

**JULY 1999 MARYLAND BAR EXAMINATION  
BOARD ANALYSIS**

**PART A - QUESTION I**

- (a) Soggy Dough Inc. (“SDI”) is liable for the payment of rent to Super Mall. Two officers of SDI signed the lease on September 20, 1998, before SDI was actually formed. Section 1-206 (a) of the Corporations and Associations Article states that charter documents of corporations are effective when accepted for filing by the State Department of Assessments and Taxation (“SDAT”). However, Alice and Barry signed the lease with Super Mall on behalf of SDI, representing to Super Mall that they were officers of SDI and that they had authority to do so. Super Mall entered into the lease agreement relying on the credit of SDI, and not on the credit of Alice and Barry, individually.

SDI will not be able successfully to assert that, because the corporation was not properly formed at the time that the lease was signed, SDI has no liability on the lease. Although Maryland does not recognize de facto corporations, its courts have adopted the doctrine of corporation by estoppel. Under corporation by estoppel, SDI should be found to be liable for payment of five months’ rent at Super Mall, plus any other sums for which SDI can be held liable under the terms of the lease. It is clear from the facts that SDI ratified the lease by accepting its terms, moving into Super Mall and operating as a business after SDAT accepted the SDI Articles of Incorporation for filing.

With respect to the liability of the individual officers on the lease, Alice and Barry signed the lease as officers of SDI. Super Mall believed at all times that it was dealing with SDI, not Alice and Barry individually, and there appears to have been no fraud, since Alice and Barry believed that the corporation had been formed. In Cranson v. International Business Machines Corp., 234 Md. 477, 200 A.2d 34 (1964), the Court of Appeals held that the corporation’s president was not liable for payment for equipment purchased for the corporation before the corporation’s articles were accepted for filing because the president of the corporation did not personally guarantee the purchase or otherwise assume any individual liability for payment. Chris may have ratified the signing of the lease by acquiescing to SDI’s possession of the premises, but Chris neither signed the lease nor made any representations to Super Mall when the lease was signed. Therefore, it appears that there is no basis for individual liability of Chris for the SDI debt on the lease. In addition, the individual officers will not be personally liable under the lease unless they guaranteed payment under the lease.

In addition to the above analysis, discussions of (i) promoter liability, (ii) partnership formation and (iii) partner liability could have been addressed in the question.

- (b) SDI and Alice will defend themselves by maintaining that a valid and binding contract did not exist with Kitchen Corp. (“KC”) because a requirement of the bylaws was not satisfied. The bylaws require the agreement and signature of two officers for any corporate obligation in excess of \$10,000.00. Alice clearly informed KC that Alice did not have the requisite authority to sign on behalf of the corporation, and that the agreement and signature of another officer would be required to form a valid contract obligating SDI to pay for the equipment. Apparently, KC made additional inquiry and Alice stated that she would seek the necessary approval for the purchase. However, KC did not wait to receive that approval, but rather, processed the order without the additional signature. KC proceeded to perform under the contract even though it had no basis for a good faith belief that a contract had been formed. Under these circumstances, there can be little doubt that KC understood that it was proceeding at its own peril, and chose to do so. Neither SDI, Alice nor any of the directors of SDI should be liable for payment for the equipment.

## **PART A - QUESTION II**

Lawyer Smart would object to Alice’s testimony as hearsay. Hearsay is defined in Maryland Rule 5-801(a) as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” If Alice attempted to testify that KC’s representative made statements to her and those out of court statements are used to prove the truth of a matter asserted, then they would be excluded as inadmissible hearsay unless the statements are either non-hearsay or are covered by an exception to the Rule.

In this case, Alice’s testimony should be admissible under one of two theories. First, Lawyer Fox could argue that Alice’s testimony concerning the KC representative’s statement is admissible because it is non-hearsay – the admission of a party. Since the KC representative was authorized to enter into contracts on behalf of KC, the representative’s statements bind KC. Second, Lawyer Fox could argue that the statement is admissible under one of the exceptions to the Rule, *i.e.* Alice’s then-existing mental condition. Under Maryland Rule 5-803 (b) (3), Lawyer Fox could argue that the statement of the KC representative to Alice was a manifestation and adoption of Alice’s intent at the time that she signed the contract with KC. Lawyer Fox would argue that the statement could be admitted to show its effect on the hearer, Alice, who intended not to enter into a contract, but to begin a process that could only be concluded with the proper ratification by another officer. Alice should be allowed to testify about both her own statements and actions at the time of the meeting with KC’s manager and those of the KC representative in connection with establishing the intent of the parties at the time of the meeting.

The “statement” in this case is the KC manager’s nod when Alice informed the manager that an additional signature would be needed to make the contract valid. A nod is not hearsay, since it is a statement of which the party has manifested an adoption or belief in its truth. See, Molesworth v. Brandon, 341 Md. 621, 672 A.2d 608 (1996). In this case, the manager’s nod acknowledged Alice’s statement that a second signature would be necessary to form a valid contract.

Furthermore, the Rule does not prohibit discussion of further conduct or actions taken by another, so Alice may testify that KC’s representative continued to contact her to get an additional approval for the contract or that KC processed the order and delivered the equipment. The Rule is intended to exclude inherently untrustworthy or tainted testimony. In this case, the contemporaneous statement (the nod) of KC’s representative helps to establish KC’s intent, and KC’s subsequent conduct is sufficient to establish the fact that KC continued to obtain approval, which was an acknowledgment of Alice’s lack of unilateral authority to bind SDI to the contract.

### **PART A - QUESTION III**

Lawyer Fox might raise two objections to introduction of the testimony – confidential marital communications privilege and inadmissible hearsay. The confidential marital communications privilege is found in Section 9-105 of the Courts and Judicial Proceedings Article, which provides that a spouse is not competent to disclose any confidential communication between the spouses occurring during the marriage. In this case, Lawyer Smart could question whether the communication was “confidential,” which is not defined. Lawyer Smart will not be able to assert successfully that the communication was not privileged because Mr. A waived the privilege by communicating the information to a third party, his barber. The privilege was Alice’s to waive, not her spouse’s. If Alice intended the communication to remain confidential, Alice’s objection that Mr. A is not competent to testify about his revelation to the barber will be upheld. See, Coleman v. State, 281 Md. 538, 380 A.2d 49 (1977). If Lawyer Fox relies exclusively on a hearsay objection, Lawyer Smart could argue that the statement was a statement of the declarant’s then-existing state of mind. In addition, if disclosed before trial, Lawyer Smart could assert that the statement is admissible because it is an “exceptional circumstance” under Maryland Rule 5-803 (b) (24), a statement not covered by another exclusion but which is (A) offered as evidence of a material fact; (B) more probative of the fact for which it is offered than any reasonably available evidence; and (C) offered to best serve the interests of justice. In this case, Lawyer Smart will argue, there is no reasonable alternative to the testimony of Mr. A, who has already breached any marital confidence by sharing his wife’s statement with his barber. This catchall exception to the hearsay rule is only applied in the most extraordinary of circumstances. Both of Lawyer Fox’s objections to the testimony of Mr. A will most likely be sustained, and the testimony will not be admitted.

## PART B - QUESTION I

I would tell Allison that Paula's claim is barred by the three-year statute of limitations at this juncture and she may not be able to file suit against Driver. Maryland Courts and Judicial Proceedings Code Annotated, Section 5-201(a); Hartford Accident & Indemnification Co. v. Scarlett Harbor Associates, 109 Md. App. 217, 674 A.2d 106 (1996). However, June was a minor at the time of the accident and may be able to proceed. Maryland Courts and Judicial Proceedings Code Annotated, Section 5-201.

Even if neither claim is barred, the facts raise an issue of liability on Paula's part. Paula's negligence arguably may not be imputed to June, and the doctrine of parent-child tort immunity may bar her claim against Paula. Renko v. McLean, 346 Md. 464, 697 A.2d 468 (1997). However, June may find herself in the position of having to testify against her mother. Since Rule 1.7 of the Maryland Rules of Professional Conduct generally precludes a lawyer from representing a client if the representation will be directly adverse to another client, I would advise Allison to not represent both unless she fully discusses this aspect of the case and garners their consent.

Additionally, Allison may not have the requisite competence to represent either client and should not accept representation if such competence cannot "be achieved by reasonable preparation." Comment To Maryland Rules of Professional Conduct, Rule 1.1.

Finally, the fee arrangement set by Allison runs afoul of Maryland Rules 1.5 and 1.8. Rule 1.5 mandates that a lawyer set a reasonable fee, determined by the time and labor required, novelty and difficulty of the question involved, experience of the attorney, the amount involved and the results obtained, and similar factors. Arguably, the fee charged Paula is not reasonable given Allison's lack of experience in this area of the law, and the fact that the suit may be barred because it was brought too late. Rule 1.8 precludes a lawyer from accepting compensation for representation of a client from one other than the client unless: the client consents; there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and, the lawyer can maintain the confidentiality requirements set forth in Rule 1.6. I would tell Allison that she could continue suit on behalf of June if she discusses the fee arrangement with her and if she no longer represents Paula.

## PART B - QUESTION II

Although a defendant has the privilege to be sued in the county of his residence, a nonresident of the State may be sued in any county of the State if service of process is accomplished. Maryland Courts and Judicial Proceedings Code Annotated, Section 6-202; Zouck v. Zouck, 204 Md. 285, 104 A.2d 573 (1954); Medina v. Meilhammer, 62 Md. App. 239, 489 A.2d 35 (1985). *See, Leung v. Nunes*, 354 Md. 217, 729 A.2d 956 (1999) (Nonresident plaintiff can choose where to file suit, and a motion to transfer

should only be granted when the balance weighs strongly in favor of the moving party.) Additionally, upon motion of any party “an action may be transferred to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice.” Maryland Courts and Judicial Proceedings Code Annotated, Section 2-327. It appears that Driver provided no information as to why the balance of convenience weighs in favor of a transfer to Baltimore City. Accordingly, the court should not grant the motion for change of venue.

### **PART B - QUESTION III**

On a motion for summary judgment, the movant must clearly show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Maryland Rule 2-501(a). Given the facts provided, Dave Driver may not be able to make such a showing.

Under the doctrine of res judicata, or claim preclusion, “a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.” Rowland v. Harrison, 320 Md. 223, 229, 577 A.2d 51 (1990). The doctrine of collateral estoppel, or issue preclusion, precludes re-litigation of a matter that has actually been litigated and decided. Its elements are identity of parties; actual litigation of an issue of fact or law; essentialness of the determination to the judgement; and the appealability of that determination by the party against whom issue preclusion is being asserted. Esslinger v. Baltimore City, 95 Md. App. 607, 622 A.2d 774 (1993).

Under either doctrine, a prong is not satisfied since Cyndi may not have been in privity with the City because she was not a party to the earlier suit; had no direct interest in the subject matter of the City’s suit (i.e., the damage to the vehicle); and lacked any control over the City’s case. *See*, Warner v. German, 100 Md. App. 512, 524, 642 A.2d 239 (1994). Accordingly, the Court should deny the motion.

### **Part C - QUESTION I**

Because the parties were married and they acquired the Harford County home they would have held title as tenants by the entirety. (There is no fact to indicate otherwise.) The separation agreement states that Al was to convey his interest in the property to Bev. Prerequisite to making a loan to Charles a deed must be prepared (in accordance with the separation agreement) conveying title to Bev.

The District Court Judgment is only recorded against Al. As long as the parties held property as tenants by the entirety this judgment would not be a lien against the property. However, immediately upon the parties divorce on June 15, 1999, the parties held title to the property as tenants in common. Thus, the District Court Judgment, even though it is only against Al, is also a lien against his interest in the property.

The right of way in favor of the next door neighbor does not indicate it is binding on his heirs, successors or assigns and does not otherwise indicate that it runs with the land. Since Jones has sold the property, the right of way is no longer an encumbrance.

The judgment recorded on January 5, 1986, against both Al and Bev is unenforceable due to limitations. The second judgment is an enforceable lien against the property which must be released in order for the mortgage to be a first lien.

The suit filed by EZ Furniture has not yet been reduced to a judgment and therefore is not a lien against the property. Recordation of a mortgage or a deed of trust from Charles to Second National prior to entry of a final judgment in favor of E Z Furniture, would give Second National's lien priority over E Z's judgment. While the pending suit does not constitute a lien on the property, a prudent title examiner would mention the existence of the suit in his/her title report.

### **Part C - QUESTION II**

Issues raised involve dual agency; the determination and resolution of independent contractor-agency relationship; availability of the equitable remedy of rescission; and liability of a principal for the negligent or fraudulent conduct of an agent.

Generally, a principal is responsible for the acts of an agent acting within the scope of his employment, whether negligent or fraudulent. The rule differs in agency situations. In these cases, one principal is not civilly liable to another for the tortious acts of an agent who acts for both parties with their consent, unless the principal in some manner participates in the wrong.

An independent contractor is normally viewed as one who acts independently without

significant control by the hiring person in matters such as scope of work, hours worked, methods, etc. A determination of the issue of agency-independent contractor depends on the substance of the relationship between the parties and not on the gloss which they choose to place on their relationship.

On these facts, Alan was not an independent contractor but an agent of BPI. Paul met Alan as a representative of BPI when he responded to the advertisement placed by BPI. Alan worked for BPI. Alan purporting to act on behalf of BPI, and using its name, facilities and resources, brokered the sales transaction between Paul and Carl. He obtained the listing contract with Carl in the name of BPI and obtained a commission for BPI. The facts fairly establish Alan's agency, both actual and apparent.

The facts also establish that Alan was acting in a dual agency capacity with the consent of Paul and Carl. He was working for Paul in an attempt to locate a suitable small business. He also analyzed the financial statements of Carl's business and advised Paul as to the profitability of that business. Clearly, by obtaining the listing contract from Carl and providing for a commission to BPI, Alan also was acting as an agent for Carl in this transaction.

There is evidence that Carl, as a principal, had no knowledge of the representations made by Paul by Alan, nor did Carl participate in any way which would make him culpable.

Alan's misrepresentations are not attributable to Carl because he was unaware at the time it was made and did not subsequently ratify or adopt Alan's representations. Therefore, Carl is not liable. As to rescission and restitution, Paul; may be entitled to rescind the contract with Carl. Equity permits rescission of contracts based on fraudulent misrepresentations by an agent even if his principal is entirely innocent in participation of the wrongdoing, on the theory that one should not benefit from the fraud of another. However, rescission is available only if the parties can be restored to the positions they held prior to the transaction. If Carl's position is materially changed before knowledge of the misrepresentations, rescission and restitution would not be an appropriate remedy.

Regarding Alan, he is personally liable for monetary damages directly attributable to his misrepresentations, whether fraudulent or negligent, if they were relied upon by Paul purchasing the business. Regarding BPI, despite the independent contractor agreement, BPI can be held liable for damages attributable to Alan's misrepresentations. The facts establish that Alan was an agent of BPI and not an independent contractor.

## **PART D - QUESTION I**

An analysis of liability must always begin with a determination of those persons who have a duty to prevent the occurrence. In our question, those persons are Whitley, Jane and ABC bank, Blink's Security, Inc. and Jerry. Whitley has a duty because, he was hired as a security guard with a primary duty to prevent the harm that actually occurred. Jane and ABC bank assumed a duty by hiring Blink's Security, Inc. to provide a security guard to prevent the harm that occurred. Blinks Security, Inc. assumed the duty by hiring Whitley and placing him in the bank to prevent the harm that occurred. Jerry's duty consisted of not harming anyone by his actions.

After identifying those persons with a duty, we must determine which of them breached their duties to the injured party. Whitley breached his duty because the fact that his weapon was not loaded prevented him from preventing the harm that occurred. ABC bank, by its agent, Jane, breached its duty because it allowed Whitley to perform his duties with a weapon that was not loaded. Since there is no evidence that Blinks Security was aware that Whitley performed his duties with an unloaded weapon, we cannot say that it breached its duty unless we can show that it should have known about his habit and took no steps to prevent it. Jerry, of course, breached his duty of not causing injury to others by his actions by shooting Susie.

The next issue to be decided is was the breach of duty by the breaching parties the proximate cause of the injuries suffered by the injured parties. Clearly, had Whitley's weapon been loaded, he might have been able to prevent Jerry from shooting Susie. Had Jane and ABC bank not allowed Whitley to perform his duties with an unloaded weapon, he might have been able to prevent the injury to Susie. And, if Jerry had not fired his weapon, Susie would not have been injured.

The injured persons are Susie and her husband. The fact of their injuries is not in doubt, nor is the fact that their injuries were caused by the negligence of Whitley, Jane and ABC bank, and the intentional actions of Jerry.

Therefore, I would advise Susie and her husband that they could file a suit for negligence against Whitley, Jane and ABC bank, and a suit for the intentional tort of assault and battery against Jerry. Each suit should also include a count for loss of consortium on behalf of Susie's husband.

## **PART D - QUESTION II**

1. The defendants may be charged with the following crimes:
  - (a) Solicitation: A criminal solicitation is the act of advising, urging or inducing another to commit a crime and that the crime be either a felony or a breach of the peace misdemeanor. Joe, now deceased, had urged Frank and Barney to commit a felony by asking them to join



him in robbing the convenience store and, had he lived, could have been charged with solicitation.

- (b) **Aiding and Abetting:** Aiding and Abetting requires that the defendant be present when the crime is committed and that he, by some act, willfully participated with the intent to make the crime succeed. There is no question that Frank aided and abetted Joe in the attempted robbery because he was actually present in the store at the time that the crime was attempted. Barney is also guilty for aiding and abetting because he provided the gun used in the attempted robbery and, although he was not present in the store, he was near enough to provide assistance.
- (c) **Accessory Before the Fact:** In order to convict the defendant of this crime, the state must prove that the felony was committed by another, and, before the crime was committed, the defendant aided, counseled, commanded or encouraged the commission of the crime with the intent that the crime succeed. An accomplice, one who knowingly and with common criminal intent, participated, cooperated, aided or abetted the principal offender, may be convicted either as a principal or an accessory before the fact. Therefore, under the facts of the question, Frank and Barney may be convicted as accessories before the fact.
- (c) **Conspiracy:** Conspiracy is an agreement between two or more persons to commit a crime. Joe and Frank certainly conspired to commit the robbery, and therefore, the charge regarding Frank is rather clear. The charge regarding Barney is a bit more difficult. However, membership in a conspiracy may be inferred on the part of one who has a stake in the outcome as demonstrated by a knowledge of the conspiracy, coupled with providing goods or services necessary for the crime. The fact that Barney had knowledge of the conspiracy between Frank and Joe, provided the gun actually used, and may have stood to gain the benefit of the proceeds makes him a member of the conspiracy.
- (d) **Attempted Robbery:** Attempt is a substantial step, beyond mere preparation, toward the commission of a crime. Robbery is the taking and carrying away the property of another from his or her presence and control by force or the threat of force with the intent to steal the property. It is clear from the facts that Frank, by going into the convenience store with Joe, took a substantial step toward the commission of the crime of robbery. And it is clear that, by the use of the gun, the defendants intended to take the property from the presence of the clerk by force or the threat of force.
- (e) **Felony Murder:** In order to convict a defendant of felony murder, the state must prove that the defendant or another participating in the crime with the defendant attempted to commit a felony and that, during the commission of the felony, either the defendant or another participating with him committed an act which resulted in the death of the victim. Maryland uses the agency theory of liability to prove felony murder. Under this theory, a felon cannot be guilty of murder unless the homicidal act is actually or constructively the act of the felons. This requires that the killing be committed by the defendant or by one acting in concert with

the defendant in furtherance of the common design. Thus, none of the felons is guilty of murder when a police officer, victim or bystander kills a police officer, victim, bystander or co-felon because the homicidal agents are direct and immediate adversaries of the felon(s) and are engaged in resisting, not furthering the design of the felons. (9 U. Balt. L. Rev. 508, 513-15)(1980). Therefore, since Joe was killed by the store clerk, the charge of felony murder is not applicable.

- (f) Theft: Theft is the taking and carrying away the property of another with the intent to permanently deprive the owner of the property. Frank is guilty of theft because, as he was leaving the store, he took a carton of cigarettes.
  - (g) Use of a Handgun in the Commission of a felony or crime of violence: In order to convict the defendant, the state must prove that the defendant committed the felony and that the defendant used a handgun in the commission of the felony. Since Joe was the one who actually held the handgun, in order for Frank and/or Barney to be convicted, it must be as an accomplice.
2. Defenses: The surviving defendants may argue as follows:
- (a) Solicitation: Both Barney and Frank will argue that the commission of the crime was Joe's idea and he solicited their participation. Therefore, they cannot be guilty of solicitation.
  - (b) Aiding and Abetting: Barney will argue that he was not present at the scene of the crime; that he was across the street in front of the bar, and that he did not aid in the commission of the crime. However, because he provided the gun that was used, he may be found guilty.
  - (c) Conspiracy: Barney will argue that he did not agree to commit the crime with Frank and Joe, and therefore, he could not be convicted of conspiracy. However, he knew about the proposed crime, provided the gun and, since the proceeds were to be divided equally, he stood to benefit.
  - (d) Voluntary Intoxication: A person may be drinking and even intoxicated but still have the necessary mental faculties to act with a specific intent. In order to convict a defendant, the state must prove, beyond a reasonable doubt, that the degree of intoxication did not prevent the defendant from acting with a specific intent.
  - (e) Attempted Robbery: Barney will argue that he took no steps toward the completion of the robbery. The supplying of the gun constitutes mere preparation at best, and more than mere preparation is required for a conviction.
  - (f) Felony Murder: Frank and Barney will both argue that, since Joe was killed by the store clerk, neither of them may be convicted of felony murder.

- (g) Theft: Barney will argue that he was not a party to the theft, and that, since the theft of the cigarettes was not a part of the original crime contemplated he could not even be convicted as a accomplice.
- (h) Use of a handgun in the commission of a crime of violence: Both defendants will argue that accomplice liability does not lie for this crime. However, their presence at the scene and their previous knowledge of the crime may be sufficient for a conviction.

**PART E - QUESTION I**

1. Paul can assert breach of implied warranty claims and express warranty claims against Sally. As a merchant of printing equipment, a warranty of merchantability is implied in the sale by Sally under §2-314 of the Commercial Law Article, unless excluded under Section §2-316. Based on the facts, Paul did not rely on Sally’s skill or judgement to select the press; consequently, there is no basis for a claim of breach of implied warranty of fitness for a particular use under §2-315. Paul can also assert a claim of express warranty based under §2-313, based on an affirmation of fact made by the repair records furnished by Seller that the press was “in first class operating condition.” Paul can argue that the repair record, including this statement, was part of the basis of the bargain and created an express warranty that the press conformed to this description. §2-316.

Credit is also given for answers which construe the bill of sale as giving Paul the right to inspect the press after deliver, and to revoke acceptance upon discovery of latent defects.

2. Paul is unlikely to prevail in his claim based on implied warranty. The term “as is,” in the bill of sale which he signed, is deemed to call “the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.”

However, Paul is likely to prevail in his claim based on a breach of express warranty. The “as is” term does not limit or negate an express warranty §2-316(1). The printing press was sold with the express warranty that it was in first-class operating condition. This express warranty was breached. Limited Flying Club, Inc. v. Wood. 632 F.2d 51 (8<sup>th</sup> Cir. 1980), 29 UCC Rep. 1497.

3. Sally, a used printing equipment dealer, is a “person in the business of selling goods of that kind” §1-201(9). Consequently, Paul will be deemed a buyer in the ordinary course of business and will take free of any security interest created by the seller, Sally. §9-307.
4. If Sally were a shop owner, instead of a dealer, she would make no implied warranty of merchantability, as she is arguably not a merchant with respect to the equipment. Alternatively, it is arguable that Sally still gives the implied warranty of merchantability because she holds herself out as having knowledge peculiar to the press. §2-104. Credit is given for a discussion of either alternative.

Likewise, if Sally is not a dealer, the protection of 9-307 is not available to Paul. By filing a financing statement in the office of the Maryland State Department of Assessments and Taxation, the Bank's security interest was perfected. §9-410(c).

Paul took title subject to the Bank's perfected security interest in the press. Paul, the owner of the press, is a "debtor" for provisions of the UCC dealing with the collateral. §9-105(d).

Upon a default by Sally in payment of the \$5,000, the Bank may exercise its rights to take possession and dispose of the collateral. §9-503, §9-504.

## **PART E - QUESTION II**

The Suns breached the employment contract by terminating Scott. Based on the facts, Scott was guaranteed a place on the team, regardless of performance standards. Scott is entitled to recover damages of \$400,000 per month, or \$3,600,000 for the nine months remaining of the contract.

The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount the employee has earned or reasonable effort might have earned from other employment opportunities not sought or accepted by the discharged employee which can be applied in mitigation. The employer must show that other employment was comparable or substantially similar to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. Parker v. 20<sup>th</sup> Century Fox, 3 Cal. 3d 176,474 P.2d 689 (1970).

The Suns substitute offer of employment as a pitching instructor and goodwill ambassador constituted an offer both different and inferior to that of a major league baseball player.

Conversely, there should be no issue that the offer from the Cubs was for similar employment and that Scott should reasonably have accepted this offer. Therefore, the Suns should be credited with \$900,000, the amount guaranteed by the Cubs.

Scott likely will recover \$3,600,000 from the Suns.

## PART F- QUESTION I

Smith's case raises a number of constitutional issues. First, although the Full Faith and Credit Clause of the Constitution requires states to honor judgments issued by the courts of another state, this principle does not prevent Maryland courts from examining the validity of the underlying judgment and, if it is not valid, refusing to enforce the foreign judgment. *See, e.g., Miserando v. Resort Properties*, 345 Md. 43, 691 A.2d 208, 1997.

As to the merits of Smith's case, he should first argue that he had insufficient contacts with Westover to warrant that state's exercising jurisdiction over him at all. He resides in Maryland, is retired and thus has no occupation and claims never to have been in Westover in his life. More importantly, the contact which is the basis of the action was not made in Westover but Maryland; Westover's role in this action appears to be quite fortuitous and is based solely upon the fact that Appliance Shack has moved its corporate headquarters to that state. In a long series of cases, the Supreme Court has made it clear that there must be at least "minimum contacts" between the forum state and the defendant. "Due process requires only that . . . [the defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). "The quality and quantity of contacts required to support the exercise of personal jurisdiction" depend upon the facts of each particular case. *Camelback Ski Corp. v. Behning*, 312 Md. 330, 338, 539 A.2d 1107 (1988), *cert. denied*, 488 U.S. 849, 102 L. Ed. 2d 103, 109 S. Ct. 130 (1988).

Ordinarily, cases involve either "general jurisdiction" where the cause of action is unrelated to the defendant's contact with the forum state, or "specific jurisdiction" where the cause of action arises out of the defendant's contacts with the forum state. *Id.* Generally speaking, when the cause of action does not arise out of, or is not directly related to, the conduct of the defendant within the forum, contacts reflecting continuous or systematic . . . conduct will be required to sustain jurisdiction. On the other hand, when the cause of action arises out of the contacts that the defendant had with the forum, it may be entirely fair to permit the exercise of jurisdiction as to that claim. *Camelback Ski Corp. v. Behning*, 312 Md. at 338-39.

This is a case of general jurisdiction and Smith does not have the regular contacts with Westover necessary to establish jurisdiction.

A second argument is that the notice afforded of the Westover litigation was inadequate. What steps are adequate to provide notice depends upon a consideration of several factors:

To determine whether notice in a particular case is constitutionally sufficient, the court "must balance the interests of the state or the giver of notice against the individual interest sought to be protected by the fourteenth amendment." At a minimum, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections."

Among the multiple factors to be considered in determining what process is due in a given situation is the nature of the action being brought.

What is a sufficient method of notification depends upon the nature of the action and the circumstances. The interests to be considered are, on the one hand, those of the state and of the plaintiff in bringing the issues involved to a final settlement and, on the other hand, those of the defendant in being afforded an opportunity to defend. The practicalities of the situation must be considered. A state is not precluded from exercising such judicial jurisdiction as it may possess by the fact that under the circumstances it is impossible to make certain that notice will reach the defendant or because the only sure way of giving notice would be so burdensome and expensive as to be impracticable. *Miserando v. Resort Properties, supra*, 345 Md. 53, 54. [Citations omitted.]

Here, the action is for a small amount of money but, on the other hand, it is clearly established in most states and under most circumstances that actual service is the preferred method of effecting service. While service first class mail may be adequate under certain circumstances, it does not generally offer a sufficiently "high degree of actual notice." *Miserando v. Resort Properties*, 345 Md. at 65.

(Note: the Court of Appeals split 4 - 3 on this issue in the *Miserandio* case so I really don't care how the examinees come out on this issue.)

## **PART F - QUESTION II**

The right against self-incrimination applies in civil as well as criminal proceedings. *Meyers v. Maness*, 419 U.S. 449, 464 (1975). Adam has two choices; both are detrimental to him. First, he could waive the privilege. If it is waived in the civil proceeding, it cannot be invoked to prevent any of his testimonial admissions from being used in the criminal trial. Alternately, Adams could assert the privilege in the civil proceeding. The trier of fact, in the civil proceeding, would then be permitted to draw an adverse conclusion from his silence.

In the civil proceeding, the plaintiff is permitted to call Adams as a witness. A witness cannot claim privilege as a reason for not taking the stand. *Adams v. State*, 200 Md. 133, 145 (1952). He would be required to take the stand. He also could take the stand in his own defense. However, he cannot be compelled to answer any questions, in the civil proceeding, that would tend to incriminate him. In order to preserve this right against self-incrimination, he would have to assert the "Fifth Amendment" upon being asked an incriminating question. The court would then determine whether the testimony sought would be "information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believed could be used against him in a criminal prosecution." *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951). If the testimony meets this two-

pronged test, Adams cannot be compelled to answer. If he, however, elects to waive his privilege and disclosed criminal behavior, he is subject to cross-examination and must disclose all of the details. *Rogers v. U.S.*, 340 U.S. 367, 373-374 (1951); *Brown v. U.S.*, 356 U.S. 148, 154-156 (1958).

The detriment to Adams in preserving this right is that the civil trier of fact will be permitted to weigh Adam's invoking of the privilege against him. The plaintiff will be permitted to comment on this silence. *Robinson v. Robinson*, 328 Md. 507, 514-516 (1992); *Whitaker v. Prince George's County*, 307 Md. 368, 384-387 (1986).

Alternatively, should Adams answer an incriminating question, he will be deemed to have waived the privilege and will no longer be able to assert it in either proceeding. Although he cannot be forced to testify in the criminal proceeding, his statements from the civil proceeding can be admitted in the criminal trial as statements by a party-opponent. Md. Rule 5-803.