July 2007 Bar Examination Sample Answers

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Question 1 - Sample Answer 1.

1.a. Because this agreement was supported by consideration, this defense will not prevail. In general, a contract must be supported by consideration to be enforceable (except under certain provisions in UCC allowing a firm offer to be enforceable despite a lack of consideration). This oral modification is governed by Common Law since it deals with the rendition of services, as opposed to a contract for goods, which would be governed by the UCC. If the UCC were to apply, consideration would not be necessary in certain situations where the firm offer rule applied.

Murphy's lawyer will likely argue that there is sufficient consideration by way of his agreeing to release all claims. If Murphy had simply agreed to get rid of the lien on the property, this defense would be weaker because of its failure to satisfy the statutory requirements of filing a lien within three months of work's being completed. However, by agreeing to release "all claims," Murphy also agreed to forbear his legal right to bring litigation against Ben for quantum meruit or the like. Relinquishing one's legal rights can serve as consideration. Further, Murphy could argue that Murphy's agreeing to take less than was agreed upon in the original contract was sufficient consideration.

This could possibly be construed as an accord-a promise to pay or do something else in place of a former promise to pay or do something else. However, simply agreeing to pay a lesser amount than the amount owed is not generally sufficient for an accord. However, since other issues are involved here, more assessment would be necessary.

Ben's defensive argument here will likely fail since this defense generally applies when parties do not agree on material matters within the contract. No meeting of the minds would allow a party to escape performance from a contract where the parties had different understandings regarding the material terms of the contract, and their performance is excused because without meeting of the minds, there is no enforceable agreement. Since it is clear that both parties intended for the lesser amount of compensation to be exchanged for the forbearance of seeking subsequent legal remedies for the failure to pay, the parties agreed.

Ben's strongest argument is that he was tricked into agreeing to pay Murphy's based on the fact that Murphy's had a valid lien against the Owner's property. Ben will argue that Murphy's actively misrepresented to him that this lien was valid. However, Ben could have easily discovered the fault in Murphy's untimely filing of the lien by checking the records, so he likely should be required to have done so before promising to pay his debts. Further, Murphy's was not misrepresenting that money is owed them for work that they have done for Ben's benefit, and Ben knew this. Ben

was to receive release of all claims in exchange for his payment, and this included other types of relief that Murphy could have sought, so he was not misled into believing that he owed someone that he really did not owe.

Question 1 - Sample Answer 2.

Since Ben is trying to disclaim the existence of his contract, this would evidence the fact that an agreement had been reached. Despite the fact that this was not signed by Ben, the fact that it was drawn by him, and contained material provisions that are sufficient to identify the parties' previous negotiations, it could be used to estop him from denying existence of the negotiations and the extent to which they reached.

In order for a contract to be enforceable, there must be a valid offer and acceptance. This writing could serve as evidence of Ben's acceptance of Murphy's offer. Ben's offer of $34,000 in exchange for release of all claims could be seen as the initial offer. While Murphy's counteroffer of $36,000 would effectively make acceptance of the $34,000 offer impossible since Murphy's counteroffer would actually constitute a new offer, it could be deemed accepted by the terms contained in Ben's attorney's letter to Murphy's in which he included terms of this settlement agreement.

The fact that it was never signed does not necessarily mean that it is irrelevant, since Ben could not use the Statute of Frauds defense in this case, and given the subject matter Murphy's was not required to produce a writing signed by the one against whom enforcement is sought.

Murphy's did not enter into a contract with owner, as Murphy's obligations and rights in contract existed with Ben. However, Murphy's may allege that Owner owes him for quantum meruit-based on the unjust enrichment that owner received at his expense. Clearly, Owner received some benefit from Murphy's services in that his property was painted. Hence, Murphy's could allege a quasi-contractual, equitable relief claim that he is owed money based on how much benefit was bestowed upon Owner.

1. a. Lack of Consideration

   Lack of consideration is not an adequate defense. The issue in Ben's first defense is whether there is adequate consideration for the promise to pay $36,000 in exchange for the promise to release the lien and not seek any further remedies. A contract is an enforceable legal agreement. An agreement is enforceable in part if there is adequate consideration. Generally one must promise to do something which one is entitled not to do or to not do something which one is entitled to do for there to be adequate consideration. Ben's defense here is based on the claim that there was no adequate lien on the property so Murphy's promise to release the lien was not adequate consideration for his promise to pay $36,000. This is not an adequate defense.

   Release from the lien was not the entire consideration for Ben's promise. Murphy's also promised to release all claims. Murphy's might have had other legal claims against Ben. Additionally, the fact that the lien was probably not enforceable does not mean that Murphy's did not have an argument for its enforceability despite what appears to

be clear legal indication that it was enforceable. Ben's agreement to settle a disputed amount, even if not legally enforceable is adequate consideration along with the release of other claims.

b. No meeting of the minds:

Ben's second argument is that there was no meeting of the minds for there to be an enforceable agreement. At issue here is the enforceability of the oral agreement to settle the case for $36,000. Oral agreements are enforceable if they are not subject to the Statute of Frauds. The Statute of Frauds demands written legal agreements in contracts for marriage, where the contract cannot be performed in one year, for land, and for the sale of land. None of these exceptions apply.

The oral agreement would be adequate therefore if all parties had agreed. Ben's argument may be based on his former belief that the lien was appropriate. This will not excuse the agreement. Ben had just as much knowledge as Murphy's, or ability to know, whether the lien was appropriate when the oral contract was made. Therefore his unilateral mistake, if there was any, is no defense that there was no meeting of the minds. The parties here agreed to all essential terms and there is an agreement.

c. Misrepresentations by Murphy's

At issue here is whether Murphy's made any misrepresentations. A misrepresentation requires a misrepresentation of material fact, fault, intent to cause reliance, actual reliance and damages. There does not appear to be any fault of scienter on Murphy's action. It appears that Murphy's believed it had a legitimate claim for the lien when placed on the property. While Murphy's did intend for Ben's to rely on this lien in coming to the settlement, Ben had no reason to solely rely on this therefore there is no actual reliance. Murphy's and Ben may both have been mistaken as to whether the lien was actually legally enforceable, however, Murphy's did nothing to mislead Ben, therefore this is not an adequate defense.

2. The additional facts of the written, unsigned agreement will have little effect on the analysis of this case. The language in the written agreement that says the agreement shall be binding when signed appears to represent that the written agreement will be binding when signed. This has no effect on a previous oral agreement which is independent of the written agreement. Once signed this language along with the rest of the written contract may operate to exclude evidence of the prior oral agreement, if the written agreement is deemed to be a full integration. The parol evidence rule effects only the reading and interpretation of the written agreement when signed, not any actual former agreements such as the oral agreement to settle the case.

3. It appears that the lien against the property is not enforceable so any remedy Murphy's may have against the owner will have to be outside of this lien. One possibility for a recourse against the owner is a contractual obligation. There are no facts to indicate that the owner had an agreement with Murphy's. However, there may have been a surety agreement in which case the owner agreed to pay for the unpaid debts of the General Contractor. If there is such an agreement Murphy's will have a claim against Ben and the Owner. With a surety agreement the protected party, Murphy's has a right of action against the surety when the debt is not paid.

Murphy's other recourse against the owner would be for unjust enrichment. An unjust enrichment occurs when one party is unjustly enriched by the actions of another party. If a party has induced another to act in such a way that he/she is benefitted then he/she must pay for the benefit. The damages for the unjust enrichment come not from the agreement but from the benefit to the defendant party. To claim this relief Murphy's must show that there is no adequate legal remedy and that fairness requires the application of the equitable remedy.

Question 1 - Sample Answer 3.

1. a. The claim is for breach of a settlement contract. The defense that a lack of consideration is not a valid defense because there was a bargained-for exchange between the parties such that each party agreed to some legal detriment or benefit, thereby providing legally sufficient consideration to support the formation of a legal contract.

   In order for there to be valid consideration sufficient to support a contract there must be a bargained for legal detriment or benefit from each party. This often is embodied by the promises exchanged by the parties. The bargained for detriment comes in the form of a promise to do something that the party is not legally obligated to otherwise do.

   In the present case the legal detriment offered by Murphy's came in the form of an accord to settle the claim for less than the original agreed price for the painting services. Murphy's was originally entitled to $40,000 and agreed to accept $36,000--an amount less than he was originally entitled to. The benefit of the exchange was that Murphy's was entitled to compensation for work completed when the satisfactory nature of the work was contested.

   The consideration offered by Ben was that he was willing to pay $36,000 when he (a) was not satisfied with the work [which may have discharged his obligation to complete the work, and (b) that he was willing to pay $36,000 when there was an invalid claim of lien (this is a bit of a stretch because Ben was not aware of the untimely lien when he agreed to pay the money)]. The benefit that Ben was to receive was the discharge of the lien in a manner that satisfied his obligation to Owner.

   Consequently, there was valid, bargained-for detriment on the part of parties to the contract and the defense of consideration will fail because the consideration offered will result in a legally binding contract.

   b. In order for a valid, legally enforceable contract to be performed, the parties must mutually assent to the same terms, promises and even conditions. In the present case, the essential terms are that Murphy's would discharge the claim of lien in exchange for the performance of Ben, which was payment of $36,000.

   Ben's claim of no meeting of the minds would be based on the fact that, as set forth in

G.C. Lawyer's letter, the details of the transaction had not been discussed; specifically, the forms of the release documents and the release of the claim of lien. In addition, there may be the issue of whether there was a timely lien in fact filed (this matter will be discussed in the next question).

Ben's claim that there is no meeting of the minds will fail. The matters contested (form and substance of release documents) are non-material (or non-essential terms) to the contract. The essence of the contract, i.e. money for release of claim of lien, was discussed and agreed. The nature of the form and substance of the documents is a matter of the order and method of performance. This is something that a court could resolve on its own. In fact, the satisfactory nature of the release documents and their form are matters of performance and not a matter of meeting the minds (which goes to the promises bargained for). A court would allow an acceptable release, complying with requirements of the lien statute, to fix method of performance.

c. In order make out a claim for misrepresentation, there must (a) a misrepresentation, (b) made by a party with knowledge of its falsity (scienter), (c) inducing detrimental reliance, (d) the detrimental reliance must be justifiable, and (e) harm must be caused.

   In Georgia, when a party asserts misrepresentation he or she must also assert that they investigated the nature of representation in order to be considered to have justifiably relied on it. In the present case, there are no facts to indicate that the General Contractor investigated the misrepresentation prior to entering the contract. Consequently, he cannot assert the material misrepresentation.

2. The facts do not change the analysis. Although one could consider the failure to sign a breach of his performance obligation, there is a simple remedy. This breach could be resolved by calling counsel and asking that the agreement be signed. To resolve the issue, call the party and have him sign it. Once signed, my answer would be the same.

   If the release was never signed and the party refused to sign it then that would be considered a breach; however, there are no facts to support that conclusion. The language is useful, however, any agreement that is not signed (and must be in writing) would violate the Statute of Frauds and would not be recognized as an enforceable contract.

3. Murphy's could sue the owner in equity for unjust enrichment. As there is no contract between the Owner and Murphy's there is no action at law. However, Murphy's has conferred a benefit (i.e. painting the house) on the Owner. The Owner is enriched by the services provided by Murphy's. Murphy's damages would be the reasonable value of the services rendered.

   In addition, Murphy's has a Claim of Lien that may confer certain rights on him for collection. However, the untimely filing of the lien would probably preclude any rights provided by statute.

   Owner may have certain defenses pursuant to the Claim of Lien statute. However, his remedy would most likely be against the General Contractor if the Owner paid the General Contractor, Ben.

To: Lyle Palkovitch
From: Applicant
Re: Mistover Acres LLC
Date: July 24, 2007

I have been asked to prepare an objective memorandum analyzing (1) whether Petra Flynn can be held personally liable for the harm caused by aerial crop dusting carried out by the LLC in which Ms. Flynn is a member (2) whether the aerial crop dusting constituted an ultrahazardous activity. My answers to both questions are below. The analysis will assume, as instructed, that the aerial crop dusting caused damage to the trout farm.

If the Aerial Crop Dusting Is Determined to Constitute Tortious Activity, Ms. Flynn Will Likely Be Personally Liable Because of Her Individual Participation In the Planning and Execution of the Crop Dusting Activities.

Under the Franklin Limited Liability Act, the personal liability of partners in limited liabilities companies is generally circumcised. Although "a member of a limited liability company is not personally liable solely by reason" of her membership, section 605 states nothing in the section "shall be construed to affect the liability of a member of a limited liability company to third parties for the member's participation tortious conduct." Thus, if Mistover LLC's crop dusting activities are determined to be tortious, Ms. Flynn ***could*** be held personally liable for her participation in those activities.

The distinction made is between management status and membership conduct. ***See Hodas v. Ice***. Ms. Flynn cannot be held personally liable for Mistover's tortious acts just by virtue of her status as a partner; she can be held personally liable for her conduct as a member. In other words, vicarious liability against members for torts committed by the LLC is not allowed, but members will be held liable for their own tortious acts as members of the LLC. ***See Hodas v. Ice***. Individual liability is derived from individual actions; for instance, Chip Kendall could be held personally liable if the crop dusting is deemed tortious because he actually flew the plane that dusted the crops.

Although the connection of Ms. Flynn's activities to the dusting are somewhat more attenuated, her conduct is likely to be deemed active participation, rather than "performing what is merely a general administrative duty." ***See Lee v. Bayrd***. Ms. Flynn did carry out "general administrative duties" in connection to her duties to market and sell Mistover's crops. She ordered the MU-83 pesticide through an agricultural supplier and filed the relevant notices on the township web site, at the Town Hall, and in three other places.

Had her activities been limited to the activities outlined above, she would have a strong case that she was merely performing administrative duties. She is in charge of marketing and sales, while Mr. Kendall has authority over planting and harvesting. However, Flynn discussed the need for pesticides with Kendall, even expressing concerns about the marketing consequences. She and Kendall then researched pesticides and together selected MU-83. She also was part of the decision to use aerial crop dusting rather than hand-spraying. Additionally she observed Mr. Kendall's flight and the use of the pesticides, and walked through the fields to verify effectiveness. The User's Guide shows that she also knew of the risks.

These actions show that Ms. Flynn was more than an administrative observer to decisions made by someone else; instead, she was an active participant in every part of the operation besides the actual use of the pesticides. The fact that she did not actually fly the plane would be helpful in

asserting that she did not directly commit the act. Under ***Hodas v. Ice***, she is not liable for the acts of other members of the partnership, but the facts tend to show that she "authorized, directs, and participated" in relevant acts. Therefore, Ms. Flynn is liable to face personal liability for those acts if they are determined to be tortious.

Because the Crop Dusting Entailed a High Degree of Risk

Although this is a closer question, Mistover's crop dusting is likely to be found an ultrahazardous activity under a six-part test outlined in ***Thurman v. Ellis***. In ***Sisson***, the court found that the most important, albeit not dispositive part of the test was the third, "inability to eliminate the risk by the exercise of reasonable care." The MU-83 User's Guide announces that "drift and runoff may be toxic to aquatic organisms in neighboring areas" and that drift "is always a risk of pesticide application." The Guide also directs that aerial dusting, although safe, should occur no higher than 30 feet. Mistover's application was made at 20 feet, perhaps indicating that the risk from the product cannot be eliminated.

I will now address the other factors sequentially. First, the high degree of risk of harm and second, the likelihood that such harm will be great, are shown in the MU-83 user's guide. Although the guide also attests to the safety of the product, it notes that drift will occur and improper use or application may cause serious injury or death. This allows for a degree of care, but still establishes a strong risk of harm.

Fourth, pesticides were not "a matter of common usage" in the area surrounding Mistover, as many of the area's farms are dedicated to organic practices. Even Flynn was concerned about marketing consequences of large-scale pesticide use. Factor five, the inappropriateness of the activity to place it is carried out, cuts both ways. On the one hand, many area growers are organic, but on the other hand, the area has long been agricultural, and pesticides are associated with agriculture.

Finally, the extent to which the activity benefitted Mistover does not equate to the extent the spraying benefitted the community, and that value is small. The community has been revitalized by organic farming, not pesticides, and the dangerous attributes of the crop spraying outweigh the benefits experienced by the community in having a successful gourmet lettuce farm (compare the benefits of firefighting).

Under the totality of the circumstances it is likely, although not certain, that the aerial crop dusting constituted an ultrahazardous activity under these circumstances.

Question 2 - Sample Answer 1.
(disclaimer)

Johnny could bring an action to modify the property settlement agreement. A marital agreement must be voluntary, fair when enforced, and all material facts must be disclosed. Here Johnny could argue that not all material facts were disclosed such as the land transfer or he could argue

that the settlement was unfair when it was enforced because he did not get a fair share of the property. Because both of Johnny's arguments are based on his acts of fraud it is unlikely that he will succeed in his action.

a. Johnny may bring an equitable action for specific performance to make Billy Bob give him back the farm per their agreement. Specific performance is available when the parties have contracted to convey a unique and special item for which there is no substitute. Here the contract involved land which by definition is unique and proper for a specific performance action.

   Billy Bob's best defense against specific performance is the equitable doctrine of unclean hands. A plaintiff seeking an equitable remedy from the court must do so with "clean hands." In other words, the plaintiff must be free of any wrongdoing himself. Here Johnny entered into his deal with Billy Bob for the unscrupulous reason of defrauding his wife Frankie. Therefore the courts of equity will not be available to him and his motion will be denied.

b. Johnny has no remedy against Jimmy George because he is a holder in due course. In order for a purchaser to take free of any claims they must give value, without notice, and in good faith. Here Jimmy George paid the fair market value for the land and there are no facts to suggest that he did it without good faith. The facts do not indicate that Jimmy had any actual knowledge of Johnny's claim and there was no constructive notice through the recording statutes nor was there notice by inspection since Jimmy George would not be notified by inspecting the land.

Johnny could bring a breach of contract action against Babe for failing to marry him. A contract requires an offer, acceptance, and consideration in order to be valid. Here Johnny and Babe promised to marry each other and Johnny gave Babe the ring in contemplation of the marriage. Babe could argue that the couple had already promised to marry each other and therefore the ring was merely a gift and shouldn't be given back. She could also argue that since the contract was entered into when both of the parties were already married and against public policy and should not be enforced. However, this argument would likely result in her having to give the ring back and her best argument is that the ring was a gift and not part of a contract.

a. Frankie can bring an action against Billy Bob for fraud. An action for fraud will result when a party misrepresents a material fact to another party in a contract. Here Frankie's husband committed fraud by inducing the seller of the farm to only put his name on the deed and since Billy Bob is not a holder in due course because of his lack of good faith in taking the farm from Johnny the claim may be brought against him as well.

   Billy Bob can bring a defense of laches against Frankie. The defense of laches attached when a plaintiff has slept on her rights and waited too long for an award to be fair. Here Frankie knew about the fraud 15 years ago and decided not to act on it. Therefore, Frankie will be not be able to recover from Billy Bob.

b. Frankie had no remedy available against Jimmy George since as discussed above he is a holder in due course and Frankie's claim arises out of a misrepresentation where she knew the character of the document and was only frauded on the underlying facts. This claim of misrepresentation is a personal defense and does not run with the land.

Question 2 - Sample Answer 2.
(disclaimer)

Johnny could assert that Frankie has waived her exclusive right to the furniture and furnishings. Because Frankie was given exclusive possession of these items in the divorce agreement, Frankie could have asserted her exclusive right to possession. Frankie, however, allowed Johnny to stay in the house with her and waived any right to exclusive possession by her actions.

Johnny may also argue no valid divorce because the parties were in collusion to remain as man and wife and thus the divorce was not valid under Georgia law.

a) Johnny can bring a claim for a constructive trust against Billy Bob. Here, this action could be brought in equity because real property is unique and because Johnny will be irreparably harmed. To bring an action for constructive trust, Johnny must show that Billy Bob has title to the land and keeping the land would be unjust enrichment. Here, Billy Bob will be unjustly enriched if allowed to keep the proceeds of the property for sale, and Johnny will claim a constructive trust on this money.

Billy Bob will counter with the defense of unclean hands because Johnny tried to transfer the farm so that it would not be involved in the divorce. This is a fraudulent activity, and equity will not impose a constructive trust for a plaintiff with unclean hands.

Additionally, a constructive trust is generally not imposed if there is no fraud involved. Here, Billy Bob agreed to hold the property and transfer it back after the divorce. If Johnny can demonstrate that Billy Bob did this with the current intent to keep the property, Johnny may be able to show fraud. If, however, Billy Bob did not intend to keep the property, there is no fraud at the time of the conveyance and equity will not impose a constructive trust.

b) Johnny can also bring an action against Jimmy in equity to impose a constructive trust on the real estate. Here, this action could be brought in equity because real property is unique and because Johnny will be irreparably harmed. To bring an action for constructive trust, Johnny must show that Jimmy has title to the land and keeping the land would be unjust enrichment.

Jimmy, however, will contend that Johnny's rights to a constructive trust have been cut off by a bona fide purchaser with superior equity. Jimmy is a bona fide purchase if he took the land for value, in good faith, and without notice. Here, Jimmy paid fair market value, so if Jimmy took the property without notice, he is a bona fide purchaser and Johnny cannot impose a constructive trust against him. This is a factual issue to be determined by the judge in equity.

Jimmy will also use the defense of unclean hands against Johnny because he tried to convey the property so that it would not be distributed upon divorce.

To get the ring back from Babe, Johnny will argue that the ring was given in contemplation of marriage. A breach of a contract in contemplation of marriage is a valid action in Georgia. Generally, an engagement ring is the type of gift that must be returned if there is no valid marriage. An engagement ring is perhaps the clearest gift that is given in contemplation of marriage, and thus Johnny can likely bring an action to get the ring back.

Here, however, Babe can assert that this contract is contrary to public policy. Babe was already lawfully married, and because Babe and Johnny could not legally get married under Georgia's law against bigamy, this contract is void as against public policy.

a) Frankie can impose a constructive trust in equity against Billy Bob. Here, this action could be brought in equity because real estate is unique and Frankie would be irreparably harmed.

Frankie will claim that Billy Bob obtained title to the property unjustly and he would be unjustly enriched by keeping the proceeds of the sale. Thus, Frankie would have a constructive trust as to the proceeds.

Billy Bob will argue laches because Frankie did not act within a reasonable time. Frankie found a copy of the deed one month after the purchase. Frankie again mentioned the sale when she was approached about the divorce yet Frankie took no action and because she did not act, she cannot bring an action in equity because she is barred by laches.

b) Frankie can also bring an action against Jimmy to impose a constructive trust against the property. Because land is unique, money damages would not be sufficient, and she would be irreparably harmed, Frankie can bring an action in equity to get the land back.

Again, Jimmy will defend with his bona fide purchase status. Because he bought the house in good faith, for value, and without notice, he is a bona fide purchaser with superior equity in the house. Because Jimmy gave fair market value, to challenge Jimmy's bona fide purchaser status, Frankie will have to show that Jimmy took the property with notice of Johnny's claim. Frankie may argue that because Billy Bob took the land by warranty deed, Jimmy was on constructive notice that there may be a superior claim to the land.

If Jimmy had notice, Jimmy is not a bona fide purchaser, and because Jimmy would be unjustly enriched by keeping the property, Frankie would be able to impose a constructive trust on the property.

Jimmy will also defend by using the doctrine of laches. Because Frankie did not act in a reasonable time after she had notice of the deed, she is estopped from bringing an action in equity. Whether or not laches will apply will be an issue for the judge sitting in equity.

Frankie can also bring a quia timet action to quiet title to the land and establish that she has valid title.

Question 2 - **Sample Answer 3.**
(disclaimer)

Johnny may try, but would not be able to render the property settlement agreement null and void even if he claims that he and Frankie were in collusion as to the entire marriage dissolution scheme. On the one hand, Frankie proceeded with the divorce thinking that it was in fact on the grounds that Johnny no longer loved her (marriage irretrievably broken, a no-fault dissolution ground in Georgia). Even though they agreed to live together as man and wife, it was only until the divorce was final and so Frankie did not commit the action necessary for collusion. Johnny, on

the other hand has "unclean hands" and will be precluded from equitable judgment in his favor. Divorce will be considered final and with it the settlement will be enforced.

Billy Bob received the farm under a warranty deed from Johnny, who purported to be the farm's only and rightful owner. Johnny misrepresented his ownership if, in fact, both he and Frankie were owners and so the deed was executed improperly and perhaps even fraudulently. Johnny and Frankie may have owned the farm as joint tenants, in which case only Johnny's interest would have been transferred under the circumstances. Johnny would be precluded from suing Billy Bob by theory of estoppel by deed having signed the deed over to him. Billy Bob may be rightful owner of only half of the interest in the farm under Georgia law. The court may reform the deed to reflect this. However, here Billy Bob did not pay a valuable consideration for the land and also agreed to assist Johnny in his scheme to defraud Frankie. Both parties are therefore precluded from recovery and the entire transaction may be set aside as invalid. The facts show that Billy Bob was supposed to transfer the land back to Johnny after the divorce was final and Johnny may now attempt to sue for specific performance or constructive trust whereby Billy Bob would have the legal but not equitable title to the land. Equitable relief may not be available to Johnny because he was guilty of intentionally hiding the land to avoid its division during divorce proceedings with Frankie. Unclean hands will typically preclude equitable relief and court will not grant Johnny's constructive trust action. Further, specific performance is not first preference as far as equitable relief goes and courts are reluctant to grant this action. Here, it cannot be granted because of lack of mutuality of remedies and also because of defenses, such as unclean hands.

Jimmy George will claim he is a bona-fide purchaser for value of the land but Georgia being the race-notice jurisdiction, he would need to show lack of notice. Also, Billy Bob should have taken the farm in good faith because Jimmy George's title would be insufficient if fraud was involved. Here, the facts point to Billy Bob's knowledge of Johnny's wrongdoing and so Jimmy George is not protected by his title as bona fide purchaser for value and without notice.

Johnny may attempt a replevin action for the ring claiming that he has title in property now in possession of Babe. Johnny will ask for the fair market value of the ring and its rental value for the time that Babe had possession of it. The court will deny Johnny's claim because he gratuitously gave the ring to Babe and she became the ring's rightful owner. Replevin may be appropriate in actions for trespass to chattels but here the prima facia elements of this action are simply not present.

Johnny's claim for restitution would also fail if he tried to claim that the ring was given in consideration of marriage between Babe and him. The subject matter of their purported "contract" would have been illegal at the time as both were still married. Babe will claim that Johnny had unclean hands in the deal. Babe may even counterclaim Johnny for interference with her familial relationships for his attempt to induce her divorce.

Frankie will need to show that she was a rightful co-owner of the farm at the time it was sold and thus had to have consented to the sale. If Johnny and her were joint tenants of the farm property, Frankie may attempt to recover her interest and claim that Johnny had committed conversion of chattels and fraud by signing the farm over to Billy Bob. Considering, however, that Frankie later became aware of the unlawful transaction but did nothing she will be found in complicity with Johnny's illegal act and would not be able to recover if Billy Bob asserted defense of unclean hands and collusion. On the other hand, Billy Bob's actions were also against the law in that he attempted to help Johnny in defrauding Frankie. Billy Bob also later sold the land to Jimmy George who may not retain his possession to property because shelter doctrine would have been destroyed by Billy Bob's notice of wrongful possession fraud and illegality.

Question 3 - Sample Answer 1.
(disclaimer)

The first action to be taken on behalf of Mr. Smith is to set aside the default that was automatically entered on May 31, 2007. In Georgia, when a defendant does not file an answer to a complaint within 30 days of the service of the complaint, the action automatically goes into default. However, a defendant has a right to have a default judgment set aside when requested within 15 days after the period for filing the answer has passed, provided the defendant pays the appropriate court costs. This can only be done once during a case. If more than 15 days have passed, the defendant must move for the court to set aside the default, and this is only done for providential cause (e.g. defendant was really sick), for excusable neglect, or if the facts deem it proper. Here, the complaint was served on Mr. Smith on May 1, 2007. Therefore, when Mr. Smith did not file an answer by May 31, 2007 (30 days after service), the action went into default. Mr. Smith has 15 days --- until June 15, 2007 --- to have the judgment set aside. Because he came to my office on June 10, 2007, I will move to have the default set aside and have Mr. Smith pay the appropriate court costs (or advance the costs to Mr. Smith because an attorney can actually loan court costs to a client). Subsequently, I will file an answer in response to the plaintiff's complaint.

Additionally, I will file a counterclaim for misrepresentation in the answer. A counterclaim is compulsory if it arises out of the same transaction or occurrence, and it is waived if not included in the answer. Here, the misrepresentations about the building, although not directly related to contract for the equipment, arose out of a contract that was entered into at the same time as was the contract to purchase the building. Therefore, it can be argued the counterclaim is compulsory, and I will file it in the answer as a precautionary measure to make sure that I do not waive the counterclaim.

In regards to Mr. Jones' case, there are two options to be taken. First, in regards to the default, the issue is whether Mr. Jones actually wants to defend the case brought by Building, Inc. Mr. Jones appears to not be as concerned with the action for nonpayment for the computers, so he appears almost willing to accept the consequences for breaching the contract in regard to the computers. The decision as to whether to pursue a certain lawsuit and what legal course of action to take is the client's decision. So, Mr. Jones can decide (1) whether he wants to be content with a default and file a separate complaint against Building or (2) whether he wants to attempt to set aside the default and then counterclaim against Building.

If Mr. Jones chooses option 2, I will have to seek permission of the court to set aside the automatic default entered on May 31, 2007 - 30 days after service upon Mr. Jones. Since Mr. Jones did not come and see me within the 15 day grace period for automatically setting aside a default, I will have to show the court that Mr. Jones failure to answer was due to providential cause, excusable neglect, or that the facts deem it proper. Here, Mr. Jones failure to answer appears to be excusable neglect. Mr. Jones made a settlement offer to Building that he believed would be accepted. However, the settlement offer was not accepted, and Mr. Jones did not answer. If the court deems this as excusable neglect or feels that these facts properly warrant setting aside default, then I will have to do two more things. First, I will have to file an answer to Building's complaint. Second, I will have to include Mr. Jones' counterclaim against Building

because it is likely that his counterclaim for misrepresentation against Building will be deemed to be in the same transaction or occurrence as Building's claim for breach of contract. Therefore, it must be included in the answer or else it will be waived.

If Mr. Jones chooses option 1 and elects to take the default, I will then have to file a complaint on behalf of Mr. Jones suing Building for misrepresentation in the sale of the building. However, Building will have the defense of Res Judicata (claim preclusion) against Mr. Jones. Res Judicata prevents a claim from being brought when (1) there has already been a legal determination regarding that claim or (2) the claim being brought is transactionally related to a claim that has already been fully litigated. Res Judicata is only available to the same parties in the same configuration. Here, the first case Building's breach of contract case against Mr. Jones, which ended in a judgment on the merits (albeit a default judgment) for Building. Here, the same parties - Building and Mr. Jones - would be in a second case adjudicating a transactionally related matter - the misrepresentation of the Building sale. Therefore, I would advise Mr. Jones not to accept a default because he would be barred from bringing his misrepresentation suit.

Building needs to move the court (and not with the clerk as in federal court) to turn the default into a judgment.

The difference in procedure lies in whether the defendant gets a hearing on damages and if the defendant has a right to a jury trial regarding damages. If the damages are contract or liquidated damages, the court will not have a hearing on the damages. If the damages are tort or unliquidated damages, the court will hold a hearing on the damages. Now, if there is a hearing, the defendant only has a right to a jury trial if the defendant has filed a dispute to the damages anytime during the case. The plaintiff cannot recover more than was asked for in the complaint.

Question 3 - Sample Answer 2.
(disclaimer)

Action on behalf of Mr. Smith

In the state of Georgia a defendant must respond to a complaint within 30 days or he will be in default. But, the state of Georgia also allows the defendant to reopen the case within 15 days of being in default if the defendant pays the costs associated with the reopening. This would be the first action taken on behalf of Mr. Smith. Re-open the case so that Building, Inc. will not be able to get a default judgment against Mr. Smith

After re-opening the case, Mr. Smith must file an answer to the complaint. The answer will be dependant upon facts not in the fact pattern.

Secondly, Mr. Smith must file a counter claim against Building, Inc. Here, the events are all part of the same transaction and occurrence even though the contracts are separate - one for the

building and one for the purchase of the equipment. Mr. Smith may file a claim for the actual damages claimed of $100,000.

The fact pattern does not state the specifics of Mr. Smith's claim for damages on the home or what the exact misrepresentations are, but in Georgia, a manufacturer or builder of new homes, who actively conceals a defect will be liable for damages. This may relate to Mr. Smith's claim, but again the facts are not clear.

Mr. Smith should also consider the use of either an arbitrator or a mediator. An arbitrator will issue a decision similar to a court, where a mediator will assist the parties in reaching an equitable agreement. Even though Building, Inc. filed suit, to avoid unnecessary expense and waste of time, Building Inc. should be approached about the possibility of alternative dispute resolution. This would prove advantageous to both sides of the dispute for a timely settlement of the issue.

Action on behalf of Mr. Jones

The opportunity to re-open the case as a matter of right has passed for Mr. Jones, but the fact pattern does not state that a default judgment has, as of yet been entered by the court. This means that a motion to re-open can be brought. Mr. Jones' stated reason of not filing an answer was that he had offered to settle with Building, Inc. and this led to his decision not to hire an attorney. This should be presented to the judge, along with an immediate plea (an "instanter") of no liability, and we must be ready to proceed to trial. This is entirely up to the judge and may or may not occur. Therefore Mr. Jones will have to exercise other options as well.

It should be discussed with Mr. Jones, the amount he offered in settlement. If he is amenable, and has no true issue with the equipment, public policy would certainly favor avoiding lawsuits and settling issues out of court.

Mr. Jones could attempt to negotiate a settlement with Building, Inc. which takes into account his ability to file suit for the misrepresentations regarding the building sale. Certainly if Building, Inc. has a potential loss of $100,000 in one case and a gain of only $10,000 in the other, they will be amenable to settlement.

How can Building, Inc. obtain a judgment by default against Mr. Jones?

Once 30 days have passed after the complaint has been served, the defendant is in default. Here, Mr. Jones was served on May 1st, so on June 1st, Mr. Jones was in default. After that, Mr. Jones had 15 days to re-open the case as a matter of right, as long as he paid the associated court costs. That time has also passed. Now that 45 days have passed since the filing of the claim and Mr. Jones has offered no answer, Building, Inc. must make a motion for default judgment - which

the court will then enter.

The difference to obtain a default judgment with liquidated claims as opposed to unliquidated.

The difference comes in the damages state of the action. A plaintiff cannot recover more that the claimed amount in the complaint regardless as to whether it is liquidated or unliquidated. Once a default judgment has been entered, if the claimed damages are liquidated, then there is no hearing to determine the amount of the award. But, if the claimed damages are not liquidated and the plaintiff has made a response to the claim before the judgment entry, he or she can request that there be a jury at the hearing to determine the amount of damages.

Question 3 - Sample Answer 3.
(disclaimer)

For Mr. Smith I would file a motion to reopen, or a motion to get his case out of default. In Georgia, a defendant has 30 days to answer a complaint. If no response is filed or motion made, the case goes into default. However, the defendant has a grace period of 15 days in which to have his case reopened, in order to do so, he must pay costs. I would also have his answer prepared. In the answer I would also assert a counter-claim for breach of K or warranty. The actions arose from a "common nucleus of operative fact" or from the same transaction or occurrence. The original contract granted the option to purchase the equipment in the building and then signed the contract the day of closing. If for some reason this would not be deemed the same transaction or occurrence, I would file a separate complaint against Building for my client.

For Mr. Jones, his case is in default like Mr. Smith. However, the grace period (15 days) is over. Assuming Building has not received a default judgment Mr. Jones can still file a motion to reopen. The court can, at its discretion, reopen a case in default if no judgment has been granted. The court will consider the motion if the delay was (1) for providential cause, (2) excusable neglect, or (3) facts otherwise show grant of motion would be proper. Here there doesn't seem to be providential cause (illness, death, etc.) but there might be excusable neglect, if Mr. Jones really believed he didn't need to file, etc. Otherwise it is up to the court if the motion will be granted. In addition, the motion will need to include (1) a meritorious defense (2) state that he is ready to plead (instanter) and (3) that he is ready to proceed to trial. Here, these factors can be met, with the possible exception of meritorious defense. Mr. Jones stated he had no problem with the equipment, so he is unlikely to have a defense to the contract. If the obligations are tied together (breach and equipment) he might be able to use set-off with Mr. Jones' answer, if he is allowed to file, I would include a counter claim for breach (misrepresentation - beach of K or warranty) for the same reasons as I did for Mr. Smith. If the court disallows and says it is not the same transaction, I will file a separate complaint. I would not have a conflict representing both parties because their interests are not diverse and representation of one, with the facts given, would not impair representation (or diverge interest from) of the other.

To obtain default judgment against Mr. Jones, Building will need to file a motion for default. While Mr. Jones is already in default, and his grace period is over, Building must file a motion for default

judgment in order to collect on it. Once the motion for default judgment has been filed, liability on the part of Mr. Jones is determined. Once the motion is filed the court will hold a hearing on damages. If there has been no response from the defendant he need not be notified. Here, if Mr. Jones has at least tried to reopen, the court may allow him to be present at the hearing on damages. Building is limited to the damages it requested in the complaint. If the damages are liquidated (sum certain) then there does not have to be a jury trial regarding the amount of damages. The court can award that amount, without a jury. If the damages are unliquidated and the defendant requests a jury to determine damages then one must be granted. To obtain a jury trial on damages the defendant must specifically request one. This is an exception to the rule for requesting a jury trial in Georgia. Usually, a party is not required to request a jury.

Question 4 - Sample Answer 1.
(disclaimer)

To: Executor
From: Applicant
Re: Decedent's Estate
Date: July 24, 2007

MEMORANDUM

Venue for probate of the will

Venue typically lies where the decedent is domiciled. In this case, the court will likely determine that the Decedent's domicile was in Georgia. Domicile is established by physical presence with an intent to permanently remain. Decedent's presence in Georgia at the time of his death probably does not independently establish venue, but his intent to return to the state after his employment in California and his continued manifestations of residency in the state are probably sufficient to do so. While Decedent was employed full time in California in a five year contract, he lacked the requisite intent to remain there permanently. Though of a lengthy duration, the job was temporary, and Decedent did not intend to extend his contract, suggesting he contemplated a return to Georgia. Further, he kept is voter's registration, driver's license, and continued to pay taxes in Georgia. These indicia of residency are likely sufficient to establish domicile in Georgia.

Wills executed in other states are admissible to probate in Georgia as long as it can be proved that they were made in compliance with the execution and attestation requirements of that state. Here, as long as the will was validly executed in Texas, it will be admissible to probate in Georgia. It should be filed in the probate court of county where the Decedent previously resided.

Bequest to second wife

The bequest to Decedent's second wife fails. First, divorce acts on operation of law as a partial

revocation on wills as long as the will was not made in contemplation of the subsequent divorce. The prior spouse is treated as predeceasing the testator. In this case, the bequest to the second wife is revoked as a matter of law and lapses. Georgia's anti-lapse statute acts to save lapsed gifts if the predeceased (or beneficiary treated as predeceased) has surviving issues that also survive the death of the testator and the will contains no contingency language. However, in the case of revocation by divorce, the anti-lapse gift will only pass to issue of both the spouse and the testator. Because second wife and Decedent did not have children, the remainder of the gift will pass to the residue to be shared between Decedent's remaining children.

Further, Decedent's bequest to second wife also fails because she was one of the two required witnesses to the will. For a will to be validly executed under Georgia law, the will must be in writing and signed by the Testator in the presence of two disinterested witnesses. If one of the witnesses is interested, the will does not fail, but the interested party can no longer take her bequest. Instead, under Georgia law, she is treated as predeceasing the testator. Second wife is an interested party under the will because she stood to inherit half of the estate. Thus, she will be treated as predeceasing the Decedent and her bequest lapses into the residue (Georgia's anti-lapse statute does not apply as discussed above) to be shared between Decedent's remaining children.

Harold's bequest

Under the current will, Harold would take ¼ of his father's estate. However, given that the bequest to Second Wife fails and lapses into the residuary, he stands to share the estate equally as the only remaining heirs to the will (assuming there are no other bequests to the residue not mentioned). As such, there is no need for him to file a caveat to the will. If he does, he stands to lose his interest under the will due to the in terrorem clause, also known as a forfeiture clause. Forfeiture clauses prohibit beneficiaries under the will from challenging any of the provisions therein at risk of the beneficiary losing the bequest entirely. If Harold filed a caveat and challenged the will, or if a court determined that his written intent to file a caveat is sufficient, a court would determine whether or not to uphold the clause. Courts look unfavorably upon forfeiture clauses and often go to great lengths to construe caveats as attempts to challenge something other than the will itself. Here, Harold could argue that he challenges not the will itself, but the legal validity of the bequests to Second Wife as it is void on two separate grounds. If the court upholds the in terrorem clause, the bequest to Harold will fail and his sibling will take the entire estate under the will.

Qualification as executor

The testator may appoint any executor he chooses to administer the will and his appointment of you as executor is valid. However, you will have to travel to probate court in Georgia to probate the will and might be required to remain for a period of time in order to settle the affairs of the estate. If you feel like this might inhibit your ability to effectively serve as executor or impose too

substantial a burden, you may petition the court to resign as executor and the court will appoint a new executor in your place.

Question 4 - Sample Answer 2.
(disclaimer)

MEMORANDUM

TO: Executor of Decedent's estate

FROM: Applicant

RE: Relevant issues regarding the administration of the Decedent's estate

The will should be probated in the county of the decedent's domicile. A person cannot have more than one domicile. The issue then is whether the decedent was domiciled in the California county in which he was currently living before his unexpected death, or in the county where he maintained his Georgia residence (and where he was when he died). Domicile is determined by both presence AND intent. While you must maintain a presence in the county, you must also intend for that county to be your domicile. While the decedent was living and working in California he maintained his residence in Georgia. Further, the decedent did not intend to extend his five year employment contract. Therefore, the assumption is that he would be returning to Georgia upon completion of the five year contract. This is strengthened by the fact that decedent kept his Georgia voter registration, Georgia driver's license, and paid taxes in Georgia when he took the job in California. Given these facts, it seems that the decedent's domicile was in Georgia in the county in which he maintained his residence. Decedent maintained a residence in Georgia (presence) and the facts indicate that decedent intended for this to be his permanent home. Therefore, since the decedent's domicile is in Georgia, the appropriate venue in which the will should be probated is the county where the decedent died.

The bequest to the second wife has lapsed and passed into the residuary estate. First, when the will was executed, the wife served as one of the two required witnesses to the will. Under Georgia law, when there are only two witnesses (supernumerary rule doesn't apply) and one of the witnesses is going to take under the will, that person's gift is void. Interested witnesses cannot take under the will. If there had been three, witnesses can take if there are at least two other disinterested witnesses. That situation is not present here though. Therefore, the wife's gift was void from the beginning because she was an interested witness.

Nonetheless, even if the wife's interest was voided, she could make a claim for years support if she was still married to the decedent. In Georgia, spouses and minor children can claim years

support. This is an alternative to taking under will or by intestacy. The spouse and/or minor children ask for a specified amount and this amount is awarded unless someone presents an objection. The amount awarded is also free of debt (except for secured debts). If the second wife had still been married to the decedent when he died, she could have obtained some of his property through years support. The facts, however, indicate that the decedent and second wife were divorced upon the decedent's death. Therefore, years support is not available to her.

Finally, notwithstanding all of the arguments above, the bequest to the second wife had lapsed because when the decedent divorced the second wife, the second wife was treated as having predeceased the decedent. An anti-lapse statute does not apply in this situation unless the child of the second wife is also the child of the decedent. In the facts given, there is no indication that the second wife had a child, but further the facts are clear that the decedent's only children were from a prior marriage. Therefore, the bequest to the second wife of one-half of the estate passes into the residuary estate (to the children).

Currently, Harold is entitled to one-half of the estate. The second wife's one-half interest has lapsed and passed into the residuary estate. The decedent's two children are entitled to take the remainder of the estate, so presumable they would each receive one-half of the whole estate. However, Harold is contemplating filing a caveat to the will. The decedent's will contains an in terrorem clause (also know as a "no contest clause") that seeks to invalidate the gift to any person who contests the will. In Terrorem clauses are valid in Georgia, but they are strictly scrutinized. To be valid, the clause must state where the property will go in the event of a successful contest to the will. Here, there is no indication that the clause states where the property should go in this event. Therefore, since courts carefully scrutinize in terrorem clauses, the court may hold that this clause is invalid and any caveat filed by Harold will not affect his current gift (½ of the estate). On the other hand, if the court holds that this clause is valid, then Harold may want to refrain from filing a caveat challenging the one-half share that goes to the second wife because he my risk losing his interest in the estate. Furthermore, such a challenge is unnecessary, as previously indicated, because the second wife's bequest will pass into the residuary estate.

The Texas attorney only needs to agree to accept the duty of being an executor in Georgia. A person is not forced to be an executor, but rather must accept the job. Also, a testator can name anyone as his/her executor/rix - it need not be a citizen of Georgia, or even the United States. To qualify, the attorney will need to come to Georgia, accept his job as Executor, and agree to probate the will in the county of the decedent's domicile.

Question 4 - Sample Answer 3.
(disclaimer)

Memo

To: Executor, Esq.

From: Attorney, Esq.

Re: Probate of Decedent's Will in Georgia

As the executor appointed by the Decedent (D) in the will you drafted for him, you retained me to represent you on matters related to the probate of the will. You inquired about several related issues, and I will address each in turn.

1. **Venue of Probate will lay in D's Georgia County of Residence**

The Official Code of Georgia (OCGA) lays venue for the probate of a Georgia resident's will in that resident's Georgia county of domicile upon death. Further, the Georgia Constitution allows for probate courts to be established, but only requires an attorney to sit as judge in the proceedings in those counties within the state meeting a statutory population threshold (currently about 96 of the 159 counties have attorney-judges in their probate courts).

Domicile is determined in Georgia by consideration of an individuals place of abode and intent to remain. Where a place of abode is difficult to determine based on a multiplicity of residential dwelling places, it will be presumed to be that residence where his/her family resides or that the individual holds out as, and others understand to be, his/her permanent resident. Intent to remain is established by facts which are all evidenced in D's circumstances and include maintaining voter registration, a Georgia driver's license, paying taxes in Georgia, etc. When this intent is coupled with the fact that D also maintained the Georgia residence where he subsequently died, the fact that D was in the midst of completing a five-year, full-time contract in the state of California will not control domicile, and thus, have no impact on venue. Venue for Probate will lay in D's Georgia County of Residence.

2. **The Bequest to Wife, D's Second Wife, is Void**

The legal status of the bequest to the second wife is that it is void. When a will is drafted, as here, such that it fails to contemplate divorce and expressly renders/names the testator's current spouse as a beneficiary, a subsequent divorce renders gifts to that spouse under the will void. Procedurally, the now divorced spouse is treated as having pre-deceased the testator/decedent and any gift to the spouse lapses. Georgia's anti-lapse statute will only effectuate salvation of gifts that could then pass to surviving children born of the marriage of the decedent/testator and the now divorced spouse. Because D and Wife did not have any shared, surviving children, any gift to Wife under D's will lapses and falls into residuary.

Moreover, when a beneficiary is one of only two to attesting witnessing to a will, his/her gifts under the will are void and roll into residuary estate for distribution. Thus, even if D was still married to Wife, any bequest made under D's will would be void due to the fact that she was one of only two subscribing witnesses to the will.

3. **The Bequest to Harold (the "remainder to [D'] children")**

As noted above, the gift to Wife lapses to residuary, thus, Harold does not appear to have a legitimate need to challenge the one-half gift to Wife unless he desires to keep that portion from his sibling as well. You noted that D had two marriages, and you appear to indicate that Harold is one of those children. You also note that having purported to give Wife one-half of his estate, D then directed the remainder to his children.

Georgia distributes assets on a per stirpes bases, thus, under D's original construction of the will, if the family unit had remained whole and D's divorce from Wife had not occurred, that would have resulted in Harold receiving a one-fourth portion of D's entire estate, having split the remaining half with his other sibling, or any surviving heirs of that sibling. However, because the gift to Wife does lapse, Harold now stands to receive one-half portion of D's entire estate, sharing it equally with his sibling. Thus, unless he is seeking to prevent the equal division of that one-half, lapsed portion, in order to take three-fourths of D's estate for himself, there is no real basis for the caveat you indicate he has threatened to bring. Georgia law will effectuate his desired outcome if it is to see the gift to Wife completely fall/lapse.

4. **Qualifying as an Executor in Georgia**

The appointment by a testator, with the capacity to make a will (a very low capacity standard in Georgia, available to those as young as 14y), of an individual to serve as executor in validly executed will (as the facts indicate is the circumstance here), will control given that the person is willing and able to serve in that capacity. Thus, in order to qualify as executor of D's estate on a will being offered for probate in Georgia, as it is here, because you are named as D's executor in the will you must simply alert the court that you are willing and able to effectuate the duties, accepting D's testamentary appointment of you to that role.

MPT 1 - Sample Answer 1.

(disclaimer)

Black Eagle Tribal Court has jurisdiction over the present action because it involves a consensual, commercial relationship and directly affects the health, welfare, economic security, and political integrity of the tribe. Although the sovereign powers of an Indian tribal court generally do not govern members of a tribe, Montana, this rule is subject to two important exceptions, both of which permit the Black Eagle Tribal Court to exercise jurisdiction in this case. The Plaintiff, Acme Resources Inc. ("Acme") has entered into a consensual relationship with the tribe concerning the extraction of mineral rights on reservation land. This agreement has had a dire effect on the Tribe's economic security and will continue to impair health, welfare and political welfare of the tribe.

Acme's Lease of Mineral Rights Constitutes a Consensual, Commercial Relationship with Members of Black Hawk Tribe and Therefore Subjects Acme to the Tribal Court's Jurisdiction.

Indian courts have the power to exercise civil jurisdiction over non-members, on reservation land, even when the land is owned by a non-member, where there is a "consensual relationship with the tribe or its members through commercial dealings..."

Montana. There must be a direct nexus between the relationship and the cause of action. See Funmaker.

The court held in Strate that an account between non-members on non-member tribal land was not subject to a tribal courts' jurisdiction. It also held that a lease between a member and non-member did not provide the tribal court with jurisdiction over a products liability action involving the subject matter of the lease. Funmaker. In Red Fox, the Fifteenth Circuit reversed summary judgment and held that there may have been a sufficient consensual relationship to confer jurisdiction where non-member architects contracted with a non-member organization to design a church on tribal land owned by non-members simply because the architects could have foreseen the building would be used by members. . .the design would be "felt on the reservation." Red Fox.

In the case at bar, although the surface rights to the land at issue are owned by a non-member, the Tribe owns the mineral rights to the land. The Tribe entered into a lease with Acme to extract minerals using a process that is known to affect the availability of water (Black Hawk aff, Bellingham aff). The Tribe has a greater ownership claim to the land than the tribes did in Strate, Funmaker, or Red Fox, where the entire land was owned by non-members. In addition, there is a commercial lease between Acme and the Tribe, which did not exist between any of the tribal court litigants and the respective tribes in Strate, Funmmaker, or Red Fox. Furthermore, Fifteenth Circuit had held that a consensual relationship may exist where the effect on the tribe is foreseeable. Red Fox In this case, the depletion of water is a requirement for extracting coal bed methane. (Bellingham off.) The effect on the tribe of the water running out, therefore, is even more foreseeable than the possibility of a design defect in an architect's plans causing personal injury. Finally, the tribal court defendant in Red Fox never came on the land nor supervised the actual building of the church. In this case Acme came on the land and physically extracted minerals. This Court should therefore find that the consensual, commercial relationship between Acme and Black Hawk Tribe is sufficient to subject Acme to jurisdiction regarding the mineral extraction.

The extraction has a direct effect on the political integrity, economic security, health and welfare of the tribe because if affects their ability to farm, the preservation of the land for future generations, their access to water, and their ability to comply with their Tribal Constitution.

A tribe may exercise jurisdiction over the conduct of non-members on reservation land owned by non-members where the conduct has a direct effect on the economic security, political integrity,

health or welfare of the tribe. Montana. There must be more than broad public safety concerns like traffic accidents. Strate. The exercise of jurisdiction must further the purpose of protecting tribal self-governance and control of internal regulations. Montana. In this case, the conduct affects the ability of members to make a living by raising crops and producing livestock. An expert estimated that all wells will go dry in 5 years, which would affect health and welfare because land without water is not sufficient for habitation. It affects political integrity because the tribe's constitution requires preservation of the land for future generations. Land is the "soul" of the tribe, and it will be basically useless after Acme is done with it. This is much more of a direct effect than that in Strate where public safety on the government owned highway was at issue.

This court should stay jurisdiction because the tribal court has not ruled in its jurisdiction.

In National Farmers, the Court said that motions of stay require exhaustion of remedies in tribal court before a federal court will act. The rule is disregarded only when the tribal court clearly lacks jurisdiction. As explained above, the tribal court probably does not have jurisdiction. But regardless of this Court's opinion on that issue, it should dismiss this action without prejudice or at least stay the proceedings until the Black Hawk Tribal Court has had an opportunity to rule on this issue.

MPT 1 - Sample Answer 2.

(disclaimer)

Memorandum of Law in Support of Defendant Black Hawk, et al; Motion For Summary Judgment, or to Stay or Dismiss

As there are no genuine issues of material fact that the Black Eagle Tribal Court (Tribal Court) has jurisdiction over the Plaintiff Acme Resources (Acme), Defendants are entitled to judgment as a matter of law, or; a dismissal or stay of this action until Acme had exhausted all of its remedies in the Tribal Court.

I. The Tribal Court Has Jurisdiction Because Acme Entered Into A Consensual Relationship With The Tribe Regarding The Extraction of Minerals and Acme's Activities Directly Affect the Political Integrity, Economic Viability, and Health of the Tribe

As a general rule, absent express authorization via federal statute or treaty, tribal courts may not exercise jurisdiction over non-members (Montana). In their complaint, however, Acmes fails to mention that the inherent sovereignty of Indian Tribes allows Tribal Courts to exercise jurisdiction over non-members and non-Indian fee lands even, as is the case here, where there is no express authorization.

A. The Consensual Relationship Between Acme and the Tribe Regarding the Lease of Mineral Rights and The Nexus Between Acme's Activity Under The Lease And The Tribe's Cause of Action Confer Jurisdiction Over The Tribal Court

Tribal Courts have civil jurisdiction over non-members who enter into consensual relationships with the tribe or its members. (Montana) Here, the Black Eagle Tribal Council leased minerals under Patrick Mulroney's land to Acme. The agreement was consensual. As a result of Acme's mining activity, Dr. Bellingham's affidavit states that the water wells supporting Defendant's livelihood are running dry. One factor courts consider in evaluating the consensual agreement as sufficient basis for jurisdiction is whether there exists a close relationship or "direct nexus" between the consensual relationship and the cause of action asserted by the Tribe or its members (Strate, Franklin Motor Credit). In Strate, the court found no relationship because the highway accident between two non-Indians was not tribal in nature. Here, the harm suffered is distinctly tribal as evidence by Sec 1, Article IV of the Tribal Constitution which states, "The land forms part of the soul of the Black Eagle Tribe." Further, unlike Strate, members of the tribe have suffered injury. Finally, the subject of the agreement - extraction of mineral rights - is the cause of the defendant's harm. As such, the Tribal Court has jurisdiction.

B. The Tribal Court Has Jurisdiction Because Acme's Development of Methane Has Resulted In Water Loss Sufficient to Impact The Political Integrity, Economic Viability, And Health of the Tribe

Tribal Courts have jurisdiction over activities by non-members that affect the political integrity, economic sustainability, and health of the tribe (Montana). The purpose of this rule is to preserve the right of the Tribe to self government (Strate). Here, Tribal law gives both the Tribal Council and the Tribal Court authority to preserve the land and provide a clean, healthful environment. Because land is part of the Tribe's soul, the right to regulate harmful and abusive use of the land is directly related to the Tribe's power of self-government. Based on Dr. Bellingham's affidavit, Acme's activities are reducing the water supply. As explained above, this directly impacts the Tribe's political integrity. Defendant Black Hawk has stated that the losses total 1.5 million dollars, and make their living off the land, the Tribe's economic viability is at stake. Finally, loss of a water supply is a health risk sufficient to implicate the welfare of the tribe. Therefore, the tribal court has civil jurisdiction.

II. The Federal Court Should Stay These Proceedings Because Acme's Filing of Suit in Federal Court Without Responding To the Suit in Tribal Court Fails The Exhaustion Requirement

Federal courts should stay proceedings, or dismiss without prejudice until the Tribal courts have had an opportunity to determine their own jurisdiction (National Farmers). Here, the Tribal Court has had no such opportunity. Further, Acme has not demonstrated that it is "clear" that the tribal court lacks jurisdiction; it has merely asserted a lack of jurisdiction without considering relevant exceptions to the Montana Rule. At a minimum, it is not clear that the Tribal Court lacks jurisdiction because (1) Acme entered into a consensual agreement with the tribe; and (2) Acme's activities directly impact the political integrity, welfare, and economic viability of the Tribe. As such, the Court should stay these proceedings until Acme has exhausted its Tribal Court Remedies.

MPT 1 - Sample Answer 3.
(disclaimer)

Motion For Summary Judgment, Stay, Or To Dismiss

I. Robert Black Hawk and the Black Eagle Tribe are entitled to judgment as a matter of law that the tribal court has jurisdiction because Acme has a consensual relationship with the tribe affecting the water supply.

Whether the Tribal Court has jurisdiction is a federal question that must be reviewed de novo. Defendant Robert Black Hawk ("Black Hawk") and seven other members of the Black Eagle Indian Tribe ("The Tribe") move for summary judgment that the Tribal court has jurisdiction to hear the dispute between Acme Resources Inc. ("Acme") and Black Hawk and the Tribe. To show that there is jurisdiction, the moving party must show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The court will analyze the facts in the light most favorable to the non-moving party.

In Montana v. United States, the Supreme Court articulated the general rule that "absent express authorization by federal statute of treaty, the inherent sovereign powers of an Indian tribe do not, as a general proposition, extend to the activities of non-members of the tribe." However, the Court also laid out two exceptions to the general rule. Specifically, a tribe may have jurisdiction over (1) non members who enter into consensual relationships with the tribe or its members, or (2) activities that directly affect the tribes political integrity, economic security, or health and welfare.

A. The Tribal Court Has Jurisdiction Because Acme Contracted With The Tribe For Rights To Extract Methane, A Consensual Relationship

Acme developed a consensual relationship with members of the Tribe because it created a contractual agreement to extract methane from the Tribe's property. (the Tribe's property being the mineral rights associated with the surface rights of Mulroney's land). Unlike Strate, which involved a car accident on a state highway and where the court found no jurisdiction for the Tribal Court, where the parties were consensually transacting business together. Here, there is a "direct nexus" because the parties directly formed an agreement to extract minerals.

Furthermore, the present case is distinguishable from Montana itself because the land involved was actually owned by Indians because the mineral rights to the land were at issue. In contrast, Montana concerned hunting and fishing by non-Indians on non-Indian owned fee land within the reservation, and the court found this insufficient for jurisdiction. Thus, a consensual relationship between a non-Indian and Indians has been established and that relationship involves Indian lands. Therefore, the Tribal Court has jurisdiction according to the first exception of the Montana test and Black Hawk and the Tribe are entitled to judgment as a matter of law. There are no facts disputed.

The Tribal Court Has Jurisdiction Because Acme's Methane Extraction Affects The Water Supply

According to the second exception to the Montana test, the Tribal Court has jurisdiction over activities that directly affect the tribes political integrity, economic security, or health and welfare. Furthermore, the Black Eagle Tribal Code establishes that "no person shall pollute or otherwise degrade the environment of the Black Eagle Reservation," 23-5(1), and establishes a cause of action in the Tribal Court for damages and relief against a person who violates 23-5(1) 23-5(2).

In the present case, Acme's coal bed methane extracting requires the extraction of huge amounts

of water. This is causing the wells to run dry and they will be completely dry in five years as established in the affidavit of geologist, Jesse Bellingham, Ph.D. Water is essential to the economy and health of the tribe's citizens because the water is needed to irrigate crops and feed cattle. So, not only might the Tribe be deprived of an essential, water, but also of nourishment. The losses are already estimated to be $1.5 million. This is not merely hunting and fishing, which might be considered recreation, this water is needed for life sustaining activities of the tribe. Furthermore, this extraction is degrading the environment contrary to the Tribe's Constitutional guidelines. Art. IV, Sect. 1. Therefore, the defendants are entitled to judgment as a matter of law that the Tribal Court has jurisdiction.

II. The Court Should Stay Or Dismiss Acme's Federal Action Until Acme Exhausts Its Remedies In Trial Court

Whether the court should stay or dismiss Acme's federal action because of failure to exhaust remedies is a federal question, which this court must review de novo. In National Farmers, the Supreme Court applied a tribal exhaustion requirement that a party exhaust its remedies in tribal court before seeking relief in federal court. The Tribal Court needs a "full opportunity to determine its own jurisdiction." This is based on a policy of comity, (i.e. giving deference to another court).

In the present case, an action in the Tribal Court regarding this matter is already being addressed. Thus, this court must follow National Farmers and give deference to the Tribal Court. Thus, this court should stay or dismiss the current action in federal court until the Tribal Court has had its full opportunity.

MPT 2 - Sample Answer 1.
(disclaimer)

Memorandum

To: Lyle Palkovich

From: Applicant

1. Can Ms. Flynn, as a member of a Franklin LLC, be held personally liable for the damage done by the crop dusting her company authorized?

The Franklin Limited Liability Company Act [FLLCA] is the controlling authority pertaining to LLC member liability. The general rule is LLC members are not personally liable for acts of the company based on membership status alone. 605(2). However, members can be liable if the person participates in tortious conduct. The court looks to authorization: direction or participation in defining conduct, thus if the courts find "participation" in a tortious activity, the courts will impose liability on that member.

As noted above, Petra will not be found liable based solely on her membership in the company.

Her membership in the company is clear however and therefore she may be liable under recent precedent based on her activities [Hodas (2004)]. As noted above, personal liability will be found if the member participates in some tortious conduct. Assuming this threshold is satisfied [see point 2 below for analysis], "participation" as defined above must be assessed.

Analysis of Ms. Flynn's "participation" in the crop dusting activities.

Ms. Flynn, who is generally solely responsible for marketing responsibilities for her company, concedes she played a role in determining both the use and subsequent crop dusting using the chemical in question. Her role was couched in the context of marketing concerns - she did not want the negative implications of using pesticides to affect the marketability of the company's food. Therefore, she helped Chip, the member who specialized in the agricultural operations, select the particular pesticide, she ordered and once it was decided conventional hand application of the chemical was insufficient to treat the pest issues, she and Chip agreed to the crop dusting and she subsequently ordered more.

Ms. Flynn's activities likely satisfy the definition of "participation"

While it is clear from the facts Ms. Flynn did not specifically fly the plane and apply the chemical herself, her role in the decision making process likely satisfies the authorization or direction necessary to find "participation." While courts have found that involvement in mere ministerial [Bayrd] and public relations task [Hodas] is insufficient in themselves to confer personal liability, Ms. Flynn's actions went beyond those standards and raise enough of a presumption of participation that she will certainly not win a motion for summary judgment on the issue and may very likely lose on this issue at trial. This of course hinges on whether there was a tortious activity.

2.Did the crop dusting of MU-83 constitute an Ultrahazardous activity thus raising the possibility of involvement in a strict liability tort for purposes of analysis 1 above?

When causation is not in doubt, as is the case here, the courts determine whether an activity qualifies as ultra hazardous [UH] by assessing the six factors enumerated in 520 of the restatement torts. These factors are: 1) existence of a high degree of risk of some harm to...land or chattels; 2) likelihood the harm will be great; 3) inability to eliminate the risk by exercise of due care; 4) whether the activity is of common usage; 5) inappropriateness of the activity where it is carried on; and 6) extent to which the activity's value to the community is outweighed by its dangerous attributes. [Thurman].

The activity in question is crop dusting in an area long held to be agricultural. Therefore in considering if the activity is of common usage, we probably need more facts on the prevalence of crop dusting, but it is likely that the activity was both common for the area, and was appropriate for the area - thus speaking to elements 4 and 5 above. With regard to element 6, agricultural growers' ability to successfully produce is important to the community and the use of pesticides is an important factor in growing food. This perspective is undermined however by recent precedent that found that firefighting was not ultrahazardous because the benefits to the community "far outweighed the inherent dangers." [Thurman]. While it is very unlikely that a court will find crop dusting analogous to fire fighting for the purposes of this analysis, this is probably the outer bound of the standard and therefore other inherently dangerous activities are properly defined as valuable to the community - it is just unclear whether crop dusting would satisfy this standard - likely not.

Furthermore, it may not matter, because of the significant number of factors that appear satisfied - thus likely causing this activity to fall into the definition of "ultrahazardous." The courts have held while no single factor is dispositive of defining an activity as UH, the courts have generally found the ability to eliminate risk with due care tends to carry more weight than others. The chemical in question "MU-83," is sold with a user guide that provides that "drift" [unwanted movement of the pesticide to no target areas] is always going to occur and that it may be toxic to aquatic organisms in neighboring areas. While Chip did use due care in not flying over the recommended 30 feet, in fact he flew at 20, according to the user guide, while drift can be mitigated with care [time of day; concentration, etc.] it cannot be eliminated. In addition to satisfying the 3rd element, this high degree of risk also satisfies elements 1 and 2, given that toxicity does strongly imply both high degree of risk and likelihood of great harm. Furthermore, because of the warning regarding toxicity to aquatic organisms, it is probable a court may find the activity was inappropriate for the area [near a pond] - which undermines the position above [the agricultural nature of the area made it likely that this was appropriate].

Given this analysis, it is likely that this activity satisfies the definition of ultrahazardous - and that Ms. Flynn will likely face personal liability.

MPT 2 - Sample Answer 2.
(disclaimer)

Ms. Flynn could be held personally liable for damages under the "participation in tortious conduct standard" because she actively participated in the decisions to select MU-83 and thereafter to use aerial crop dusting.

The key determination with respect to Ms. Flynn's personal liability is whether, under the "participation in tortious conduct standard" her conduct constitutes authorization, direction, or participation in a tortious, or alternately, the performance of a general administrative duty.

It is undisputed under Franklin law that the FLLCA, which governs limited liability companies such as Mistover, members of LLCs are generally not held personally liable for acts or debts of the company or for those of other members "solely by reason of" their membership of management status. FLLCA, 605(1),(2); ***see also*** Hodas v Ice LLC (Franklin Ct. App 2004). However, liability does attach for such a member's participation in tortious conduct. Hodas. While case law seems to suggest that tort liability attaches for authorizing or directing tortious conduct, such liability is not imposed on a member for performing "a general administrative duty." Hodas. [citing Lee v. Bayrd (Franklin Ct. App 1985)]. Therefore, the issue of whether Ms. Flynn can be held personally liable for the damage done by the aerial crop dusting will depend on whether her conduct is most appropriately characterized as the authorization, direction, or participation in a tortious act, or, alternately, the performance of a general administrative duty.

Upon application of the "participation in tortious conduct" standard, it could be found that Ms. Flynn actively participated in the decisions to select MU-83 and thereafter to use aerial crop dusting such that she could be held personally liable for any resulting damage.

Here, according to the terms of the operating agreement, Ms. Flynn's acts with respect to business decisions only in conjunction with her partners day to day decisions regarding planting and harvesting delegated to Chip and day to day marketing and sales decisions supervised by Ms. Flynn. However, it appears from a review of the interview notes that together with Chip, she researched and selected MU-83 together and thereafter she ordered the pesticide from an agricultural supplier. It also appears from a review of the notes that she actively participated in the decision with Chip to use aerial crop dusting. While it could be found that ordering the pesticide or filing the public notice, with no additional acts, could constitute the performance of general administrative duties such that liability would not attach, under the rational in Hodas, her active participation in making the decisions to order the pesticide at issue and subsequently to use the aerial crop dusting method expose her liability for any tortious conduct there from. ***See*** Hodas (comparing the liability of Castellano, for whom the only basis for liability was the appearance of his name on a liquor license, with that of O'Malley and Kaufman, who actively participated in customer relations and personnel matters).

The totality of the circumstances support a finding that crop dusting MU-83 is an ultrahazardous activity.

The relevant factors, under the Restatement Second test adopted by Franklin, which are to be **e**xamined under the totality of the circumstances are: 1) the existence of a high degree of risk of some harm to the person, land, or chattels of others; 2) likelihood that the resulting harm will be great; 3) inability to eliminate the risk by exercise of reasonable care; 4) extent to which the activity is not a matter of common usage; 5) inappropriateness of the activity to the place where it is carried on; and 6) the extent to which the activity's value is outweighed by its dangerous attributes. Thurman v. Ellis, (Franklin Ct. App. 2003) (***citing*** Sisson v, City of Bremerton, (Franklin Sup. Ct. 1975).

Like in Thurman, the precise degree of risk may be uncertain, but upon review of the User's Guide, the likelihood is high that any harm to aquatic organisms, such as trout, resulting from the activity will be great. See User's Guide for MU-83 Application. ("Drift and runoff may be toxic to aquatic organisms in neighboring areas.") Because the guide states that "drift will occur with every application," any exercise of reasonable care, no matter how great, will not eliminate the risk, thereby satisfying the weighty third factor. ***Id.*** Whether the activity is characterized as use of pesticides in commercial agriculture or, alternately, the use of MU-83 may prove material to the determination of whether the activity at issue is a matter of common usage. Presuming, based on the statement in the User's Guide that "[a]s with all pesticides, persons applying MU-83 should... be aware that pesticide "drift" is always a risk of pesticide application," and in light of the fact that Mistover is located in Sutton Hills, long a place of agriculture, the activity of applying pesticides should be found to be a matter of common usage.

Regarding the inappropriateness of use of pesticides on Mistover, while it could be found to be inappropriate to spray pesticides near a trout farm, it should be found to defy logic as to the appropriateness of applying pesticides on an agricultural farm.

Finally, regarding the weight of dusting crops with MU-83 vis-à-vis the harm it may cause, it could be found, in light of the economic difficulties of the region and the potential that Mistover crops pose for economic renewal of the region, that permitting aerial crop dusting for MU-83 in the interests of preserving the Mistover lettuce crop outweighs the damage caused to Genesee Trout. However, this is an unlikely conclusion because the situation here does not implicate an activity that benefits the community at large, like in Frederick v. Centralia Fire Dept. , (Franklin Ct. App. 1999), but rather implicated an activity that benefits a discreet class of people like in Thurman.

The aerial crop dusting should be considered an ultrahazardous activity.

MPT 2 - Sample Answer 3.
(disclaimer)

To: Lyle Palkovitch
From: Applicant
Re: Mistover Acres LLC
Date: July 24, 2007

I have been asked to prepare an objective memorandum analyzing (1) whether Petra Flynn can be held personally liable for the harm caused by aerial crop dusting carried out by the LLC in which Ms. Flynn is a member (2) whether the aerial crop dusting constituted an ultrahazardous activity. My answers to both questions are below. The analysis will assume, as instructed, that the aerial crop dusting caused damage to the trout farm.

If the Aerial Crop Dusting Is Determined to Constitute Tortious Activity, Ms. Flynn Will Likely Be Personally Liable Because of Her Individual Participation In the Planning and Execution of the Crop Dusting Activities.

Under the Franklin Limited Liability Act, the personal liability of partners in limited liabilities companies is generally circumcised. Although "a member of a limited liability company is not personally liable solely by reason" of her membership, section 605 states nothing in the section "shall be construed to affect the liability of a member of a limited liability company to third parties for the member's participation tortious conduct." Thus, if Mistover LLC's crop dusting activities are determined to be tortious, Ms. Flynn ***could*** be held personally liable for her participation in those activities.

The distinction made is between management status and membership conduct. ***See Hodas v. Ice***. Ms. Flynn cannot be held personally liable for Mistover's tortious acts just by virtue of her status as a partner; she can be held personally liable for her conduct as a member. In other words, vicarious liability against members for torts committed by the LLC is not allowed, but members will be held liable for their own tortious acts as members of the LLC. ***See Hodas v. Ice***. Individual liability is derived from individual actions; for instance, Chip Kendall could be held personally liable if the crop dusting is deemed tortious because he actually flew the plane that dusted the crops.

Although the connection of Ms. Flynn's activities to the dusting are somewhat more attenuated, her conduct is likely to be deemed active participation, rather than "performing what is merely a general administrative duty." ***See Lee v. Bayrd***. Ms. Flynn did carry out "general administrative duties" in connection to her duties to market and sell Mistover's crops. She ordered the MU-83 pesticide through an agricultural supplier and filed the relevant notices on the township web site, at the Town Hall, and in three other places.

Had her activities been limited to the activities outlined above, she would have a strong case that she was merely performing administrative duties. She is in charge of marketing and sales, while Mr. Kendall has authority over planting and harvesting. However, Flynn discussed the need for

pesticides with Kendall, even expressing concerns about the marketing consequences. She and Kendall then researched pesticides and together selected MU-83. She also was part of the decision to use aerial crop dusting rather than hand-spraying. Additionally she observed Mr. Kendall's flight and the use of the pesticides, and walked through the fields to verify effectiveness. The User's Guide shows that she also knew of the risks.

These actions show that Ms. Flynn was more than an administrative observer to decisions made by someone else; instead, she was an active participant in every part of the operation besides the actual use of the pesticides. The fact that she did not actually fly the plane would be helpful in asserting that she did not directly commit the act. Under ***Hodas v. Ice***, she is not liable for the acts of other members of the partnership, but the facts tend to show that she "authorized, directs, and participated" in relevant acts. Therefore, Ms. Flynn is liable to face personal liability for those acts if they are determined to be tortious.

Because the Crop Dusting Entailed a High Degree of Risk

Although this is a closer question, Mistover's crop dusting is likely to be found an ultrahazardous activity under a six-part test outlined in ***Thurman v. Ellis***. In ***Sisson***, the court found that the most important, albeit not dispositive part of the test was the third, "inability to eliminate the risk by the exercise of reasonable care." The MU-83 User's Guide announces that "drift and runoff may be toxic to aquatic organisms in neighboring areas" and that drift "is always a risk of pesticide application." The Guide also directs that aerial dusting, although safe, should occur no higher than 30 feet. Mistover's application was made at 20 feet, perhaps indicating that the risk from the product cannot be eliminated.

I will now address the other factors sequentially. First, the high degree of risk of harm and second, the likelihood that such harm will be great, are shown in the MU-83 user's guide. Although the guide also attests to the safety of the product, it notes that drift will occur and improper use or application may cause serious injury or death. This allows for a degree of care, but still establishes a strong risk of harm.

Fourth, pesticides were not "a matter of common usage" in the area surrounding Mistover, as many of the area's farms are dedicated to organic practices. Even Flynn was concerned about marketing consequences of large-scale pesticide use. Factor five, the inappropriateness of the activity to place it is carried out, cuts both ways. On the one hand, many area growers are organic, but on the other hand, the area has long been agricultural, and pesticides are associated with agriculture.

Finally, the extent to which the activity benefitted Mistover does not equate to the extent the spraying benefitted the community, and that value is small. The community has been revitalized by organic farming, not pesticides, and the dangerous attributes of the crop spraying outweigh the benefits experienced by the community in having a successful gourmet lettuce farm (compare the benefits of firefighting).

Under the totality of the circumstances it is likely, although not certain, that the aerial crop dusting constituted an ultrahazardous activity under these circumstances.