

# **FEBRUARY 2001 KENTUCKY ESSAY QUESTIONS 1 - 6**

## **INSTRUCTIONS FOR QUESTIONS NO. 1 AND 2**

You are to assume that you are the law clerk for the judge of the Fayette Circuit Court, who is to decide the case of Buyer v. Buyer. All the facts are agreed, and are set out in the draft of the first part of the judge's Opinion, which is attached hereto. You are to complete the draft Opinion, by deciding the two questions which the judge wants you to help her decide. That is –

**Question No. 1.** Is the Second Buyer subject to the jurisdiction of the Fayette Circuit Court under Kentucky's long arm statute?

**Question No. 2.** Assuming that there is jurisdiction over Second Buyer, is First Buyer entitled to the proceeds of the Florida sale?

Note that you are to answer these questions in the form of paragraphs in an Opinion. You should answer each question by a paragraph of no more than eight sentences. A copy of a portion of Kentucky's long arm statute is attached.

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
CIVIL BRANCH

FIRST BUYER

PLAINTIFF

v.

**OPINION**

SECOND BUYER

DEFENDANT

\* \* \* \* \*

The agreed facts which are important in this case begin in New York, where, on the 5<sup>th</sup> day of August 1997 the Plaintiff in this case, First Buyer (“First”), a resident of Lexington purchased at an auction conducted by the Thoroughbred Sales Company (“the Auctioneer”) a thoroughbred filly (“the Filly”) by MR. PROSPECTOR out of SALLY JONES for \$500,000. Under the Auctioneer’s Conditions of Sale, First was required immediately to pay the \$500,000 purchase price. He did not do so, but the Auctioneer allowed First, despite the Conditions of Sale, to remove the Filly from the grounds without paying for her, and to return her to Westover Farm (“the Farm”) in Fayette County where she had been prepared for sale.

In the first week of September, 1997, the Auctioneer wrote letters to First, in which it reserved “all rights” which were available to it under the Conditions of Sale,

which included the right to resell the Filly for First's account. The Auctioneer's employees had many conversations with First over the next two months, the gist of which was that the Auctioneer wanted to be paid as quickly as possible, which First agreed to do – making several promises of specific dates, none of which was accomplished. There was never a conversation, however, in which the Auctioneer informed First that it intended to or was about to resell the Filly. All these conversations took place with both parties (that is First and the Auctioneer's agents) being in their offices in Kentucky.

At the sale in New York, First had been represented by a bloodstock agent named Bill Agent ("Agent"). Agent had advised First about the Filly's bloodlines, and her potential to be a racing and breeding animal, and had placed the prevailing bid for First, and was paid \$10,000 by First. He had represented First in the purchase of a colt on one prior occasion.

During the course of the period when First and the Auctioneer were having their telephone conversations, in October of 1997, Agent was spending the day with another client, the Defendant, Second Buyer ("Second"), a resident of New York, who is no relation to First Buyer. Second asked Agent whether he knew of any racing/breeding prospects that were for sale, as he had a closing for the sale of a business he owned set for the spring of 1998, and he would like to "roll over" the purchase price into the purchase of a horse. Second had purchased one horse at the Keeneland sale in Lexington in the fall of 1996. Believing he was doing a favor for both First and Second, and for the Auctioneer as well, Agent told Second about the Filly

Agent (who was in New York) called the Auctioneer and told the employee he had been dealing with that his regular client, Second, was interested in buying the Filly, and wondered if Auctioneer would sell her to Second. Auctioneer's employee said that it would. Second thereupon called an employee of the Auctioneer who he knew. The call was made from Second's office in New York, to the office of the Auctioneer in Lexington. Considerable negotiations over the telephone from and to these two offices occurred thereafter, totaling 7 telephone calls. The telephone calls culminated in an oral agreement that Second would buy the Filly for \$425,000. The transaction was confirmed by a letter written by the Auctioneer's officer in Lexington, mailed to Second in New York, which letter was co-signed by Agent and a copy thereof mailed back to the Auctioneer in Kentucky. During the course of the negotiations, Second engaged a veterinarian in Lexington to go to the Farm to inspect the Filly, which he did, and as a result of which he sent a favorable report and a bill to Second in New York. Second paid the veterinarian's bill.

The oral agreement, and the letter confirming the agreement, provided that payment would not be made by Second until June of 1998, and that in the meantime Filly would be sent to Florida, and placed in training. This was done, and, on advice from Agent, Second listed the Filly for sale at the Auctioneer's April sale in Florida.

Negotiations between First and the Auctioneer had been suspended late in January, 1998, and First first learned that the Filly was consigned for sale in Florida by

looking at the Auctioneer's catalog for the April sale, which was published in March. First wrote a letter to the Auctioneer complaining, and expressing wonderment that the Filly was listed for sale by Second. "I own that horse," he said.

The horse was in fact auctioned in April, and sold for \$650,000. The Auctioneer received payment from the purchaser in Florida, took its usual 5% commission from the \$650,000 sale, deducted from the purchase price the \$425,000 owed to it by Second, and sent the remaining balance of \$192,000 to Second. Auctioneer then sent First a bill for \$75,000, the difference between the \$500,000 bid price in New York and the \$425,000 sale to Second. When Second got his \$192,000 check, he wrote a check to Agent for \$10,000, for his help in locating the Filly and contacting the Auctioneer for him.

This action was then brought in the Fayette Circuit Court by First against Second. It is First's position that the "sale" of First's Filly by Auctioneer to Second involved improper activities of Agent, and the Auctioneer, and so was void. First, however, purported to adopt the sale in Florida as its own, claiming, then, that he was entitled to the \$650,000 purchase price for the sale of "his" horse. He acknowledged that out of the \$650,000, he owed the Auctioneer the \$500,000 purchase price from the New York sale in which he had bought the horse. Second, on the other hand, contends that the sale to him was a completed transaction, and that it was "his" horse which was sold in Florida. Furthermore, Second contends that the Fayette Circuit Court does not have jurisdiction over him, under the Kentucky Long Arm Statute under which he was served in this action.

**454.210. Personal jurisdiction. of courts over nonresident – Process, how served - Venue.**

- (1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative,  
or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this Commonwealth.
- (2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
  1. Transacting any business in this Commonwealth;
  2. Contracting to supply services or goods in this Commonwealth;
  3. Causing tortious injury by an act or omission in this Commonwealth;
  4. Causing tortious injury in this Commonwealth by - an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;
  5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;
  6. Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam. jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated;
  7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.
  8. Committing sexual intercourse in this state which intercourse causes the birth of a child when:
    - a. The father or mother or both are domiciled in this state;
    - b. There is a repeated pattern of intercourse between the father and mother in this state;. or
    - c. Said intercourse is a tort or a crime in this state;
- (b) When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him,

### **QUESTION NO. 3**

At 5:00 AM, a police officer observed a pink Camaro exiting an area adjacent to a downtown business. As the car pulled away, the officer watched it accelerate to approximately forty-five to fifty miles per hour in an area with a speed limit of twenty-five miles per hour. The officer followed the car a short distance and pulled the car over. Upon approaching the car, the officer noticed the smell of alcohol in the passenger compartment. The officer then asked the driver, Ken, to exit the vehicle. He also asked the sole passenger, Barbie, to exit the vehicle. He then performed a field sobriety test on Ken. Ken was found to be intoxicated, was placed under arrest for driving under the influence, was given his Miranda warnings and was placed in the patrol car.

The officer then performed a field sobriety test on Barbie. After Barbie failed a field sobriety test and was found to be intoxicated, the officer offered to call someone to drive her home. Barbie indicated that she wished for her sister, Skipper to pick her up, and the officer radioed for Skipper to be called.

The officer subsequently proceeded to search the interior of the vehicle (two hours after he asked Ken and Barbie to exit the vehicle), and located a small coin purse in the pocket on the passenger side door. The officer described the contents of the purse as feeling hard and heavy, and suspected it might contain a knife or handgun. The officer opened the purse and found two packages of cocaine, a mirror, razor blades, two straws, and a pink lipstick. Barbie was placed under arrest, given her Miranda warnings and subsequently stated that the cocaine belonged to her and not to Ken. At no time did the officer cite Ken for speeding.

Barbie was later indicted by the Fayette County Grand Jury and charged with possession of a controlled substance and possession of drug paraphernalia. Before trial, Barbie tendered a motion seeking to suppress the evidence obtained in the vehicle search. At the suppression hearing, the officer testified that when he first saw Barbie and Ken, they were parked by a building that had been burglarized a month ago. He testified that the building had been burglarized at 5:00 AM and that the perpetrator sped off after the burglary. He also testified that Ken was going forty-five to fifty miles per hour in an area with a twenty-five mile per hour speed limit.

If you were the trial judge, how would you rule and why?

#### QUESTION NO. 4

**PART A.** Jones, a prominent criminal lawyer of Rome, Kentucky , finally lost a case. A jury convicted his client of murder, and the client was sentenced to a term of life in the penitentiary. Jones exhausted all appellate remedies without success. Not one to quit, Jones decided to file a Petition with the Governor of the Commonwealth of Kentucky to pardon his client. In this petition for the pardon, Jones alleged that the prosecution was instigated by Catalina, in conspiracy with others, to ruin his client's reputation, and that Catalina was a person of immoral character & unworthy of belief. Jones made these allegations solely on the strength of the client's statements to him. The lawyer had made no further investigation, and the statements were in fact false. Catalina sued Jones for libel. What result and why?

**PART B.** Bernadine was a member of a socially prominent family that resided in the largest metropolitan area of Kentucky. On a family outing to Myrtle Beach, South Carolina, Bernadine's boy friend photographed her in an extremely revealing bikini bathing suit on the beach. The boy friend sent the photograph to St. George Company, a manufacturer of bathing suits. Without Bernadine's consent, St. George used the photograph to advertise its products. Beneath the picture St. George included the phrase, "Miss Bernadine X prefers a St. George Suit; don't you?" Upon seeing the advertisement Bernadine was enraged. She consulted an attorney and then sued St. George for an invasion of her right of privacy. St. George defended on the ground that Bernadine had always worn St. George products to the exclusion of all others which was true. What result and why?

## QUESTION NO. 5

### FACTS:

Prospective Plaintiff, Penelope Penniless, has come to see your boss, Mr. Tortfinder. You are his first year associate attorney. You and Mr. Tortfinder listen to Ms. Penniless' story as follows:

“I underwent a bilateral subcutaneous mastectomy and my surgeon did a perfect job of reconstructive surgery on my breasts utilizing silicone gel implants manufactured by Chemical Glass Company.

Recently I became very ill and I have just been diagnosed with mixed connective tissue disease (“MCTD”), which is a rheumatological disorder with symptoms and effects of extreme fatigue, weakness, muscle aches, myalgia and arthritis. I can hardly move without constant pain like a throbbing toothache all over my body. My new surgeon discovered that the breast implants had ruptured, leaking silicone gel into my system. He recommends they be replaced right away but won't guarantee that will cure me.

My mother is a surgical nurse and can testify that leaking silicone breast implants causes MCTD because she has had numerous patients complain of these same symptoms when having ruptured silicone gel breast implants removed.

My surgeon said he is not familiar with such a connection.

I have found on the Internet that a Dr. Uno is a Ph.D. Toxicologist, but is not a medical doctor nor an Epidemiologist. Toxicology is the study of toxic substances, including their effects on people, and Epidemiology is the study of the incidence, distribution and causes of diseases in human populations). Dr. Uno

solicits, via his WebPages, women who have had breast implants, who may be interested in being tested for latent toxicity, and who he then refers to Brockavich & Associates, a Beverly Hills, California law firm, specializing in toxic tort mass class actions.

I also found in Yahoo a medical doctor, Dr. Payne, who is a Rheumatologist who has written articles in the American Medical Association Journal of Internal Medicine and the American Epidemiology Association Journal about his clinical studies on the relationship of leaky silicone breast implants and MCTD. He has advocated warnings regarding silicone's effect on the immune system and has conducted clinical studies on animals on the effect of silicone leakage on animal organs in rats and rabbits. He has been admitted to testify as an expert on MCTD in Toronto.

Do I have a case?"

Mr. Tortfinder advises Ms. Penniless that he will look into it and get back to her.

Mr. Tortfinder says to you, "Suppose we find these experts and they are willing to help. Before I take this case and spend a ton of money on it I want to be confident that the trial judge will let them testify as to causation. My experience around here is that if a witness has a M.D. or a Ph.D. behind their name the judge will let them testify about pretty near anything.

Please write a memo to me on this. If Chemical Glass Company objects to the testimony of each of these folks, how should the judge rule? What other information should I find out about these experts to help us decide if the judge will allow their causation testimony? What additional things, if anything, could each expert do between now and trial to increase the chances of the judge letting them testify on their opinion of causation of Ms. Penniless' condition of MCTD?"

## QUESTION NO. 6

### PART A

Joe Whistleblower worked for Big Bad Oil, Inc., (BBO) from 1975 until his termination in 1999. During his years of employment at BBO, Joe held a variety of jobs including environmental compliance director. Although Joe received positive performance reviews during his tenure at BBO, he was fired in 1999.

Joe disputes the company's stated reason for the firing. Joe believes that BBO executives feared that his reports on BBO's numerous environmental violations might be released and lead to large fines. BBO disputes this and claims Joe never fit in and that as an at will employee he could be fired with or without cause.

Joe began seeing a therapist after his termination. Joe threatened to sue BBO for employment discrimination in order to pay for his costly therapy sessions. Joe hired Al Ambulance Chaser as his attorney. Fearing a messy law suit, BBO agreed to settle with Joe. Joe signed a document entitled "Severance Agreement and Release." In exchange for signing this document, Joe received \$300,000 from BBO. The release stated that Joe waived all claims that he might have against the company due to his termination.

### Question 1

Under the current Federal Tax Code, is the money Joe received from BBO taxable income or may Joe exclude it? Discuss all issues necessary to support your conclusion.

## Question 2

Suppose instead that Joe had not settled with BBO and had rather filed a lawsuit and was subsequently awarded \$25,000 in emotional distress damages and \$250,000 in punitive damages against BBO. Under the current Federal Tax Code, would the emotional distress award be included in Joe's taxable income for the year in which he received it? Under the current Federal Tax Code, would the punitive damage award be included in Joe's taxable income for the year in which he received it? Discuss all issues necessary to support your conclusions.

## PART B

Hampton stops at Wal-Mart on his way home from work to pick up a few items. While turning the corner onto an aisle, Hampton slips on a foreign substance which has been dropped onto the floor. As a result of his fall, Hampton breaks his right arm. Hampton works as a bouncer at a local tavern and is forced to miss six weeks of work while his arm is in a sling. Hampton hires Al Ambulance Chaser as his lawyer and sues Wal-Mart for damages resulting from his fall. The matter proceeds to trial and Hampton is awarded \$5,000 in medical expenses; \$5,000 in lost wages and \$10,000 for pain and suffering.

## Question 3

Will Hampton be able to properly exclude any of these items of damages he recovered from his yearly taxable income under the current Federal Tax Code? Discuss all issues necessary to support your conclusions?

