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VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia – February 28, 2012

You MUST write your answers to Questions 6 and 7 in BLUE Answer Booklet D.

6. Tom and Jerry, charged with possession of marijuana with intent to distribute in violation of the laws of Virginia, were being tried in non-jury trials in the Circuit Court of the City of Norfolk. The charges were based on their arrests under the following circumstances:

Detective Smith ("Smith"), an undercover narcotics officer of the Norfolk Police Department, undertook to set up a "sting," in which the plan was to catch Tom in a major drug transaction. Tom was suspected of regularly dealing drugs in the Frog Hollow neighborhood of Norfolk, but he had never been charged or convicted of any such offense. Jerry occasionally used marijuana recreationally, which he purchased in very small quantities from Tom. On one occasion, Smith caught Jerry smoking a joint in his car while parked in the local Grab 'n Go parking lot. When questioned by Smith, Jerry told him he had purchased the joint from Tom.

Smith told Jerry that he could be arrested and prosecuted for felony use and possession of marijuana but that if Jerry would "cooperate" with him in setting up a sting, Smith would "forget about" having caught Jerry smoking. What Smith did not tell Jerry was that the most he could be charged with was a minor infraction.

Under the sting plan, Smith, pretending to be a marijuana dealer named Smitty, would approach Tom and offer to supply 25 kilos of the "good stuff" at a bargain price and to deliver it through Jerry at a prearranged time and place. Jerry, who, aside from the occasional use of marijuana, was a law-abiding citizen, reluctantly agreed to go along with Smith's plan. He was fearful that if he did not, Smith would make good on the threat of a felony prosecution.

Smith, impersonating Smitty, made contact with Tom and described the "deal" he was willing to make on 25 kilos. Tom had bought large quantities of marijuana for distribution before, but never from sources that were not well known to him. He was suspicious of Smitty's deal and at first refused even to consider it, protesting that he did not want to get involved with violating the law. Smitty persisted and offered to drop the price even more. Inasmuch as the price was good and the delivery was to be made by Jerry, with whom Tom was already acquainted, Tom agreed to the transaction.

Smith alerted the Narcotics Division of where and when the "deal was going down" and arranged for other narcotics officers to stake out the site and be prepared to make the arrest. Smith, in order to preserve his cover, did not intend to be at the sting site. Smith did not inform the other narcotics officers about Jerry's role. However, expecting that Jerry would be arrested along with Tom, Smith planned after the sting to disclose to the arresting officers that Jerry was an innocent participant.

The delivery and exchange of money took place as planned. The arresting officers arrested both Tom and Jerry. Earlier in the day, Smith, working on another undercover drug assignment, had been shot and killed by a dealer who had discovered that Smith was a police detective. Thus, Smith did not have the chance to communicate to the arresting officers Jerry's innocent role, and the officers did not believe Jerry's protestations of innocence.

What defense is suggested by the foregoing facts, and are Tom and Jerry each likely to prevail on such a defense? Explain fully.

Reminder: You MUST answer Question #6 above in the Blue Booklet D.

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7. Romeo Dickerson, a resident of Virginia Beach, Virginia, was an avid sport fisherman and was in the market for a new boat. He wanted one that could cruise at speed of 30 miles per hour because in that area of Virginia a typical offshore fishing site is about 90 miles from the coast. It was important that the boat could cruise at that speed in order to get out to the fishing grounds and still leave enough time in the day for fishing. Specifically, he was interested in a Trophy Convertible manufactured by Marineliner, Inc. In Virginia Beach, Marineliner's exclusive dealer was Tidewater Boats, Inc.

Romeo met with Tidewater's salesperson and told him that he was interested in a new Trophy Convertible and asked what the cruising speed of such a boat was. The salesperson said he was unsure what cruising speed such a boat could achieve, but gave Romeo a page from Marineliner's manual, which contained recommended propeller sizes, gear ratios, engine sizes, and maximum speeds for each model made by Marineliner. The Marineliner Model 3486 Trophy Convertible was listed as having a cruising speed of 30 miles per hour when equipped with a "20x20" or "20x19" propeller and with only certain limited optional features that would not increase the weight of the boat and thereby reduce the cruising speed. Tidewater's salesperson also gave Romeo a brochure published by Marineliner that depicted a 3486 Trophy Convertible rigged for offshore fishing, accompanied by the statement that this model "delivers the kind of performance you need to get to the offshore fishing grounds."

Romeo purchased a new 3486 Trophy Convertible from Tidewater for $120,000. The boat he purchased was equipped with a "20x17" propeller, and the specifications prescribed by Romeo included several "after market" items not offered by Marineliner, such as an extra generator, icemakers, navigation system, and air conditioning and heating units, to be installed by Tidewater. The purchase contract between Romeo and Tidewater contained no language about warranties.

Romeo took delivery of the new fully-loaded boat and almost immediately discovered that the boat's maximum cruising speed was 15 miles per hour. Romeo promptly returned the boat and reported the problem to Tidewater, which worked diligently to address the issue, but was unable to achieve a speed greater than 22 miles per hour. Romeo sent a letter to Marineliner and Tidewater tendering return of the boat, requesting return of the purchase price, and saying that he was unable to use the boat for offshore fishing because of its inadequate speed and that he would not have purchased the boat if he had known that its maximum cruising speed was 22 miles per hour. Romeo received no response to his letter. Tidewater has since gone out of business.

Romeo timely filed a complaint in the Circuit Court of the City of Virginia Beach against Marineliner, alleging breach of express warranties and of implied warranties of fitness and merchantability.

Marineliner's general counsel asks you, as the company's outside counsel for court cases filed in Virginia, how the Circuit Court is likely to rule on each of Romeo's claims and why:

(a) Breach of express warranties? Explain fully.

(b) Breach of implied warranty of merchantability? Explain fully.

(c) Breach of implied warranty of fitness for a particular purpose? Explain fully.

Reminder: You MUST answer Question #7 above in the Blue Booklet D.

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→→ Now MOVE to PURPLE Answer Booklet E ←←

You MUST write your answer to Questions 8 and 9 in PURPLE Answer Booklet E.

8. In 1995, when Sue Johnson and her husband, Don, separated, Sue purchased a residence in the Tall Oaks community in Richmond, Virginia. She took title in her name as her sole and separate equitable estate. Sue and Don never divorced.

In July 2009, Sue listed the residence for sale, and Wilton agreed to purchase it for $400,000. One of the things that made the area attractive to Wilton was the large, indoor swimming pool at the nearby Tall Oaks Country Club, which had been developed by the same developer who built the Tall Oaks residential subdivision.

During the negotiations for the house, Sue told Wilton that ownership of the house carried with it the right to use the swimming pool, which Sue said she had used several times a week since 1995. Sue gave Wilton a copy of the contract by which she had purchased the house from the developer. That contract contained the following language: "Use of the Tall Oaks Country Club swimming pool shall be available to purchaser and her family." The deed from the developer to Sue, however, made no reference to the right to use the pool.

At the closing of the sale from Sue to Wilton, neither their contract of sale nor Sue's deed to Wilton made any reference to the right to use the pool. After the closing, Wilton moved into the house, and when he tried to use the pool he was denied access by the Country Club proprietor, who told Wilton that they had let Sue use the pool as an accommodation.

Sue died intestate in November 2011, leaving Don, as her sole heir at law. In the process of administering Sue's final affairs, Don discovered for the first time that, back in 1995, Sue had withdrawn $100,000 from their joint investment account and had used that money to buy the Tall Oaks house.

In January 2012, Wilton was transferred by his employer to manage the company's plant in New Mexico. Wilton put the Tall Oaks house on the market and accepted a $500,000 offer from Thomas.

At about that time, Wilton received a call from Don, who told him that he believed Sue's conveyance to him (Wilton) was invalid. Don explained his discovery of Sue's use of their joint funds to purchase the house and claimed that he therefore retained an interest that he would assert to block any sale by Wilton. He offered, however, to quitclaim his interest if Wilton paid him $100,000. Wilton refused.

Thomas, aware of the foregoing, asks the following questions:

(a) Can Wilton convey good and marketable title to Thomas? Explain fully.

(b) Can Wilton convey the right to use the swimming pool? Explain fully.

Reminder: You MUST answer Question #8 above in PURPLE Answer Booklet E.

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9. Apex Chemical Co. (Apex) had a manufacturing plant on land it owned near the small town of Paint Bank in Craig County, Virginia. Apex was the largest employer in the area and had operated the plant since the early 1970s. The surrounding area was highly productive grassland purchased by the Paint Bank Land Co. (Land Co.) in 1980. The land was leased to local farmers to graze their organically grown cattle. The grazing leases produced between $70,000 and $75,000 annually for Land Co. In addition, Land Co. derived $50,000 a year from the Town of Paint Bank (the Town) for supplying the Town's municipal water system with water from deep wells on Land Co.'s land.

Increasingly the farmers had begun to complain to Land Co. that some of their cattle were becoming sick, and the problem appeared to be getting worse. Since 2009, Land Co. has been unable to lease the land because the farmers have not wanted to expose their cattle to the problem.

In 2010, Land Co. tested the water in the several ponds on the property that furnished the water for the cattle and found evidence of chemical contamination. The contamination was traced back to leaks of toxic materials that were leaching into the ground water from a deteriorating underground pipeline system maintained by Apex.

Periodic annual tests of the well water for the municipal water system also revealed low levels of contamination from the same chemicals. Each year the level of contaminants increased slightly but had not yet reached levels that were harmful for human consumption.

Efforts by Land Co. and the Town to persuade Apex to voluntarily remediate the problem have failed. Apex's studies show that to stop the chemicals from leaching into the ground would require it either to dig up and repair the pipeline or replace it with an above-ground system. Either way, the cost would be in excess of $5,000,000. Moreover, it would have to curtail production at the plant for at least eight months, costing it several millions in lost profits and putting about 25 of the 100 employees, all residents of the Town, out of work for the duration.

Land Co., on the other hand, could line the cattle ponds with impermeable material and replenish them periodically with water hauled by truck from a reservoir 40 miles away. The cost of lining the ponds would be about $100,000, and the cost of hauling the water and maintaining the ponds would be approximately $20,000 per year.

The Town has no other feasible way of getting water for the municipality. Its system was connected directly to the wells on Land Co.'s land, and to build a pipeline to the distant reservoir and buy the water from that source would be prohibitively expensive.

Land Co. and the Town both want to obtain an injunction requiring Apex to dig up and repair or replace the pipeline system.

(a) **On what legal theories may Land Co. and the Town each base a suit for injunctive relief? Explain fully.**

(b) **As between Land Co. and Apex, what remedy, if any, would the court be likely to grant? Explain fully.**

(c) **As between the Town and Apex, what remedy, if any, would the court be likely to grant? Explain fully.**

DO NOT DISCUSS FEDERAL OR STATE ENVIRONMENTAL OR WATER-RIGHTS LAWS.

Reminder: You MUST answer Question #9 above in PURPLE Answer Booklet E.

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Proceed to the short answer questions in Booklet F - (the GRAY Booklet).