costs.

Fred recently inherited some money from his father, so he has the ability to pay Lessor. Fred asserts that he has no obligation to pay but that, if he does, his obligation to pay is secondary to Ethyl's primary obligation. Lessor, Inc., on the other hand, asserts that Fred is a primary obligor.

Fred recites the above facts and asks you the following questions:

- (a) **What is the correct characterization of Fred's obligation? Explain fully.**
- (b) **What is Fred's best defense against Lessor, Inc. based on the terms of the "Guaranty" and the circumstances under which he signed it, and how is the Circuit Court likely to analyze and rule on that defense? Explain fully.**
- (c) **If Fred is ultimately required to pay Lessor, Inc., what rights, if any, does he have to recover against Ethyl? Explain fully.**

* * * * *

ORANGE BOOKLET - Write your answer to Question 9 in the ORANGE Answer Booklet 9

9. On January 2, 2013, Golden Beverage, Inc. (“Golden”), a California corporation with its principal place of business in Colorado, and Jefferson Orchards, Inc. (“Jefferson”), a Delaware corporation with its principal place of business in Albemarle County, Virginia, entered into a written contract requiring Jefferson to deliver large quantities of fresh apples from its orchards in Virginia to Golden in Colorado. The contract was negotiated and signed during a meeting of the companies’ executives at the Boar’s Head Resort in Charlottesville, Virginia. The contract provided that Jefferson would deliver the apples to Golden’s warehouse in Colorado throughout the 2013 apple harvest season.

After a dispute arose over the delivery of apples under the contract, in October 2013, Golden sued Jefferson in the Circuit Court for the City of Charlottesville, alleging breach of the contract and claiming damages in the amount of \$50,000. Jefferson promptly filed a notice of removal and other appropriate papers to remove the case to the United States District Court for the Western District of Virginia in Charlottesville. The following week, Jefferson filed an Answer and Counterclaim against Golden, alleging that Golden had breached the contract by refusing to accept certain deliveries and seeking \$30,000 in damages for Golden’s alleged breaches.

In pretrial proceedings, Jefferson argued that the breach of contract claims should be governed by Virginia law. Golden argued for application of Colorado law. The District Court agreed with Jefferson and at trial instructed the jury in accordance with Virginia law.

The jury returned a verdict in favor of Jefferson on Golden’s claim and found in favor of Jefferson on its Counterclaim, awarding Jefferson damages in the amount of \$30,000. On December 15, 2013, the Court entered final judgment in conformity with the jury’s verdict.

On January 15, 2014 Golden filed a motion for relief from the judgment, alleging that the judgment was void because the court lacked jurisdiction over the controversy.

- (a) Was the Court correct in applying Virginia law? Explain fully.**
- (b) On what two grounds could Golden have moved before trial to have the case remanded to state court for lack of diversity jurisdiction, and what would have been the likely outcome on each ground of such a motion? Explain fully.**
- (c) Should the Court grant Golden’s motion for relief from the judgment, and, if so, what should the relief be? Explain fully.**

* * * * *

Proceed to the short answer questions in Booklet SA - the BLUE Booklet.