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## Virginia Bar Exam, July 2013, Section 2

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VIRGINIA BOARD OF BAR EXAMINERS  
Roanoke, Virginia – July 30, 2013

***GREEN BOOKLET - Write your answer to Question 6 in the GREEN Answer Booklet 6***

6. In 2010, Cammie and Jackson, married adults, purchased a new house located in a residential development in Fairfax County, Virginia. The vendor was Southern Homes, Inc., (“Southern”), a nationwide builder with its principal office in Jacksonville, Florida.

Southern’s standard purchase contract, which was signed by the parties, stated that contractual matters would be governed by Virginia law. The only mention of the subject of warranties was a provision in all capital letters, printed in type two points larger than the remainder of the contract, that read in its entirety: “ALL WARRANTIES, EXPRESS OR IMPLIED, ARE SPECIFICALLY WAIVED.” Other than the foregoing quoted provision, the contract was entirely in a uniform type-face. In addition, the purchase contract stated that, as to dispute resolution: “Any dispute between the parties arising in connection with this purchase contract, which is not otherwise resolved, shall be submitted to binding arbitration for decision, the venue for which shall be Reno, Nevada, and each party is to bear his own attorneys’ fees, expenses of witnesses, and pay one-half the costs of arbitration and the fee of the arbitrator.”

Within six months of the sale, Cammie and Jackson observed cracks in the basement walls and floors of their new house, which they believed to be evidence of structural defects in the house’s foundation. Southern declined to take any remedial action.

Cammie and Jackson sued Southern in the Circuit Court of Fairfax County, claiming breach of contract, negligent design, and breach of the implied statutory warranty contained in Virginia Code § 55-70.1, which states in pertinent part:

In every contract for the sale of a new dwelling, the vendor, if he is in the business of building or selling such dwellings, shall be held to warrant to the vendee that, at the time of transfer of record title or the vendee's taking possession, whichever occurs first, the dwelling together with all its fixtures is sufficiently (i) free from structural defects, so as to pass without objection in the trade, (ii) constructed in a workmanlike manner, so as to pass without objection in the trade, and (iii) fit for habitation.

The above warranties implied in the contract for sale shall be held to survive the transfer of title. A contract for sale may waive, modify or exclude any or all express and implied warranties and sell a new home "as is" only if the words used to waive, modify or exclude such warranties are conspicuous, set forth on the face of such contract in capital letters which are at least two points larger than the other type in the contract and only if the words used to waive, modify or exclude the warranties state with specificity the warranty or warranties that are being waived, modified or excluded. If all warranties are waived or excluded, a contract must specifically set forth in capital letters, which are at least two points larger than the other type in the contract that the dwelling is being sold "as is."

Southern timely filed an answer, which included the affirmative defense that all warranties had been contractually waived. With its answer, Southern also served interrogatories and requests for production of documents on the plaintiffs. In the course of pretrial discovery, Southern's attorney deposed both Cammie and Jackson separately.

Cammie and Jackson also served Southern with interrogatories, one of which asked for information about changes Southern had made in 2011 to the design of its foundations. Southern objected to the interrogatory on the ground that such information was irrelevant to plaintiffs' claim based on a home constructed in 2010 and that measures taken in 2011 to correct prior defects are inadmissible to prove negligence as to any 2010 defects.

Southern filed a Plea in Bar on the basis of its affirmative defense that all warranties had been waived and a motion to compel arbitration based on the contractual dispute resolution provision. Cammie and Jackson filed a motion to compel an answer to their interrogatory regarding the foundation design change.

- (a) **How would the court be likely to rule on Southern's affirmative defense? Explain fully.**
- (b) **How would the court be likely to rule on Cammie and Jackson's motion to compel an answer to their interrogatory? Explain fully.**
- (c) **On what bases should Cammie and Jackson oppose Southern's motion to compel arbitration, and how would the court be likely to rule? Explain fully.**

\* \* \* \* \*

***PURPLE BOOKLET - Write your answer to Question 7 in the PURPLE Answer Booklet 7***

7. Coratech is a Virginia Corporation headquartered in Russell County, Virginia. Its sole business is the development and sale of proprietary computer software for use in business applications, primarily inventory control. Coratech's Board of Directors recently decided that it required larger quarters to accommodate its expanding business. The Board formed a Site Location Committee (the Committee) to find and recommend the purchase of a new location for its headquarters. It appointed three members of the Board to the Committee, naming Dana as its chair.

The Committee received and carefully studied several proposals from commercial real estate brokers, including one for the last available site in Redknap Business Park (the "Redknap site"). The Committee determined that the Redknap site was particularly attractive because of its high-tech campus-like setting. The Redknap site was priced at \$500,000. Dana intended at the next regularly scheduled meeting of the Committee to finalize a recommendation to the Board to purchase the Redknap site. Dana postponed the meeting for a month because its timing interfered with a long-planned golf vacation in Scotland.

Upon Dana's return, and before the meeting of the Committee, Dana received a proposal involving a parcel in Bell Industrial Park (the "Bell parcel"), available for \$350,000. Dana

believed that the Bell parcel was better suited for a warehouse facility than for an office-type facility that Coratech required.

The next day, at the Committee meeting, based on Dana's presentation, the Committee unanimously recommended to the Board that Coratech purchase the Redknap site for \$500,000. Dana did not mention the Bell parcel. The Board debated and adopted the Committee recommendation and submitted a full-price offer of \$500,000. The real estate broker representing the seller responded that, within the last week, his client had received an offer of \$900,000 for the Redknap site and was about to accept it. The Board, still believing that the Redknap site was well-suited for Coratech's needs, responded with an offer of \$1,000,000, which the owner of the Redknap site accepted.

Unbeknown to the Coratech Board, Dana purchased the Bell parcel for his own account and later sold it for \$700,000.

Upon learning of the foregoing, a Coratech shareholder brought a derivative lawsuit. The complaint alleges that:

(1) The Board of Directors collectively and Dana individually breached their duties to the corporation and are, therefore, liable to the corporation for the difference between the \$1,000,000 paid for the Redknap site and the \$500,000 for which it could have acquired it.

(2) Dana breached his duty to the corporation and is, therefore, liable for the amount by which he profited by the purchase and sale of the Bell parcel.

You may assume that the derivative suit satisfies all procedural prerequisites.

- (a) **With regard to the Redknap site transaction, what duties, if any, did the Board and Dana owe to the corporation; what defenses, if any, might they assert; and what is the likely outcome as to their liability? Explain fully.**
- (b) **With regard to the Bell parcel transaction, what duty, if any, did Dana owe the corporation, what defense might he assert, and what is the likely outcome? Explain fully.**

\* \* \* \* \*

***GOLD BOOKLET - Write your answer to Question 8 in the GOLD Answer Booklet 8***

**8.** On June 1, 2012, Chris Creditor ("Creditor") obtained a judgment against Dan Debtor ("Debtor") in the Circuit Court of Norfolk, Virginia in the amount of \$60,000 for work performed in remodeling Debtor's restaurant. Debtor, who was being hounded by several creditors, retained the law firm of Smith, Smith & Jones (the "Firm") on June 23, 2012, to defend him against the creditors.

Debtor gave the Smith firm a \$75,000 advance deposit, which was deposited into the Firm's client trust account under an agreement that stated, "This deposit will be applied toward

legal services heretofore and hereafter rendered and disbursements for costs advanced by the Firm.” The following events then occurred sequentially in 2012:

- On July 28, the Firm made its first disbursement from the trust account to itself for fees earned in the amount of \$17,000.
- On August 1, Creditor obtained from the Clerk of the Norfolk Circuit Court a writ of *feri facias* against Debtor.
- On August 5, the writ was delivered to the Sheriff, and the Sheriff served upon the Firm a notice of the lien of *feri facias*; the notice specified a lien “against all of Debtor’s property in Firm’s possession.”
- On August 10, the Firm made a \$20,000 disbursement from the trust account to itself for fees earned.
- On August 18, the Firm made another disbursement from the trust account to itself in the amount of \$10,000 for fees earned. This left a book balance of \$28,000 of Debtor’s initial advance deposit in the trust account.
- On August 19, the Circuit Court issued a garnishment summons against the Firm; the summons was accompanied by a new writ of *feri facias* and another notice of lien.
- On August 20, the Firm and Debtor were both served with the garnishment summons and accompanying documents.
- On August 30, the Firm discovered that as early as August 15 its recently hired bookkeeper had falsified the trust account books and embezzled funds from the trust account so that the actual amount of the balance attributable to Debtor’s advance deposit was only \$3,000.
- On September 7, the return date of the garnishment summons, the Firm filed a motion to dismiss the garnishment and also delivered a check to the Court in the amount of \$3,000, the post-embezzlement balance of Debtor’s initial advance.

The Firm’s motion to dismiss was based on three grounds: (1) none of the \$75,000 advance deposit given to the Firm by Debtor was subject to the lien because it became the Firm’s property upon receipt, subject only to a contractual obligation to refund to Debtor any balance remaining upon termination of the representation; (2) the lien was defective and unenforceable because the description specifying “all of Debtor’s property in Firm’s possession” was vague and uncertain; and (3) in any event, the most the Firm is required to return is \$3,000 left in the trust account attributable to Debtor’s initial advance deposit on the date the Firm was served with the garnishment summons.

**How should the Court rule on each ground of the Firm’s motion to dismiss? Explain fully.**

\* \* \* \* \*

**ORANGE BOOKLET - Write your answer to Question 9 in the ORANGE Answer Booklet 9**

9. Brent and Gloria Johnson married in 2008 in Blacksburg, which is located in Montgomery County, Virginia. They last lived as husband and wife in Blacksburg where, before the marriage, Gloria had been employed by Virginia Tech as an administrative assistant. She left that job soon after the marriage and was not employed at any other time during the marriage. Brent is unemployed and unemployable due to several felony convictions prior to the marriage, which arose from drug related crimes. In February 2012 Brent was incarcerated for eight months for a probation violation. They have no children of the marriage. Their marriage has been turbulent and, following extensive counseling, they have mutually agreed to seek a divorce. They ceased cohabitation in December 2012 and Brent moved out of the house (the “House”) on January 1, 2013 and relocated to Virginia Beach, where he has continuously lived in a rented apartment.

Brent’s father was a successful businessman and, when he died in 2005, he left a business, which generates a substantial income, in a trust (the “Trust”) of which Brent is the sole beneficiary. The Trust is currently valued at \$10,000,000. Since his father’s death, Brent has received between \$200,000 and \$300,000 a year in distributions from the Trust. The Trust owns the House where Gloria continues to live. It has a value of approximately \$350,000. Brent’s current assets are \$25,000 in a checking account at Wells Fargo Bank and an auto valued at \$20,000. Gloria has no assets and is not currently employed. Following the separation, Brent instructed the Trust to continue to provide payments of \$5,000 per month to Gloria for her living expenses.

Brent and Gloria now want to divorce. They initially expressed their preference to obtain a no-fault divorce, but Gloria has now threatened that she may instead seek a fault-based divorce on the ground that Brent was incarcerated for a period during the marriage. They cannot agree on where to file the action. Gloria wants to file the action in Blacksburg, but Brent insists that it should be filed in Virginia Beach. Gloria intends to demand a property settlement awarding her at least \$2,500,000 in a lump sum, the House, and support payments of \$10,000 a month as long as she remains unmarried. Brent opposes Gloria’s demands.

- (a) **Can Gloria prevail in her desire that the divorce action be filed in Blacksburg?**
- (b) **Can Brent and Gloria obtain a no-fault divorce?**
- (c) **Could Gloria, if she chose, obtain the divorce on the ground of Brent’s incarceration during the marriage?**
- (d) **What factors would the Court take into account in ruling on Gloria’s property settlement and support demands, and what is the likely outcome on each?**

**Explain your answers fully.**

\* \* \* \* \*

***Proceed to the short answer questions in Booklet SA - the BLUE Booklet.***