

FEBRUARY 2007 PENNSYLVANIA BAR EXAMINATION

Sample Answers



Pennsylvania Board of Law Examiners
5070A Ritter Road, Suite 300
Mechanicsburg, PA 17055
(717) 795-7270
www.pabarexam.org

Question No. 1: Sample Answer

1. Issue: Whether Able's disclosure to Frank's doctor about how Sam might overdose Frank violated any Pennsylvania Rule of Professional Conduct.

Able was Sam's attorney. Able is a licensed Pennsylvania attorney. Able became aware of Frank's plan through conversation with Sam. Able took it upon himself to confirm Frank's competence. Able told Frank's doctor, without Sam's or Frank's permission, about how Sam intended to assist Frank in his death when asked.

The attorney owes to the client a duty to maintain the confidentiality of all conversations relating to the representation made in the attorney client relationship. The client holds the privilege and it is up to the client to waive the privilege. However, the Pennsylvania Rules of Conduct state that an attorney can disclose confidential information, if the attorney believes the information is likely to prevent a death or serious bodily injury. However, the attorney's belief must be reasonable and the attorney owes a duty of confidentiality in all communications related to the representation. At no point did Sam or Frank waive the privilege either expressly or constructively.

Able could assert the defense of a breach of confidentiality based on the fact that Sam informed him that he planned to overdose Frank. An attorney may disclose any information that would be deemed confidential if he believes that information will prevent a person from serious bodily harm or death to a person. In the present case, because of Frank's impending death, and Sam's plan to act when Frank becomes ill, Able could have reasonably believed that a death was likely to occur.

2. Since Frank died with no will, the \$100,000 will pass to his heirs through the laws of intestacy for the Commonwealth of Pennsylvania.

According to the facts, Frank only has two issue, his son Sam and his daughter Darla. He has one further lineal descendant, Junior, a grandson. Following the laws of intestacy, generally the \$100K would be split equally amongst his children. However, there are a few facts that effect intestacy in Frank's case.

A person who is convicted of causing the death of the decedent may not benefit from the estate of the decedent through intestacy. Sam was convicted as being responsible for Frank's death in 2006. Therefore, Sam can not now inherit through intestacy. However, the advancement of \$10,000 from Frank to Sam is excludable because it was made during the lifetime of the decedent.

If an issue is unable to take from the estate, this does not prevent his children, who are also lineal descendants of the decedent, from taking from the estate. Junior, Sam's son and Frank's grandson, will still receive a portion of Frank's estate. However, the advancement of \$10K to Sam conditioned that the advancement was part of Sam or Junior's inheritance. Therefore, an offset for the \$10K advancement to Sam must be made before Junior will receive his intestacy share.

Therefore, Darla will receive \$55,000 and Junior will receive \$45,000 since the \$10,000 was advanced to his father.

3. Gross income is income received or derived from whatever source, unless a specific exclusion applies. Income is the recipient's net accession to wealth over which the recipient has total control.

A) Sam could argue that the \$10,000 was an advancement given by Frank with the intent as a down payment on his inheritance upon Frank's death. Gifts, bequest, and devises received from a decedent are excluded from gross income. The note by Frank evidences a contemporaneous writing of advancement.

B) Sam received this income in return for doing something for his father (killing him) and even funds received from illegal acts are not excluded from gross income without an exclusion. The cash was made readily accessible and available to him in 2006 and thus is taxable in that year.

Question No. 2: Sample Answer

1. The charges of second degree murder and kidnapping are supported by the facts. The charge of first degree murder is not.

The charge of kidnapping is appropriate because Al kidnapped Amy. Kidnapping requires unlawful confinement of a person without their consent or removal a substantial distance with the requisite intent. Amy tried to escape and Al did not allow her. He forced her to stay in the car. He also removed her 10 miles from the scene. He did so with intent – both to cover up his crime and he did so with intent to use force (he prevented her from leaving). He may have also had the gun.

Second degree murder is felony murder in Pennsylvania which is committed during an inherently dangerous felony or while fleeing. Here, a robbery is an inherently dangerous felony. Since he was fleeing from the robbery the accident was a foreseeable result of the fleeing and he will be charged correctly with second degree murder.

First degree murder in Pennsylvania is murder of another person with the specific intent to kill them accompanied by malice express or implied. Here, Al did not have the specific intent to kill Amy. He lost control of his vehicle, ran a stop sign and crashed the car. Amy died as a result of injuries at the scene. Absent this specific intent to kill Amy (Al was madly in love with her), Al can not be convicted of first degree murder in Pennsylvania.

2. The prosecutor should argue no interrogations requiring Miranda warnings occurred since Chief is not a police officer. The general rule is that, under the constitution, police are required to give the Miranda warning prior to custodial interrogation. Here, Chief was a private security guard acting on behalf of his employer, not as an agent of the police. Then, Chief's conduct is not state action or police custodial interrogation. The general rule is that evidence obtained in violation of the 5th and 6th amendment is inadmissible. But here, because Chief is not a police officer, no custodial arrest and interrogation occurred. Thus, the Motion to Suppress should be denied.

3. The issue is what civil action, if any, Sue should file against Al to address her concerns for her personal safety raised by Al's threat against her, and with what likely result.

A Protection From Abuse order, or PFA, is an order by the court stating that one person is not permitted to be within a certain distance of another or will be found in contempt. PFA's are filed by current or former spouses who fear that the other person will commit some type of injury against them. There must be a real threat and/or past violence proven for a court to issue a PFA.

According to the facts, Al has a history of domestic violence against Sue, and has threatened her via phone that she will not live to celebrate her next birthday.

Based on the facts presented, it is very likely that the court would grant Sue a Protection From Abuse order.

4. In Pennsylvania, dying declarations are allowed into evidence as an exception to the hearsay rule. Hearsay is an out of court statement offered in court to prove the truth of the statement. Here, the statement that is to be admitted is Carl's last words to Officer. This statement concerned what Amy had told him before she died.

A dying declaration may be admitted if the statement was made in contemplation of their death. Here, it is undisputed that Carl was aware that he only had minutes to live. However, the dying declaration rule requires that the statement be in regard to the facts and circumstances surrounding their death.

Carl's statement to Officer did not concern his death, they concerned Amy's death, and, thus, the declaration would not be admissible.

It seems that Carl could have possibly testified, under the dying declaration exception, to Amy's last words, if Carl was alive.

Question No. 3: Sample Answer

1. In addition to negligence or warranty claims, Sandy should bring a cause of action for strict products liability against Whirlwind and Bike, Inc. Sandy will likely win the strict products liability claims.

Strict Products Liability

A claim of strict products liability may be brought against a merchant. A merchant is anyone that regularly deals in goods of the kind. Both Whirlwind and Bike are merchants because Whirlwind is a company that designs, manufactures, and distributes racing bikes and Bike is a retail seller of racing bicycles. An action of strict products liability may be brought against any merchant in the chain of the sale. Thus, Sandy may bring an action against both Whirlwind and Bike, Inc.

To succeed on a cause of action of strict products liability, a plaintiff must show that there was a manufacturing or design defect, that the defect existed when it left the defendant's hands, and that the defect caused the plaintiff's injuries. A manufacturing defect will be found where the particular product in question was more dangerous than the other, identical products that came off the same assembly line. There was a mistake in that specific product. A design defect is a defect that occurs as a result of the actual design of a product. The product in question is not any different than the other products that came off the same assembly line because the defect is the design itself. A court will find a design defective if there is a substitute design that could be used that would be safer for the public and could be made without an undue increase in costs to the company. A failure to warn of potential dangers when using the product is also considered a basis for strict liability. The plaintiff in a strict products liability case can be the ultimate purchaser of the product or a family member or third party that was in the purchaser's household and injured by the product. The plaintiff must also prove that the damage occurred while she was making a foreseeable use of the product.

Here, Sandy will argue that there was a design defects in the bike that she purchased from Bike Inc. and that an inadequate warning about the defect was provided. First, she will argue that the catastrophic failure of the front wheel assembly was a design defect. Sandy will show that this was a dangerous condition that Whirlwind was aware of and could have fixed without unreasonably increasing their costs. Whirlwind was aware that the front wheel assembly of the Rocket failed at speeds of 40 miles per hour and yet marketed the bike as "Whirlwind's sleekest racing bike." The reason that Whirlwind did not change the design of the bike was in order to preserve its sleek look, not because it would be too difficult or too expensive. In addition, although Whirlwind did include a conspicuous warning on the handlebars of the Rocket, this warning was not specific enough to convey the true danger that existed when using the bike at high speeds. Whirlwind could easily have included a warning that stated "do not use above 40 mph," which would have prevented Sandy's accident.

Sandy was engaging in a foreseeable use, competing in a race with a "sleek" racing bike, and thus should succeed in her action for damages.

2. Whirlwind should file a preliminary objection. This responsive pleading is the mechanism under Pennsylvania law by which a defendant may alert the court to certain defects in the complaint. Here, Whirlwind should state that the complaint contains scandalous and impertinent material. This is one permissible ground for a preliminary objection. The court is likely to sustain this preliminary objection. The statements that Whirlwind executives were “money hungry scoundrels and crooks” and “robbed the public to fatten the pockets of its stockholders” have nothing to do with Sandy’s negligence claim.

In addition, Whirlwind’s preliminary objection should also state that service of process was improper. Under the Pennsylvania Rules of Civil Procedure, service of process may only be effected by a sheriff, except in cases filed in Philadelphia County. Because the instant case was filed in X County, Attorney Big was required to have a sheriff serve process upon Whirlwind. Therefore, this preliminary objection will be sustained, because service of process was improper.

3. Hearsay is an out of court statement by a declarant that is not testifying at a trial or hearing, which is being offered to prove the truth of the matter asserted.

Attorney Big may respond that the statement falls under the exception to hearsay of present sense impressions, requiring the declarant to be depicting or describing his or her own sense of an event contemporaneously occurring.

The statement will likely be admissible.

Question No. 4: Sample Answer

1. A proper plaintiff could challenge the new five dollar fee imposed by C County on solid waste generated outside C County, specifically that waste generated outside of Pennsylvania, on the basis that it places an undue burden on interstate commerce.

The issue is what claim(s) based upon the United States Constitution should be asserted by an appropriate plaintiff to challenge the new five dollar fee imposed by C County on solid waste generated outside C County and deposited in C County landfills and with what likely result?

Under the Commerce Clause Congress has authority to regulate the channels and instrumentalities of interstate commerce. A state may not place an undue burden on interstate commerce and if it does it must be proportionately related. Here, there is interstate activity because garbage is being brought from out of state into Pennsylvania. Specifically that which can be challenged is the charge for out of state garbage disposal subject to the five dollar per ton fee because it is being done with the intent of discouraging use of the landfills for waste collected outside of C County. This directly will affect interstate commerce and violates the commerce clause because it is placing an undue burden on interstate commerce.

On the other hand, one could argue that the fee is not discriminatory against out of staters because the fee applies to all garbage from outside C County and in that case the fee charged for out of state garbage is not disproportional to charges being incurred by in-state businesses. However, because the Supreme Court has determined that prohibiting garbage moving in interstate commerce violates the constitution, it is most likely that an out of state company incurring the fee will be the best to challenge the fee and will most likely prevail.

2. A plaintiff must have proper standing to assert a claim. The plaintiff must 1.) have suffered personal injury or have a personal stake in the outcome, 2.) have a claim that is able to be redressed by the court, and 3.) show causation such that the complained of act can be traced to the defendant in the matter.

Here, the claim is ripe as there is a viable live controversy because the ordinance is in effect and fees are being imposed on the waste disposal companies. WCI can easily show that they have a personal stake or have been injured because the facts indicate a “substantially increased” fee amount. Also, the court can redress and remedy the ordinance. Causation is met because the ordinance/fees can be traced to C County.

WCI may run into an obstacle in bringing a violation based on interstate commerce burden, however, because the facts indicate it does not deal with waste from outside the state like the other 2 companies. WCI does deal with outside city’s and still must pay the fine on a potentially invalid ordinance.

3. If Eli is terminated he will not be successful in a claim of discrimination against WCI brought under the Americans with Disabilities ACT (“ADA”) because there are no reasonable accommodations that can be made by WCI.

The issue is if Eli is terminated, would he be successful if he brought a claim of discrimination under the ADA against WCI?

The ADA states that employers shall not discriminate against qualified individuals with a disability. The ADA is applicable to employers with 15 or more employees. Here, WCI has 150 employees so it is subject to the ADA. Eli is an individual with a disability because he was recently injured in an automobile accident that has resulted in a severe injury to his right arm and a permanent loss of use of his right arm. An individual has a disability if they are unable to perform major life functions. Based on the facts, permanent loss of use of one arm would make Eli unable to perform major life functions. When an individual has a disability, the employee may request reasonable accommodations. Reasonable accommodations are not available here because Eli cannot operate a trash collection truck like he did in the past because there are no known devices that are available where only one functional arm can operate the trash collection truck. Thus, there are actually no reasonable accommodations with respect to giving Eli back his former position. In addition, it would be financially burdensome if WCI would be required to place someone in the truck because two functional arms are required to steer and operate the front-end lift simultaneously. Reasonable accommodations are also not available in another position because the only other position for which WCI could accommodate is already being held by another employee. WCI has determined that Eli could operate the trash compacting machine located at the landfill with only one functioning arm, however, that position is currently held by Mary, who had been employed by WCI for many years in that capacity. It would be unreasonable to terminate Mary in order to give Eli a reasonable accommodation.

4. The employees of WCI could successfully assert a First Amendment and Fourteenth Amendment Right to Privacy claim against C County. The First Amendment/Fourteenth Amendment Right to Privacy requires that the government not interfere with a persons right to privacy. Invasion of privacy by the government could be invasion into marriage, divorce, contraceptives, child rearing, sexuality, health... If the government invades a persons privacy, the Plaintiff must first have an expectation of privacy, then the Plaintiff has standing for an invasion to privacy claim.

Here, the employees of WCI had an expectation of privacy in their medical records that contained any medical conditions that they might have. In order to ensure compliance with the licensing requirement of all employees exposed to solid waste as part of their regular duties to obtain an annual medical examination from a licensed physician, C County required a copy of the medical record of each employee's medical conditions be submitted with the application for license renewal. After receiving the medical records, C County, a government agency, placed the medical records in an unlocked filing cabinet that virtually any employee of C County had access to. C County requirement for the medical records was to help protect the employee's health who were exposed to solid waste as part of their regular employment duties. Protecting an employee's health is not a compelling reason for the government to become involved in the collection of WCI's employees and the two other companies employees medical records. If the employer is collecting this information for a file that could be made readily available to C County, C County does not have a compelling reason to collect this information and store it in an unlocked filing cabinet. Therefore, the employees of WCI could successfully assert a First Amendment and Fourteenth Amendment right to privacy.

Question No. 5: Sample Answer

1. The court will rule that the property is Bob's

In PA, a tenancy by the entirety is only available to married persons. Once the marriage is terminated, however, so is the tenancy by the entirety. Instead, courts have held the property to be held in a tenancy in common. In cases like Angie & Bob's, however, this rule is more difficult to apply. Although there is a strong presumption against rights of survivorship a court will generally hold a tenancy by an entirety to be a joint tenancy with rights of survivorship (JTROS), in cases where the 2 people are not yet married. This is because an intent to share survivorship rights is presumed by having a tenancy in entirety. Since Angie & Bob never did anything to sever their joint tenancy (Angie's subsequent marriage to John does not count) like a sale, partition, or mortgage based on the facts, Angie & Bob had a JTROS and the property passes to Bob at Angie's death.

2. Connie should seek a court order to enjoin Dave's construction and to enforce the equitable servitude under which George conveyed his property. A plaintiff can enforce an equitable servitude against successors of ownership of land subject to an equitable servitude if they prove that the original agreement stating the condition between the original parties was in writing, that the original agreement states the intent to bind successors of ownership of the land; that the agreement touches and concerns the legal relationship of the parties as land owners; and that successors in interest had notice of the equitable servitude. Such notice can be established by record notice even if one of the successors of interest received title by a deed that didn't contain the covenant if the other deeds did contain the covenant, and all deeds were conveyed in the same chain of title.

Here, the deed to lot 3 which George conveyed to the owner prior to Dave contained the covenant in writing. Also, the deed stated that the restriction was binding on all successors to the land. Additionally, the covenant touched and concerned the party's legal relation as land owners. Lastly, all the deeds, including Dave's, were conveyed in the same chain of title, thereby putting Dave on record notice of the restriction.

Because all the elements are met, Connie can enjoin Dave's construction and enforce the equitable servitude against him.

3. Dave cannot successfully defend against Supplier's suit by raising the Statute of Frauds because although his oral promise was to act as a surety (and a promise to answer for the debt of another normally comes within the Statute of Frauds and requires a writing) Dave's main purpose for making the promise was to secure a pecuniary benefit for himself.

Under the Statute of Frauds, certain types of contracts require a writing in order to be valid and enforceable. If a contract comes within the Statute of Frauds, it must be in a writing signed by the party to be charged, which sets forth the essential elements of the bargain and the identity of all parties to the contract. Promises to answer for the debt of another come within the Statute of Frauds and normally must be in writing to be enforceable. However, a recognized exception to

the writing requirement is the “main purpose” exception. This exception does not require a writing for a contract which would otherwise come within the Statute if the main purpose for making the oral promise was to advance one’s own benefits.

Here, Dave promised orally via telephone that he would pay Tony’s bill if Supplier would deliver the goods to Tony. On its face such promise is a promise to answer for the debt of another (Tony). However, Dave’s main purpose for making the promise was because he wanted the goods to be available for his own benefit. Therefore, Dave’s oral promise is enforceable under the “main purpose” exception to the Statute of Frauds and he will be unsuccessful in asserting the Statute as a defense to Supplier’s action.

4. If Ed is found liable for the damages Dave suffers when Happy Harry’s did not open on time, Ed will be responsible for the \$1,000/day because the parties expressly agreed that Ed would pay that amount if the renovation of the warehouse was not complete in time for Happy Harry’s Grand Opening.

The issue is if Dave sues Ed for actual damages suffered when Happy Harry’s did not open on time and if Ed is found liable, what is the proper measure of damages.

The \$1,000/day is a liquidated damages amount. Parties to an agreement may agree in advance to a damages amount to be paid in the event of a breach. Such damages are called liquidated damages and are generally upheld when it would be hard to determine damages in advance and when the amount is reasonable. The amount should not be so disproportionate that it is deemed a penalty. Here, it would be hard to determine actual damages because while Dave had extensive experience in the restaurant and entertainment industries, he had no certainty on his side because Happy Harry’s franchise was a completely new and untried concept in the Big City market. Dave’s use of his experience in estimating earnings of an average of \$1,000/day in profits is a reasonable amount because it is estimated in good faith and finally, because in reality it was actually lower and not a penalty. Therefore, Ed will most likely be responsible for the liquidated damages the parties agreed to in advance.

Question No. 6: Sample Answer

1. Retail could assert that Pete is usurping a corporate opportunity if he forms a new corporation and buys Outlet.

A director must discharge his duties in good faith and with the reasonable belief that his actions are in the best interests of the corporation. This is the director's duty of loyalty. The duty of loyalty includes the duty not to usurp corporate opportunities. A corporate opportunity is defined several ways; it includes a business opportunity that is necessary to the corporation or in the corporation's line of business. If a director learns of a corporate opportunity and keeps this information from the corporation and acts on it by himself, he is usurping a corporate opportunity. A director may not usurp a corporate opportunity. Instead, the director must make the board aware of the opportunity and wait for the board to reject it. If the board does so, the director may then proceed on his own.

Here, buying Outlet was a corporate opportunity, because Retail's board of directors had specifically discussed opening up an outlet operation to sell lower-priced goods in order to increase profits. In addition, the Outlet location would be perfect for Retail's prospective new outlet business. Therefore, the opportunity to buy Outlet was a corporate opportunity.

If Pete buys Outlet on his own by forming a new corporation without telling Retail, he will have breached his duty of loyalty to the corporation. As a director of Retail, Pete must make the Outlet purchase opportunity known to the Retail board. If Retail rejects the opportunity, Pete may be free to pursue the Outlet business on his own. However, his plan to keep the information from the Retail board would be a breach of his duty of loyalty and a usurpation of corporate opportunity.

Therefore, under corporate law, Retail could assert that Pete's independent, secret acquisition of Outlet would be a breach of his duty of loyalty and usurpation of corporate opportunity.

2. Retail could seek equitable relief, including disgorgement of profits or a constructive trust.

Equitable relief is available at the discretion of the court if money damages are not sufficient and equitable relief is feasible. Generally, a director who breaches his duty of loyalty and usurps a corporate opportunity must make the corporation whole through equitable remedies such as disgorgement of profits or a constructive trust. Essentially, a director who usurps a corporate opportunity is required to give up the benefit he has wrongfully acquired and make the corporation whole.

Here, money damages would be insufficient for the breach of loyalty that Pete would commit if he purchased Outlet on his own. This is because ownership of a business is inherently speculative. There is no way to calculate the financial harm that Pete did to Retail over the long run by cutting off its opportunity to create a new and potentially very profitable type of appliance business. Equitable relief would be feasible, because Pete could be required to account for the

profits of his new business and turn them over to the corporation; in addition, or in the alternative, the new business could be placed in a constructive trust and transferred to Retail. Therefore, money damages are insufficient and equitable relief is feasible. In addition, the duty of loyalty owed by a director is a very high standard, and a court would be reluctant to let Pete profit from his breach of loyalty.

Therefore, Retail could seek equitable relief as a remedy for usurpation of corporate opportunity.

3. Joe should assert unconscionability as applied to the clause and would probably be able to invalidate the contract, or at least the unconscionable clause.

Unconscionability consists of 2 elements, each taken on a sliding scale. These elements are procedural and substantive. Procedural unconscionability shows an unfairness in the bargaining process as a whole, while substantive unconscionability shows oppressive terms and unfair surprise.

Here, Joe can argue procedural unconscionability based on the sales agreement being 6 pages in length and in very small print. Further, Pete never explained what the terms, clauses, or contents of the agreement were to Joe. There is an unfair bargaining process here. Substantively, the terms are oppressive to Joe. The average appliance buyer does not know what a “cross-default/cross collateralization clause” is. The facts even indicate the clause was “complicated” and Pete knows most of his customers are “not that smart”. Thus, the clause would act as an unfair surprise in contract terms to Joe.

Joe will likely be able to invalidate the clause, or contract based on unconscionability.

4. State X’s food stamp amount will be what Joe receives. A citizen is domiciled in the state in which he is actually physically present and mentally intends to be domiciled. Here, Joe barely meets the physically present requirement and does not meet the mental requirement that he intends to be domiciled in Pennsylvania. Joe only rents an apartment in PA on a month-to-month basis, he rarely spends an evening or weekend in the state while spending the vast majority of his non-work time in state X. He maintains his checking account, driver’s license and voter registration in state X, he only comes to PA for work and only rents an apartment here because he is required to have a C City address for his job and he does not like C City. His activities and attitude demonstrate that he does not intend to be domiciled in Pennsylvania and instead intends to be domiciled in state X where he spends all of his non-work time. Accordingly, he will receive the welfare benefit amount from state X.

Question PT: Sample Answer

To: Honorable John D. Smith
From: Applicant
Date: February 27, 2007
Subject: Plaintiff v. Paco, Newco, and Delco; No. 06-CV-7890;
Plaintiff's Motion to Remand

Statement of the Facts

The case before us involves alleged negligence by the Defendants in the form of products liability. Plaintiff filed her Complaint on December 15, 2006 in the Court of Common Pleas of Philadelphia County. The Defendants received their copies of Plaintiff's Complaint at their respective places of business by certified mail on December 26, 2006. Defendants signed the receipts for the certified mail on the same day. Plaintiff believed that the Defendants needed to file their Motion for Removal by January 17, 2007. Defendants filed their Motion for Removal on January 22, 2007. Therefore, Plaintiff, operating under the belief that Defendants had not filed within the thirty day time period, filed her Motion to Remand on February 1, 2007.

The Defendants assert that there is complete diversity of citizenship between the parties and that Defendant Paco ("Paco") was fraudulently joined as a defendant solely to defeat federal diversity jurisdiction. Paco is the parent company of Defendant Marco ("Marco"). Paco's principal place of business is Bethlehem, Pennsylvania. Paco maintains a specialized staff in their corporate offices in Bethlehem. This specialized staff provides services for all Paco's subsidiaries in such areas as facility design and construction, real estate acquisition and disposal, insurance, preparing and making federal and local tax payments, supply purchasing, and transportation, as well as various other corporate office functions. Paco also utilizes centralized accounting, merchandise, and accounts payable functions for its subsidiaries. Plaintiff asserts that Paco is liable for the negligent acts of Marco as Marco's parent company.

All of the Defendants maintain their principal places of business in different locales. Defendant Newco ("Newco") is a corporation organized and existing under the laws of the State of New Jersey, with its principle place of business in Trenton, New Jersey. Defendant Delco ("Delco") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Wilmington, Delaware. Defendant Paco is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Bethlehem, Pennsylvania. Paco is the parent company of Marco and Marco is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in Baltimore, Maryland.

Plaintiff lives in Philadelphia, Pennsylvania. Plaintiff asserts that Paco is liable for the negligence of its subsidiary Marco. Marco allegedly was negligent in its manufacturing of a heating element in Plaintiff's electric stove. The heating element overheated. Plaintiff alleges that as a direct and proximate result of the negligence and carelessness of the above named Defendants, Plaintiff's home, personal belongings, and actual person were injured. As a result of Defendants' alleged negligence, Plaintiff lost wages, experienced pain and suffering, is permanently disfigured, and incurred medical expenses. Plaintiff requests \$250,000.

2. Issue(s) and Brief Conclusion

1. The first issue raised by Plaintiff is that Defendants Notice of Removal was not timely filed and therefore this matter must be remanded back to the Court of Common Pleas of Philadelphia County.

Defendants did in fact file the motion in a timely manner and therefore the matter should not be remanded for this reason.

2. The second issue raised by Plaintiff is that Defendant Paco is not a fraudulent Defendant, therefore the parties are not diverse and this matter should be remanded back to the court of the Common Pleas of Philadelphia County.

Defendant Paco is not a fraudulent Defendant, it is a citizen of Pennsylvania, therefore there is not complete diversity of citizenship and the case should be remanded back to the court of Common Pleas of Philadelphia County.

3. Analysis

1. The matter should not be remanded because of the alleged untimely filing of the Defendant's Notice of Removal.

According to Pa.R.C.P. No. 404, "Original process shall be served outside of the Commonwealth ... (2) by mail in the manner provided by Rule 403." Rule 403 states that "If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to defendant by any form of mail requiring a receipt signed by the defendant. Service is complete upon delivery of the mail."

In this case, the Plaintiff filed a complaint on or about December 15, 2006. Defendants were sent the complaint on December 18, 2006 and received a copy by certified mail on December 26, 2006. It was proper for Plaintiff to serve defendants via certified mail because they resided outside the Commonwealth. According to Rule 403, process was served on December 26, 2006, when Defendants received the mail.

Notice of Removal is required to be filed within 30 days, and Defendants met that deadline by filing on January 22, 2007. Plaintiff is wrong in asserting they were sent the complaint and the timeline starting running on December 18, 2006, the date she sent the complaint. The 30 day timeline started December 26, 2006, the date they received the mail. Therefore, the matter should not be remanded based on this issue.

2. Remand is necessary based on the lack of complete diversity defeating Subject Matter Jurisdiction (SMJ).

An action is removable to federal court if that court would have original jurisdiction. 28 U.S.C. 1441. Original jurisdiction exists where the amount in controversy exceeds \$75,000 and it is between citizens of different states. 28 U.S.C. 1332 (a). The citizenship of corporation entities is determined by state of incorporation and principle place of business. 28 U.S.C. 1332(c).

“The removal statutes” are to be strictly construed against removal and all doubts should be resolved in favor of remand. *Boyer v. Snap-On Tools*. Thus, the party seeking removal bears a heavy burden of proof when attempting to overcome the deference given to Plaintiffs choice of parties. *Id.*

When removal is based upon a claim that a party was joined solely to defeat diversity, that party’s joinder to the action must be shown to be fraudulent, that is: “There is no reasonable basis in fact or colorable ground supporting the claim against the joined Defendant.”

In conducting this analysis the court must resolve all contested issues of substantive law in favor of the Plaintiff.” Thus only a limited piercing of the allegations is appropriate. *Boyer citing Smoot*

Here Paco, asserts it was fraudulently joined as a Defendant based on a spurious theory of liability for its subsidiary. Rather than decide whether Paco is liable for actions of its subsidiary this court should examine whether there is a colorable claim that it can be, with issues of unresolved fact favoring the plaintiff.

The standard for parent subsidiary liability is set forth by *Stinson v. GAF* and, essentially, requires that the subsidiary be a mere instrumentality of the parent. This is determined by the degree of control exercised by the parent and considers such factors as capitalization, overlapping of officers and directors, record keeping, and authority of day to day operations. *Stinson*

Here Marco and Paco share two directors and the financial and credit services are consolidated. Additionally, Paco provides help for various office functions of Marco such as taxes, insurance and supply purchasing. Without deciding the issue, and impermissibly piercing the pleading, it seems a colorable claim can be made that Paco sufficiently controls Marco to be liable. *Stinson*. See also *Cockrell* As such, Paco is properly joined. *Cockrell, Stinson*. This joinder defeats diversity jurisdiction, § 1332, and requires remand. § 1447.

Conclusion and Recommendation

The matter should be remanded. Although there was no procedural problem with the notice of removal, the potential liability of Paco (for the actions of Marco) makes it a properly joined defendant that defeats federal subject matter jurisdiction.

