

KENTUCKY BAR EXAMINATION

July 29, 2008

ESSAY QUESTIONS 1 – 6

QUESTION NO. 1

Peter Plaintiff, ever aware of rising gas prices, decided that he needed a new, more fuel-efficient car, and that he needed to trade in his old gas guzzler. He entered a local dealership, Defendant Autos, one evening and found a small and efficient hybrid to his liking. The salesman accepted Peter's word that he owned the old gas guzzler outright and consummated a swap of the guzzler and cash for the new hybrid. Peter drove off that evening in his shiny, new hybrid smiling because, in reality, he still owed over \$4,000.00 on the old guzzler. The next day, Defendant Autos' Manager, Mary, checked the registration of the guzzler and learned of Peter's deception. She placed a call to Peter and informed him of the problem. Peter responded that he would not pay the \$4,000.00 difference and that he would not return the hybrid to the dealership. Mary concluded from this conversation that Peter would never voluntarily give up the hybrid.

Undaunted, Mary dispatched several employees to try to repossess the hybrid the next day. Their attempt was unsuccessful, and the employees reported back to the manager that Peter had threatened them and that Peter was "crazy." The next day, Manager authorized another employee, Ethan, to attempt to locate the hybrid and repossess it. As luck would have it, Ethan, happened upon Peter on a public road and recognized the vehicle. While stopped at a stoplight, Ethan exited his vehicle and approached Peter. He knocked on the window and demanded that Peter exit the vehicle. When Peter refused, Ethan drew a pistol, yelled, "I'll get this car back one way or another!" and discharged three bullets into each of the hybrid's tires.

During his criminal trial, Ethan testified in his own behalf and repeatedly asserted his defense that his conduct was justified because Peter "had stolen our property" and that "he was entitled to get the car back for Defendant Motors." In the inevitable civil action arising from these events, Peter named Defendant Motors as a defendant, alleging that it should be held liable for the conduct of its employee, Ethan. Discuss Peter's prospects for obtaining a judgment against Defendant Motors.

QUESTION NO. 2

Patty and Roger are the divorced parents of two children. At the time the family court in Kentucky entered the decree dissolving the marriage, the children were ages 8 and 9, and the decree awarded the parties joint custody of the children and equal time-sharing. Neither party was required to pay child support to the other.

Three years later, Patty lost her job but soon found another in North Carolina. Before she moved, Patty filed a motion with the Kentucky family court to modify the custody and timesharing provisions of the decree so that she would be the primary custodial parent and Roger's timesharing adjusted to account for the distance created by her impending move. She also asked that Roger be required to pay child support for the two children in the amount of \$1,000 per month in accordance with the Kentucky child support guidelines. These motions were granted and Patty moved to North Carolina.

Soon thereafter, Roger lost his job as well, but was unable to find suitable employment and moved in with his parents, who live in Tennessee. He had sufficient savings to pay child support for a year, but unemployed and strapped for cash, Roger then ceased making child support payments.

Patty filed a motion with the family court in Kentucky, asking that Roger be held in contempt for failing to pay child support. Roger responded by filing a motion to reduce his child support obligation. Roger also filed a motion to increase his time with the children because his parents' home in Tennessee was only two (2) hours from Patty's residence and more frequent timesharing was no longer impracticable.

With reference to applicable law, discuss whether the family court in Kentucky may properly decide the issues of contempt, modification of child support and modification of timesharing. If Kentucky is not the proper court to decide any of the motions, which state (or states) does have jurisdiction and why?

QUESTION NO. 3

Franchisor brought an action against Franchisee and Franchisee's guarantor (the "Guarantor") to enforce a Promissory Note signed by the Franchisee in connection with a Franchise Agreement between Franchisor and Franchisee. Franchisee and Guarantor asserted as a counterclaim that they were fraudulently induced to enter into the Agreement.

The Franchise Agreement was for Franchisee to own and operate a fast food store in Louisville, Kentucky. As part of the transaction, Franchisee also executed a Promissory Note to borrow \$50,000 from Franchisor. The Promissory Note was secured by a personal guarantee by Franchisee's president, the Guarantor. The Franchise Agreement and the Promissory Note each contain clauses which merge all prior negotiations and representations into the written agreements. The Franchise Agreement provided in part as follows:

"All prior negotiations and agreements between the parties with respect to the subject matter of this Agreement are merged in this Agreement. No prior statement, agreement or understanding, oral or written, not contained in the final Agreement will be recognized or enforced."

The Promissory Note also contained the following language:

"This Note and the other written loan documents represent the final Agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties."

The Franchise Agreement permitted the Franchisee to opt out of the franchise in the 12th month of operation if the franchise proved to be unsuccessful or unprofitable. The Louisville store was not successful and Franchisee closed at the end of 12 months. Franchisee, however, also defaulted on its payments under the Promissory Note. Consequently, Franchisor brought the action against Franchisee and the Guarantor to collect on the Note. In response, Franchisee and Guarantor asserted fraud in the inducement as a counterclaim. According to the Guarantor, in negotiations prior to the execution of the Franchise Agreement and Promissory Note, Franchisor's president told him that the Franchisee could expect a 40% profit margin during the

first year, and that a previous franchise store in Louisville had “done great” and had made annual purchases of thousands of dollars of inventory from Franchisor. In fact, however, such store lost money in the first year of operation; failed to pay the Franchisor for much of the inventory which had been purchased; and when the store closed its doors, it owed the Franchisor several thousand dollars in unpaid merchandise.

At the trial of this action, and over the objection of Franchisor, Franchisee and Guarantor sought to introduce into evidence the oral statements and representations allegedly made to them by Franchisor’s president. Are such alleged oral representations and statements admissible or should they be excluded? Please set forth and discuss the evidentiary basis for your answer.

QUESTION NO. 4

Father and two sons had a successful business selling expensive diagnostic equipment to hospitals. They formed a limited liability company under Kentucky law and saw no need to provide for a manager in the articles of organization. When the father died, his widow, Mother, inherited her husband's interest in the company. A general manager was employed to operate the company day-by-day. Sons called on customers and potential customers. Mother attended charitable functions in the medical community. The general manager developed a personal relationship with Mother.

The general manager complained to Mother that the company regularly purchased Toyotas for sons and Mother to use. Mother and general manager then went to a local dealer and purchased a Jaguar in the company's name and charged it to the company. Before the Jaguar was delivered, one son learned of this transaction playing golf with the car dealer, but told no one else about it. When the Jaguar was delivered Mother gave its keys to the general manager, and said to him, "This is your car to drive for company business." When the invoice for the Jaguar arrived at the company, the other son learned of this transaction, ordered the bookkeeper not to pay the invoice, and ordered the general manager to return the Jaguar to the dealer.

1. Who owns the Jaguar?
2. Who, if anyone, must pay for the Jaguar?
3. What additional rights does anyone have regarding the above transaction not discussed above?

Please explain your answers.

QUESTION NO. 5

Part I

Conrad Rich died as a result of injuries he received in an automobile accident which occurred in Jefferson County, Kentucky, in April of last year. At the time of the accident, Rich, a resident of New Albany, Indiana, had just left his place of employment in Bullitt County, Kentucky, and was returning to his home in New Albany. The accident occurred when Dallas Myrick, who was operating a vehicle owned by his mother, Betty Mangum, struck the Rich vehicle, a 1975 Corvette, causing it to overturn. Myrick, who had been drinking just prior to the accident, was subsequently convicted of a criminal offense as a result of the accident and he was sentenced to a term of imprisonment.

At the time of his death, Rich had three vehicles insured with Hoosier Insurance Company, two of the vehicles were insured on one policy with Hoosier, while the third vehicle was covered under a second Hoosier policy. In addition to the Corvette, Rich also had a vintage El Camino and a gently-used pickup truck which he kept at his home in New Albany. Both policies, billed through separate premiums, contained underinsured motorist coverage for bodily injury with limits of \$100,000 per person / \$300,000 per occurrence.

Rich's Estate filed a lawsuit in the Jefferson County, Kentucky, Circuit Court, alleging several claims. The claims against Myrick and Mangum included wrongful death, loss of consortium, and negligent entrustment. The Rich Estate also filed a claim for underinsured motorist benefits against Hoosier Insurance Company as part of the same lawsuit.

The Rich Estate has just settled its claims against Myrick and Mangum. Under the terms of the settlement agreement, the Estate released all claims against Myrick and Mangum in return for a settlement of the limits of their insurance coverage, \$25,000. The Estate is still pursuing its claim for underinsured motorist benefits against Hoosier Insurance Company and it has argued

that Kentucky law should apply and allow it to stack the underinsured motorist coverages from the two Hoosier policies. (Assume this is allowed under Kentucky law). Hoosier Insurance Company is arguing that Indiana law should apply and that under the laws of that state, the Rich Estate would not be allowed to stack underinsured motorist coverages. In addition, assume that Indiana law allows an insurer, like Hoosier, to offset underinsured motorist coverage to the extent the insured settles with, or receives benefit from, the alleged tortfeasor(s).

Both the Estate and Hoosier have filed competing motions for summary judgment on the underinsured motorist coverage claim. You are the judge of the Jefferson Circuit Court that will decide this issue. Explain fully whether Kentucky law or Indiana law should apply on this claim.

Part II

Last summer, Frank and Gail Thompson, who had been visiting relatives in West Virginia, were returning to their home in Nashville, Tennessee, when they were involved in a motor vehicle accident in Simpson County, Kentucky. The Thompson vehicle, a 2001 Ford Explorer, collided with a tractor-trailer driven by Bob Evans. Both Frank and Gail Thompson suffered serious injuries as a result of this motor vehicle accident.

The Thompsons have filed a lawsuit in the United States District Court for the Western District of Kentucky (based upon diversity jurisdiction) against the driver of the tractor-trailer, Bob Evans, and against his employer and the owner of the tractor-trailer, Bigg Trucking, Inc. Bigg Trucking, Inc. is a Delaware corporation, with its principal place of business in Bowling Green, Kentucky. Bob Evans resides in Evansville, Indiana.

Assume that there are conflicts in the laws of the various parties' home states on the applicability of several tort claims asserted by the Thompsons in their complaint. Explain fully which state's substantive tort law should apply.

QUESTION NO. 6

Buddy gave the following statement to investigators:

“This lady I never saw before or since met with me and told me that she wanted me to kill her husband. I had never seen him, so she gave me a photograph of him. We bargained, and agreed that I would kill him if she gave me \$10,000.00 then, which she did, and \$10,000.00 after I had killed him. She said that no one would be at their home on Tuesday night, if I wanted to check out the place, and her husband would be home alone on Wednesday night. Also she told me where her husband kept his Rolex watch, which she said was worth \$1,400.00.

“I never intended to kill the dude, but to make a quick \$10,000.00, and I thought I might as well have the watch. On Tuesday night I went by the house. The front door was unlocked, a door mat said, “welcome.” I went in and took the watch. It turned out to be a fake and worth only \$35.00. I have never seen the husband.”

On Thursday morning the husband was found beaten to death in his home.

Assume that everything Buddy said was true.

1. Of what crime(s), if any, is Buddy guilty?
2. Of what crime(s), if any, the lady guilty?

Please explain your answers.