JULY 2021
PENNSYLVANIA BAR EXAMINATION

Sample Answers

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Performance Test: Sample Answer

Issue 1

DATE: July 26, 2021

Good morning,

This letter is to address the history of bad faith law in Pennsylvania, the intricacies of the current state of bad faith law, and whether NIC's current lawsuit is subject to a claim under Pennsylvania's bad faith law.

Issue 2

History of Pennsylvania's Bad Faith Law

Pennsylvania's insurance law developed in response to a national movement towards providing a cause of action for bad faith insurance actions. However, Pennsylvania acted differently than most states by demanding the legislative branch, rather than the judicial branch; provide a bad faith cause of action.

In 1981, in D'Ambrosio v. Pennsylvania Nat'l. Mut. Cas. Ins. Co. (D'Ambrosio), Pennsylvania courts had their first opportunity to decide whether plaintiffs have a cause of action against insurance companies that plaintiffs believe to have acted in bad faith in covering certain injuries. Despite the national trend in developing case law supporting this claim of right, the court declined to do so, stating that the General Assembly of the state, rather than the courts, should decide if such a cause of action should be created.

Despite failing to create the cause of action, the D'Ambrosio court set out a potential standard for the legislature to follow in defining how a plaintiff can prove bad faith insurance coverage. However, unlike some other states, the D'Ambrosio Court made no distinction between general bad faith liability and bad faith liability proof required to award punitive damages. The resulting statute, Section 8371, reflected the legislature's response to the courts invitation in D'Ambrosio, but it failed to set forth distinct standards for what constitutes bad faith nor did it define the requirements for punitive damages.

Instead, Section 8371 simply states: "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions: (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%; (2) Award punitive damages against the insurer; (3) Assess court costs and attorney fees against the insurer." However, Section 8371 fails to define "bad faith" and merely provides the actions a court may take if it finds the insurer acted in bad faith. Id.

In Terletsky, the Superior Court defined the elements required for insurance bad faith denial of coverage under section 8371. The Terletsky Court, however, complicated the issue relating to punitive damages when it quoted Black's Law Dictionary. The Terletsky Court did not find fraud to be necessary for punitive damages, but did cite a portion of the definition creating confusion as to whether a motive or self-interest or ill-will was necessary for an award of punitive damages. However, in the official holding, and as demonstrated by current and more developed Pennsylvania caselaw, self-interest or ill-

will is not necessary for an award of punitive damages, but rather is probative to an insurance company acted in bad faith. Section 8371 reflects this standard by failing to distinguish between punitive damages and general liability, thus establishing that ill-will and self-interest are not required for success in a bad faith case.

Ultimately, Pennsylvania's Section 8371, in conjunction with the Superior Court's Terletsky decision, demonstrate the current state of bad faith law in Pennsylvania.

Current Bad Faith Liability Requirements

In the Rancosky decision, Pennsylvania used statutory construction when analyzing Section 8371 in light of the Terletsky decision to find the appropriate test for bad faith insurance coverage claims. 1 Pa.C.S. 1921(c).

Today, the Terletsky test, in conjunction with Section 8371, provide the elements of proof required to prove an insurance company acted in bad faith. By clear and convincing evidence, a plaintiff must prove two prongs. Rancosky. First, the plaintiff must prove that the defendant did not have a reasonable basis for denying benefits under the policy. Rancosky. This is an objective inquiry that looks to the facts and circumstances presented to the court. Rancosky. Therefore, ill-will and self-interest are not required to prove this prong. Rancosky. However, mere negligence on the part of the defendant is insufficient to find bad faith. Rancosky. In Rancosky, for example, the court noted a finding of bad faith where the defendant insurance company did not do a meaningful investigation into the plaintiff's claim is probative of meeting the first element.

Once the first prong is proven, a plaintiff must also prove that the defendant knew or recklessly disregarded its lack of a reasonable basis in denying the claim. Rancosky. Unlike the first prong of the Terletsky test, this prong is a subjective inquiry where self-interest or ill-will is relevant, but not required. Rancosky. Therefore, any evidence of those improper motives are merely probative of this prong, rather than prerequisites to success. Rancosky. To be clear, self-interest or ill-will is not a third element. Rancosky.

Under current Pennsylvania law allowing a cause of action for bad faith insurance claims, the plaintiff must prove that the defendant did not have a reasonable basis for denying benefits under the policy and that the defendant knew or recklessly disregarded its lack of a reasonable basis in denying the claim. A showing of ill-will or self-interest, while probative, is not required.

Issue 3

NIC's Actions and Application

Here, NIC will likely be found to have acted in bad faith because NIC's actions meet the standard of proof set forth in Terletsky to prove bad faith by an insurance company.

First, the plaintiff must prove, under an objective standard, that the defendant did not have a reasonable basis for denying benefits under the policy. Here, in the time leading up to the arbitration on April 22, 2020, NIC had plenty of opportunities to thoroughly and reasonably investigate Mrs. Kerwick's claim.

Mrs. Kerwick provided NIC with plenty of paperwork and reliable documentation and testimony for NIC to reasonably calculate her claim. First, in May 2019, Mrs. Kerwick provided NIC with her medical records. In November 2019, NIC hired Dr. Townsley, who found Mrs. Kerwick's disc herniations to be a result of the October 2018 accident. In the following months, three physicians confirmed Dr. Townsley's conclusions and added that Mrs. Kerwick's conditions would require future surgical interventions. Further, Dr. Townsley wrote a second report confirming his prior opinions. NIC responded nearly a month later, indicating that they were still investigating. This was more than a year after the notice of the claim. Dr. Townsley again confirmed his findings a third time and found no pre-existing conditions caused Mrs. Kerwick's injury.

Second, Mrs. Kerwick provided NIC with an expert's economic report. The economist concluded that Mrs. Kerwick's claim and damages had a value of $1.28 million, not taking into account pain and suffering. NIC never obtained an economic report disputing Mrs. Kerwick's claim value by her economist. The only offer was $250,000. At arbitration, the arbitration panel accepted Mrs. Kerwick's wage loss claim of $750,000, loss of household services of $300,000, and her future medical costs of $230,000, ultimately awarding her $1.5 million, including financial losses and pain and suffering. Subtract $250,000 from this to account for NIC's one and only award offer, and Mrs. Kerwick received $1.25 million in arbitration award money. NIC never obtained an economic report disputing the value of Mrs. Kerwick's economist.

On December 28, 2019, NIC'c claims adjuster indicated that Mrs. Kerwick's economic projections were over the policy limits.

On January 19, 2020, NIC provided a settlement offer to Mrs. Kerwick in the amount of $250,000.

With all of this information provided to NIC, including economic and medical reports, NIC did not have a reasonable basis to reject Mrs. Kerwick's offer to reach the policy limits.

Second, the plaintiff must prove that the defendant knew or recklessly disregarded its lack of a reasonable basis in denying the claim.

Here, NIC's claims adjuster made notes that Mrs. Kerwick's claim was worth much more than the $250,000 offer. His notes expressed worry about having to pay her policy limits, but NIC still decided to force Mrs. Kerwick to arbitrate, resulting in an award that cost more than her policy limits. This, in conjunction with NIC's internal notes, indicates awareness of the lack of reasonable basis in denying Kerwick's claim and in offering only $250,000 to settle her claim.

Based on the state of the law and the facts as outlined above, NIC will likely be liable to Mrs. Kerwick under the bad faith statute.

Sincerely,
Assigning Partner

Question 1: Sample Answer

Issue 1

The court should determine that the oral agreement does not meet the requirements of a valid contract to make a will. Therefore, the court is unlikely to rule in favor of Eric.

Under Pennsylvania law, a contract to make a will is enforceable if one of three requirements are met: (1) a written agreement is validly executed that contains the essential terms of the contract; (2) a validly executed will includes all of the material terms of the agreement; or (3) the will makes explicit reference to the agreement and sufficient external evidence can be introduced to prove its terms.

Here, Eric is attempting to enforce an agreement to make a will yet cannot meet any of the three requirements. Emily orally promised Eric that if he moved in and helped her for the rest of her life, she would leave Green Street to him in the will. While this would count as valid consideration for a written agreement, the agreement between Emily and Eric was oral. As a result, the agreement is not enforceable under the first test. Second, though Emily had a validly executed will, that will was executed before the agreement and does not contain the terms of the oral agreement. Finally, and for the same reason, the will makes no mention of the agreement and as a result, Eric cannot bring in the external evidence that would prove the terms.

Because Eric cannot meet any of the requirements for a valid contract to make a will, a court will not enforce the agreement with Emily and will deny Eric’s claim.

Issue 2

Under the PEF Code Phil should elect against the probate estate.

Pennsylvania's PEF Code strongly favors the notion that a spouse should be taken care of upon the death of his or her partner. To that end, Pennsylvania allows a surviving spouse to elect against a decedent's estate and be awarded an amount equal to 1/3 of the decedent's probate estate. This is called the spousal elective share, and it is available to a surviving spouse when they have not been adequately provided for in a testamentary document. The remaining 2/3 of the probate estate is then awarded according to the terms of the will. A spouse must timely assert that they would like to make this election so that they do not lose the opportunity to do so.

Here, Phil is the surviving spouse of Emily. They were married in 1988 and there is no evidence to suggest the couple was not still married at the time of Emily's death, therefore, Phil is eligible to elect against Emily's probate estate. If Phil timely takes this action, the probate estate would be distributed such that Phil takes 1/3 and Eric takes 2/3. Since Emily's only asset for distribution is the Green Street property, the court would likely order a sale of the home, after which point the proceeds would be distributed to Phil and Eric accordingly.

Thus, Phil has the option to take a spouse's elective share against Emily's estate, and, if he timely does so, the probate estate will be distributed to Phil and Eric in 1/3 and 2/3 shares respectively.

Issue 3

Arnold violated his duties of diligence and communication under the Pennsylvania Rules of Professional Conduct (PA RPC). Under the PA RPC, an attorney has a duty of diligence that requires the attorney to timely complete the work the attorney was hired to perform without any undue delay. An attorney is not excused from the duty of diligence by reason of higher paying obligation to other clients.

Under the PA RPC, an attorney also owes clients a duty to communicate timely and effectively. An attorney is required to keep their clients abreast of all developments in the matter as they arise. An attorney is also required to respond to communications from clients within a reasonable period of time.

Here, Emily signed a fee agreement with Arnold to prepare Emily's new will. Arnold did not complete the will because he was busy handling a more complex, higher paying lawsuit. When Emily checked on the status of her will, Arnold said the will would be done soon. Arnold then failed to reply to any of Emily's subsequent emails and never prepared Emily's will, resulting in Emily dying without her new will. Arnold breached his duty of diligence when he failed to timely complete Emily's will as agreed upon in his fee agreement. Arnold had no excuse for his delay in and ultimate failure to complete Emily's new will. Arnold also breached his duty of communication when he failed to reply to Emily's emails. As such, Arnold has violated the PA RPC.

Issue 4

As a result of taking the briefcase, Eric will have to report the stolen $25,000 from the briefcase as income on his 2019 Federal Income Taxes, but because he returned it later, $25,000 may be deductible on his 2020 Federal Income Taxes. The Internal Revenue Service (IRS) defines income for tax purposes as "all income generated, derived from any source." This includes income generated through illegal means. In the year that someone receives income as a result of theft, embezzlement or other illegal activities, they are required to count the amount illegally obtained as income for that year. Eric took the briefcase containing $25,000 with the intention of keeping it, and placed it in a safety deposit box, owned by him in 2019. Therefore, as a cash basis taxpayer, the $25,000 must be included in his 2019 income for tax purposes.

When an individual generates income through illegal means and reports that income in a prior year, they may also list it as a deduction in a subsequent year to the extent that repayment of the stolen property is made. In 2020, after being confronted by Penny regarding the missing briefcase, Eric returned the briefcase with the cash to Phil. Therefore, if he properly included the $25,000 in his 2019 income, he may be able to claim it as a deduction for the year 2020 when it was returned.

Question 2: Sample Answer

Issue 1

Because Lynn was entering into a personal business deal as well as a fee arrangement with her client, Farm, she should have advised Farm to obtain their own legal counsel, she should have informed farm in writing the detail of all the risks and alternatives involved with the deal, and she should have obtained informed consent in writing with the terms of the agreement also in that writing. It may not have been advisable for Lynn to accept the arrangement because the fee arrangement could be seen as fundamentally unfair to Farm and Lynn may not be able to properly represent Farm with her own self-interest involved.

When a lawyer and a client enter into a business transaction together, several requirements must be met. First, the client must be informed of all the risks and alternatives involved with the transaction with a lawyer. This includes knowledge the potential of implicit influence of the lawyer over the client. The client must also be aware of alternative business transactions available to them before agreeing to transact with the lawyer. This information must be provided as a means of obtaining informed consent, which is consent with the knowledge of all the risks and alternatives that a reasonable person would want to know under the circumstances. Second, the terms must be in writing and they must be reasonable, according to other transactions of the same type and circumstances. Finally, the lawyer must advise the client to receive independent legal counsel to advise on the terms of the agreement to ensure they are not coercive or unconscionable for the client. Even where these requirements are met, a lawyer must be very diligent and careful not to commingle with client assets or duties to the point of unduly serving the personal interests of the lawyer. A lawyer must, first and foremost, act as an advocate for the client, not herself.

Here, Lynn did not take the necessary steps to validate her fee arrangement and business transaction with Farm. Further, Lynn did not advise Farm to receive independent counsel in contracting this deal with Lynn. Even though nine other investors consented to the transaction, Lynn should have advised the potential client to seek independent legal counsel in these circumstances. Whether that counsel is eventually obtained is for Farm to decide, but Lynn must at least advise Farm of that fact. Finally, the terms of the arrangement were not reasonable, thus precluding the existence of Farm's informed consent. No facts indicate that Lynn and Farm discussed the reasonableness of the terms or alternative arrangements for paying Lynn's fee without putting Farm's financial future in danger. Further, the terms are not reasonable because the total cash value received from the deal, about $12,000 (including $2,000 in legal services and the value of 5% of the stock), is three times Lynn's usual fee. No facts indicate that this job is more complicated or complex for Lynn in that it requires three times more hours than Lynn's usual work. Therefore, the increase in pay is unfair to Farm and unduly benefits Lynn for work she would normally perform at one third of the price. This disparity in payment precludes the existence of informed consent, especially since the facts do not indicate any discussion between Farm and Lynn about the reasonableness of the terms.

Even if all the proper steps were taken by Lynn, Lynn should not have taken this arrangement because she is using her legal services as a method of enhancing her own position,

rather than that of her client. She cannot be a proper fierce advocate when her personal investment funds are at stake. The involvement of her own money is inappropriate and is improperly used in exchange for her services.

Issue 2

Dealer bears the risk of loss of the backhoe because, under the Uniform Commercial Code (UCC), Dealer is a non-carrier merchant who assumes the risk of loss until the good is delivered to the buyer.

The Uniform Commercial Code governs contracts for sale of goods. Goods are moveable items, as opposed to services, which are not. Under the UCC, a seller bears the risk of loss of a product until the buyer takes delivery. When the buyer takes delivery depends on whether the contract is a contract involving a merchant and whether the contract is a contract involving a carrier. A merchant is a dealer who regularly sells goods of the kind being sold in the transaction at issue. When seller is a merchant dealing in goods of the kind, the seller bears the risk of loss of the goods or damages to the goods until the delivery to the buyer. Until then, the seller will pay damages for any losses.

Here, the UCC governs the contract because a backhoe is a movable good. Therefore, the Dealer bears the risk of loss until Farm, under Al's authority, takes delivery. Dealer is a merchant because Dealer is an excavation equipment retailer, indicating that Dealer regularly deals in goods of the kind. The exchange between Dealer and Al is a non-carrier exchange because Dealer is not delivering the backhoe to Al through a large mail carrier, but he is delivering the backhoe to Al personally, at his store. The risk of loss does not shift to Al until Dealer has fully delivered the goods to Al. A mere sale between the two parties, as existed here, is insufficient to shift the risk of loss because the backhoe is not in Al's hand or on Farm's property, but still in Dealer's parking lot per Al’s agreement with Dealer. Therefore, Dealer bears the risk of the theft of the backhoe.

Issue 3

Al can be held personally liable for his own torts even when he is acting within the scope of the business.

In PA, corporate officers are not personally liable for the torts of other corporate officers. Thus, if one officer commits a tort while within the scope of his or her duties, the other officers cannot be held liable for that officer's conduct. However, a corporate office can be liable for his own personal torts even if acting for the corporation. He is not shielded by the corporation for his own personal tort.

Here, Al is the person being held accountable for his own tortious actions and therefore can be held personally liable even if he was acting within the scope of his duties as a corporate officer. Al, while aware of the potential risk to homes below Blackacre, negligently created a

water diversion system to address a water issue for the Farm. Thus, the owners of the homes below Blackacre can sue Al directly regardless of Al's status as an officer of Farm.

Thus, Al can be held liable for his tortious conduct.

Issue 4

HVAC's services to Farm do not support a claim under the Code that the furnace was not fit for the ordinary purpose for which it was used because HVAC's services do not fall under the purview of the Uniform Commercial Code, which governs the implied warranty of merchantability.

When a contract involves both services and goods, the law requires the court to look to the primary purpose of the contract to see whether services or goods were the primary purpose of the contract. Once the primary purpose of the contract is decided, it governs the entire contract; the contract is not split piecemeal amongst governing laws. Where services dominates the contract, the common law rules the entire contract and it is not covered by article 2 of the UCC. Where goods dominate the contract, the UCC governs the entire contract. The Uniform Commercial Code governs contracts including tangible goods. Tangible goods are moveable items, as opposed to services, which are not.

Here, HVAC's contract with Farm is a contract primarily for services because the purpose of the contract was to get the furnace in working order, not to provide an entirely new furnace to Farm. Even though HVAC provided the furnace with some new parts, the parts only cost $100 of the $1,000 contract, indicating that the parts, or the goods themselves, were incidental to the primary purpose of the contract, which is the services. 90% of the contract involved labor, or services, which were oiling and cleaning the furnace itself. Thus, the primary purpose of the contract is services. Therefore, this contract is governed by the common law. Therefore, Farm cannot bring an action under the UCC.

Question 3: Sample Answer

Issue 1

Zach can be found guilty of Forgery because he had the intent to deceive and defraud, created a false impression of the check by signing Joe's name and adding the phony job number, and E Bank relied on the false impression of the check by cashing the check and depriving Joe's company of the money.

A person can be found guilty of forgery if with the intent to deceive and defraud, they create a false impression of an instrument, and there is proof that there was reliance on the false impression. Uttering is cashing the false instrument.

Here, Zach clearly had the intent to deceive and defraud. Zach knew that Joe had not authorized him to sign his name to company checks and signing the check and taking it to E Bank to be cashed satisfies the intent requirement.

By signing Joe's name to the check with the knowledge that Joe had not authorized Zach to sign his signature, Zach falsified the check and therefore created the false impression that the check was legitimate. Furthermore, adding the phony job number on the memo line further supports that he falsified and created a false impression of the instrument (the check).

Finally, by taking the falsified check to the bank and having the bank cashed, the bank clearly relied on the false impression of the check that Zach forged to appear that it was legitimate. Zach also committed the crime of uttering when he cashed the check.

Therefore, the court would find Zach guilty of forgery.

Issue 2

The facts support a third degree murder charge against Zach for Mike's death because third degree murder in Pennsylvania does not require intent to kill and may be based on recklessness.

In Pennsylvania, first degree murder is premeditated murder with intent to kill. Second degree murder is felony murder. Third degree murder is all other murder that is not premeditated or felony murder. Third degree murder requires recklessness or depraved heart which is an indifference to the risk of the harm that may be caused by one's actions. Intent is not required.

Here, Zach was loading fireworks into launch racks by the edge of the lake. Zach then turned one of the racks toward the bonfire where Sara and Mike were standing together. Zach thought the fireworks would go off above the bonfire, so he did not intend to harm or kill Sara or Mike but he was aware they were standing there because Zach was staring at Sara and laughed when he turned the racks towards the bonfire. The launch rack tipped over as Zach lit the fuse, sending the fireworks into the bonfire where they exploded, knocking Sara and Mike off their feet. Mike died at the scene. When Zach turned the rack toward the bonfire knowing Sara and

Mike were standing there, he had a reckless disregard for their safety and a depraved heart as to whether or not they would be injured by the fireworks. Fireworks are inherently dangerous and Zach should have appreciated their danger rather than be indifferent as to whether the fireworks would go off above the bonfire or not. If the DA filed a third degree murder charge against Zach for Mike's death, these facts support the charge.

Issue 3

The State can also raise the hearsay exception of excited utterance.

The issue is what hearsay exception, other than present sense impression, can the State raise to admit Sara's statement to the police. Hearsay is an out of court statement made by a human declarant that is being offered for the truth of the matter asserted. Pennsylvania law recognizes only exceptions to the hearsay rule, so to make a hearsay statement admissible, it must fall under one of the acceptable hearsay exceptions. Pennsylvania recognizes the excited utterance hearsay exception which admits a statement made about a startling event by a person who is still laboring under the excitement of that event. The excited utterance hearsay exception embraces statements that are made immediately after experiencing the startling event, but also statements made after the startling event so long as the declarant is still feeling the excitement of the startling event.

Here, the state seeks to admit Sara's out of court statement for the truth of the matter asserted because the statement indicates that Zach turned the fireworks towards the bonfire and was aware Sara and Mike were standing there. Sara gave the statement at question to police very soon after the firework explosion occurred. When the firework explosion occurred, paramedics and police responded to the scene immediately. The police interviewed Sara who was "uninjured but still very startled and shaken." The facts further indicate, by the use of the words "she managed to answer" that during the interview with the police Sara was having a hard time giving answers because she was still so upset by the firework explosion. Thus, it is clear that when Sara made the statement to the police she was still laboring under the excitement of a recent startling event, i.e. the firework explosion. And, a short enough period of time had passed such that she was still feeling the impact of the startling event. So the state is likely to succeed in seeking admission of the statement under the excited utterance exception.

Issue 4

Sara is likely to succeed in obtaining a PFA order against Zach.

The fourth issue is Sara's likelihood of obtaining a PFA order against Zach.

The purpose of the Protection from Abuse Act is to prevent future abuse or harassment of a victim when the harassment is coming from a household member or family member. Couples in a sexual relationship qualify for protection under the Protection from Abuse Act even though the harassing party may not be a household member or family member. Stalking and harassment are enough for the court to grant a PFA. A PFA order protects the victim from contact with and future abuse or harassment from the defendant.

Here, Sara is likely to succeed in obtaining a PFA order against Zach. While Zach is not a household member or family member of Sara's, Sara and Zach were in a close sexual relationship. As soon as Zach was released from custody, Sara told Zach to stop contacting her. Despite her pleading, Zach continued to attempt to contact Sara. Not only did he call, text, and post at Sara for three days, but he also showed up to her apartment and her place of work. Zach went even further by threatening Sara with "something even more explosive . . . if she wouldn't see him." After the events with Mike, Zach's actions were directly interfering with Sara's life. Zach's actions rise to the level of abuse and harassment under the Protection from Abuse Act.

Therefore, Sara is likely to succeed in obtaining a PFA order against Zach.

Question 4: Sample Answer

Issue 1

a. Nina should raise a facially discriminatory claim of systemic disparate treatment theory based on the fact that the Policy specially mandates hiring and staffing based on gender and thus it is facially discriminatory.

Under a systemic disparate treatment theory under Title VII, a plaintiff must show that a employer has a discriminatory policy and because of that policy the plaintiff has been discriminated against.

Here, the New Way has a hiring policy that discriminates on its face. New way has a written policy that Counselors must work only with patients that are the same gender as the Counselor – a facially discriminatory policy based on gender. Nina has been discriminated against based on her gender because she applied for an open job offering, she was the most qualified candidate, she was not interviewed or hired, and men who were less qualified than her were given the job.

Thus, based on the discriminatory policy, Nina has an action under the systemic disparate treatment theory.

b. New way should raise the defense of having a bona fide occupational qualification (BFOQ) and the court will uphold the policy as being valid.

When an employer has been sued under Title VII as having an employment policy that discriminates on its face, it may offer as a defense a BFOQ. A BFOQ is a qualification that is necessary and essential to the functions of the job. Further, a BFOQ will be upheld if it is necessary for the safety of the workers.

Here, New Way assigning the Counselors based on the gender is a valid BFOQ. Counselors are critical to New Way's mission for emotional support for the adolescent patients. Extensive data shows that adolescent patients experience better outcomes when they receive therapy from those of the same sex. More than 40% of patients have been physically or sexually abused by members of the opposite gender. This all points to a valid policy that is essential and necessary for the job. It could be a safety concern for patients who have been abused by the opposite gender to be paired with an opposite gender Counselor. Therefore, New Way will be successful in defending Nina’s discrimination suit using the BFOQ defense.

Issue 2

Nina's Equal Protection claim against New Way would fail under the state action doctrine because New Way is a private employer and the state is not involved enough in their business for state action to be at play.

The equal protection clause of the 14th amendment holds that states should afford persons equal protection under the law. In evaluating an equal protection claim, courts determine whether a suspect

class is denied equal protection under the law or if there was a denial of a fundamental right. In order for the equal protection clause to be triggered, however, there must be state action involved. The state action doctrine holds that private parties are not liable for discriminatory treatment under the equal protection clause (or other restrictions against the government) unless they are either (1) exercising a traditional state function traditionally left to states; or (2) the state has become excessively entangled with the private party such that it is the state acting through the private party. The second factor is rare and does not apply to situations where the party is subject to regulation, receives governmental funding, or receives a license. Mere acquiescence by the state is not enough, the state must receive a specific benefit from the private party because of its relationship.

Here, the equal protection challenge would be barred by the state action doctrine because New Way is a private actor and State A is not involved enough for it to be considered state action. While New Way receives significant funding and health insurance reimbursements, and is subject to substantial regulation, that is not enough for them to be considered a state actor. They are a private corporation with private actors filling their board. They are not exercising a traditional and exclusive state function. Nor is state A involved enough simply granting funds and insurance reimbursements to New Way. There is simply not enough of an entanglement between the state and the private party for New Way's actions to be imputed as state action. Thus, the equal protection challenge would fail.

Issue 3

New Way will be able to successfully seek dismissal of Nina's most recent Title VII claims on the basis of issue preclusion but not claim preclusion.

Issue preclusion can be used where an issue has been actually litigated and finally decided against an original party to the prior action or a party in privity with the original party in the prior action. Issue preclusion does not require both parties be the same in the new action. Claim preclusion can only be used where both parties are the same in the prior action and the new action. Claim preclusion means that a party that should have and could have brought a claim or raised an issue against another party in the prior action the party will not be allowed to bring that same claim in a new action. This applies mainly where multiple claims arise from a singular series of transactions or occurrences.

Here, the issue of gender based staffing vis a vis Nina's Title VII claim was already tried before a jury where she lost. The judgment is final. If Nina tries to relitigate with respect to her most recent Title VII claim, New Way should be able to use issue preclusion to prevent relitigating the gender based staffing policy. This is because New Way and Nina were both parties to the prior action, the issue was finally decided and actually litigated. Also, there was no change in the law that could make the final judgment voidable on relitigation.

Claim preclusion would not work because the newest Title VII claim arose as a result of New Way's 2021 failure to hire Nina. Thus it is a new cause of action because Nina could not have possibly brought this claim in the prior action in 2020. Therefore, Nina may bring a new action against New Way based on this particular incident alleging a Title VII violation, but New Way can use issue preclusion to avoid relitigating the gender based hiring policy for the reasons mentioned above.

Question 5: Sample Answer

Issue 1

a. Amy retained an express easement appurtenant on Blackacre.

The first issue is whether Amy retained an easement appurtenant when she conveyed Blackacre to Bill.

An easement appurtenant is created when there are two separate properties a dominant estate and a servient estate. The dominant estate has the benefit of using the right of way retained on the servient estate for the specific use. An easement appurtenant can be express or implied. An express easement appurtenant is created when the right to use the right of way is explicit in the conveyance of the property.

Here, Amy created an express easement appurtenant when she conveyed Blackacre to Bill. Blackacre is the servient estate to the easement and Whiteacre is the dominant estate. Whiteacre has the benefit of using the dirt road on Blackacre for ingress and egress to Beaver River. The creation of the easement was express because it was in the valid deed given to Bill. The right of way on Blackacre can only be used for ingress and egress as per the explicit terms in the express creation of the easement. In the conveyance, Amy explicitly reserved herself a right to use the easement.

Therefore, Amy retains an interest in Blackacre because she created an express easement appurtenant.

b. Carl no longer has a cognizable property interest in Blackacre.

The second issue is whether the express easement appurtenant on Blackacre was extinguished when Carl owned both Blackacre and Whiteacre.

An easement appurtenant is extinguished when there is a merger of the dominant and servient estates. A merger occurs when one party owns both the dominant and the servient estates. It is irrelevant if the property is re conveyed back to the original owner, the merger already extinguished the easement.

Here, Carl's interest in Blackacre was extinguished when Bill sold him Blackacre. Merger extinguishes an easement appurtenant because the owner to the property does not need an easement to access their own property. It does not matter that Bill promised to buy back Blackacre and it does not matter that Carl conveyed Blackacre back to Bill. Once the dominant and servient estates, Whiteacre and Blackacre, respectively, were merged, the easement appurtenant was lost.

Therefore, Carl no longer has a cognizable property interest in Blackacre and he cannot require Bill to remove the barrier preventing Carl from traveling to Beaver River.

Issue 2

Constructive Eviction and Implied Warranty of Habitability

Sam would be successful in defending this suit based on breach of the implied warranty of habitability because Carl failed to fix defects that made the home inhabitable. However, he would not succeed on his constructive eviction claim because he failed to vacate the premises.

Constructive Eviction

The implied covenant of quiet enjoyment prevents a landlord or anyone else from denying the tenant their reasonable enjoyment in their home. Constructive eviction is a violation of this implied covenant and occurs when the landlord takes steps or lets the house get into such a state of disrepair that it prevents the tenant from living in the house. It is sufficient if he makes only part of the premises uninhabitable. However, in order to succeed in a constructive eviction claim, the tenant must actually vacate the premises.

Here, Carl has failed to take actions to fix the pipes and clean the basement, which has caused the basement to be flooded and contaminated the house's water supply and attracted rats. This in turn violated Sam's right to quiet enjoyment of the property. However, Sam will be unsuccessful in asserting a constructive eviction claim based on the fact that he has said to Carl "I'm not leaving!" and he did not leave. In order to prevail on this claim, Sam must stop living in the house.

Implied Warranty of Habitability

Every lease in Pennsylvania comes with an implied warrant of habitability. This implied warranty means that the house must be fit for dwelling. To make out a claim that the landlord has violated this implied warrant, the plaintiff must establish three things. First, she must show there was a material defect in the home.

Second, she must show that she notified the landlord about the defect. Third, the landlord must have had a reasonable opportunity to fix the defect and failed to fix it. If the plaintiff is able to establish these three elements, he can use a breach of this warranty as a defense against an action by the landlord for unpaid rent. The tenant is within her rights to withhold the amount of rent that is proportional to the materiality of the defect.

Here, Sam will be able to successfully defend this suit on the basis of a breach of the implied warranty of habitability. The first element is met because these defects were very substantial, as the entire basement was flooding with raw sewage, there was a rat infestation, and it contaminated the water supply, along with a very foul odor. These are major health and safety concerns. The second element is met as Sam has constantly called and sent emails to Carl to notify him of these defects. The third element is met as Carl has had a reasonable opportunity to fix the defects and he has failed to make any repairs. Because of that, Sam was rightful is withholding all of his rent and can defend an action against Carl for unpaid rent on this ground.

In conclusion, Sam will be successful in defending the suit on the basis of the implied warranty of habitability but not on the basis of constructive eviction.

Issue 3

Was a valid contract formed between Bill and Sam for Sam to perform as Mark Twain at the grand opening of Bill's bookstore? In order for a contract to be formed there must be mutual assent between parties resulting in an offer and acceptance. An option contract is a contract that is held open for a period of time in return for consideration. Bill asked Sam to perform for him and Sam responded that he would perform for the price of $5,000 requiring written confirmation of an acceptance. Bill asked that the offer remain open until May 1 and offered to pay Sam $500 to leave the offer open within that period. Sam agreed and Bill paid him $500.

While a party can usually revoke an offer within any reasonable time before acceptance, a party cannot revoke an offer that was agreed to be left open when consideration has been paid – an option contract. Bill paid Sam $500 which would constitute consideration to leave the offer open. In doing so, Sam was unable to revoke the offer before May 1 as that was the agreed upon date. Therefore, when Sam texted Bill on April 28 revoking his offer, the revocation was invalid since Bill had paid him consideration and the option period was still open. Based on this, there was still a valid offer that could be accepted. On April 29, when Bill sent a written note accepting the terms of the offer and paying the agreed upon price to Sam he successfully accepted the offer. Sam, as the offeror, was the master of the offer and required that Bill accept the offer in writing. Bill accepted the offer by those terms, paid consideration to leave the offer open, accepted the offer within the option period, and paid the agreed upon price of the offer. Therefore, a valid contract was formed.

Issue 4

A court should allow Bill to remove the display cases and the jacket cover posters, but not the sprinkler system.

Personal property in a leased premises is defined in three categories:

(1) Fixtures: fixtures are attached the structure of the building and cannot be removed if it would substantially damage the building.

(2) Trade fixtures is personal property that the tenant used to carry out their type of business. Trade fixtures are freely removable when the tenant vacates the property.

(3) Chattels are personal property, not attached to the structure and are freely removable when the tenant vacates.

The sprinkler system installed by Bill is a fixture. If he could remove it without damaging the property, he would be able to take it with him. However, the facts note that it can't be removed without substantially damaging the leased space. Therefore, Bill cannot remove the sprinkler system when leaving.

The display cases are considered trade fixtures. They were specifically designed and built for his book stores and were made to protect the rare books from direct sunlight and humidity. Bill will be able to remove these as they are a trade fixture (built for selling books) and they are freely removable.

The jacket covers can also be removed by Bill as they are considered personal property. They are not structurally connected the building, they served more of a decorative purpose. A tenant is free to remove chattels that are personal property from the property when vacating.

A court should allow Bill to remove the display cases and the jacket cover posters, but not the sprinkler system.

Question 6: Sample Answer

Issue 1

Porter should assert an action for strict liability and will likely succeed.

In Pennsylvania, a defendant may be held strictly liable for injuries cause by abnormally dangerous activities. To make out such a case, the plaintiff must show that the defendant had an absolute duty to exercise utmost care, that the activity was indeed abnormally dangerous, and that the activity was not common to the area. If a plaintiff can show that a defendant was involved in an abnormally dangerous activity, and that that activity cause his injury, the defendant will be held liable even if defendant exercised reasonable care (or, in other words, regardless of fault).

Here, DEF was involved in blasting using dynamite, which is generally considered to be an abnormally dangerous activity. Porter could likely show that these activities caused his extensive injuries, both property and personal, and dynamite blasting is presumably not considered an activity common to a residential area. Porter could likely make out a case for strict liability. Edna's reasonable care developing the "safest possible plan" and the blasting crew's dedication to following the plan precisely will provide no defense for DEF. Thus, based on the facts, Porter will likely succeed in an action for strict liability based upon an abnormally dangerous activity against DEF.

As such, Porter's attorney should bring an action for strict liability against DEF, and will likely be successful.

Issue 2

Porter's attorney should file for a default judgment, should take the necessary steps to do so, and will succeed.

In order to obtain a default judgment, the other side must not have responded to the complaint in the necessary time period. The steps one needs to take to obtain a default judgment are to file a request with the prothonotary, and the prothonotary will render the judgment if the other party has not responded. However, in PA, the plaintiff, must notify the other side that they are filing for default judgment and give the other side an additional 10 days to reply before the default judgment can be filed.

In this case, the parties have agreed to allow DEF a 60 day extension to reply to the complaint. If DEF does not answer in that time period, Porter's attorney can file with the prothonotary to enter a default judgment, however, before this happens, even though the parties agreed that DEF would reply in this time, Porter must still give DEF notice about the default judgment and allow DEF to have 10 more days to respond before it is filed with the prothonotary. If Porter takes those steps, a default judgment will be entered.

Issue 3

a. The liability insurance will not be able to come in for the intended purpose of showing that because DEF has insurance, they acted negligently.

Evidence is typically allowed in if it is relevant. Relevant evidence makes a fact at issue more likely to occur than not. Relevant evidence is typically allowed in, but can be excluded in PA if the risk of prejudice outweighs any probative value of the evidence. Further, the PA rules of evidence (following the FRE) provide for certain types of evidence that are not allowed in as a matter of public policy because they are just too prejudicial on a party. Included in those public policy exceptions is any evidence related to a Defendant having insurance when the party trying to get the evidence admitted is trying to use that insurance to show that because the defendant had insurance, they acted in a culpable or negligent manner. Evidence of insurance coverage is allowed in, however, if it is offered for another purpose, such as to show that a person had ownership of a certain item or area that is covered by the insurance agreement.

In the present case, DEF maintains liability insurance with a coverage of 10 million dollars per occurrence, plus a 50 million dollar umbrella policy. While this may be relevant to the case at issue, it certainly will be excluded as a matter of public policy. Porter wants to introduce evidence concerning the amount of liability insurance coverage in order to imply to the jury that DEF anticipated damage resulting from its blasting activities. This is not an acceptable use of the insurance coverage, as it is aiming to show that DEF engaged in culpable conduct resulting from their confidence in the insurance policy. There is no mention that Porter is trying to use this evidence for another purpose, so it will likely be excluded as too prejudicial.

b. DEF should seek to introduce testimony from Will to authenticate the document. The court is likely to admit the document.

Under the Pennsylvania Rules of Evidence, tangible evidence must be authenticated before it is admitted. Authentication of tangible evidence simply requires that a party lay a sufficient foundation for the court or finder of fact to be confident that the item is what the proponent says it is. While the creator of a drawing or instructions can help the proponent authenticate a tangible piece of evidence, they are not required. To authenticate a document including a sketch, the proponent can offer the testimony of a person who has knowledge of its preparation.

Here, Edna will be unavailable to testify as to her sketch. However, DEF should have Will testify to the authenticity of the sketch. They should have Will testify that he witnessed Edna create the detailed sketch and demolition plan and that the document is in fact the plan Edna created. Will should also testify that he witnessed Edna add handwritten notes and that they planned the blast together. DEF can further authenticate the document by having Will testify that it is Edna's handwriting as he is familiar with her handwriting. If DEF follows these measures the court is likely to allow the documents to be admitted.