July 2024 Georgia Bar Examination Sample Answers

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Essay 1 — Sample Answer 1

Handwritten note

The handwritten note in the Amended Agreement became an enforceable part of the Amended Agreement.

At issue is whether the handwritten note in the Amended Agreement became part of a valid contract. Because this is a contract for services, it is governed by common law rules. For a contract to be valid, there must be mutual assent (offer plus acceptance), consideration, and lack of any defenses. An offer is the willingness and desire to enter into a valid contract and creates in the offeree the power of acceptance. An offer must be clear and include relevant terms such as the parties and the price. Under the mirror image rule, an acceptance must be unequivocal and on the exact same terms contained in the offer. If the offeree includes any additional terms or modifies the terms of the offer, it is a rejection and a counteroffer. Consideration is bargained for exchange between the parties, and there must be a legal detriment and a legal benefit. Consideration cannot be based on preexisting legal duties. Common contract defenses are statute of frauds and mistake, misrepresentation, and fraud (discussed below).

The Amended Agreement consisted of an offer to Mr. Wright which increased his base compensation. However, Mr. Wright rejected the initial offer by General Counsel because he hand wrote additional terms into the contract, adding the "for purposes of calculating bonus compensation, debt service expense shall not be deducted from APF's pretax income." Because the "acceptance" changed the terms of the original offer, it operated as a rejection and a counteroffer. While the initial offer was rejected, APF General Counsel accepted Mr. Wright's counteroffer when the General Counsel learned of the counteroffer and responded "that's fine." At this time, a valid contract was formed which included the Mr. Wright's additional terms. Consideration consisted of the increased compensation for Mr. Wright and the additional three years of employment, provided Mr. Wright was not already legally obligated to work for the term of the Amended Agreement. A statute of frauds issue could be raised, because the contract on its face cannot be completed within one year, and so must be in writing. However, Mr. Wright's modification to the agreement was in writing, and the statute of frauds does not require that the contract be typed; therefore, the initial contract between Mr. Wright and APF with Mr. Wright's handwritten note is valid. The parties agreed to memorialize the agreed-upon contract by typing it up; however, subsequent memorialization does not affect the validity of the contract that was formed when General Counsel agreed to Mr. Wright's counteroffer.

The parol evidence rule, which prohibits the use of extrinsic evidence to interpret a fully integrated agreement, is not implicated here, because the contract was not formed until APF General Counsel agreed to Mr. Wright's counteroffer. A valid contract was not formed when Mr. Wright signed the Amended Agreement for the reasons stated above.

Breach of contract and anticipatory breach of contract

The facts support Mr. Wright's claim for anticipatory repudiation and not breach of contract.

At issue is whether APF breached or anticipatorily breached the contract with Mr. Wright. A breach occurs when a valid contract exists and one party fails to perform their obligations under the contract and the other party was ready, willing, and able to perform. Anticipatory repudiation, or anticipatory breach, occurs when one party communicates to the nonbreaching party that they do not intend to perform their obligations under the contract prior to performance being due. If a party anticipatorily breaches, the nonbreaching party may choose to either immediately sue for breach or wait until performance is due to see if the other party will in fact perform. Here, APF did not breach the Amended Agreement because the contract stated that bonus compensation calculations would not include debt service expense. APF paid the 2022 and 2023 bonuses pursuant to the contract, complying with their obligation under the contract. Their subsequent demand that Mr. Wright return the bonuses does not constitute a breach, because they told Mr. Wright that they would not pay him the 2024 bonus. This communication operated as an anticipatory repudiation because APF is informing Mr. Wright that they will not perform their obligation under the contract when performance is due at the end of 2024. Therefore, while APF did not breach the contract in 2022 and 2023, Mr. Wright can nevertheless sue APF for breach under a theory of anticipatory repudiation.

Mistake, apparent authority, fraud, or negligent misrepresentation

Mistake is a defense to a valid contract when both parties are mistaken as to a material or essential term of the contract (mutual mistake). Unilateral mistake is also a defense when one party is mistaken and the nonmistaken party knew or should have known of the mistaken party's belief. Here, both Mr. Wright and APF General Counsel believed that the contract contained Mr. Wright's handwritten note, evidenced by their instruction to type the agreement including the note and by their performance for two years under the terms of the handwritten note. APF was also informed by WCP that the debt service expense would be excluded from the calculation when determining the size of the profit-sharing pool. Therefore, both Mr. Wright and APF were mistaken as to whether the debt service expenses would be included or excluded from the compensation calculation. The amount at issue, $3 million, also likely makes the mistake material. Therefore, Mr. Wright can claim mutual mistake against APF.

Apparent authority exists when a principal holds another as an agent for themselves and leads a third party into believing the agent has the authority to act on behalf of the principal. Here, APF authorized its Chairman to execute the Amended Agreement and directed General Counsel to present the agreement to Mr. Wright. APF held General Counsel out as if they had authority to accept Mr. Wright's counteroffer on behalf of APF. By granting General Counsel the authority to draft the agreement and type up any edited provisions, APF made it seem as though General Counsel acted as APF's agent. Therefore, in accepting Mr. Wright's counteroffer, APF would be bound under the doctrine of apparent authority.

Fraud exists when an individual makes a material misrepresentation, or omission, to another person and the other person acts in reliance on that misrepresentation. Fraud occurs where the party would not have entered into the contract but for the misrepresentation and had they known the truth, they would have refrained from entering into the contract. Here, APF informed Mr. Wright that they would not include debt service expenses in the pool compensation calculation. Mr. Wright acted in reliance on this representation from ACF by entering into the Amended Agreement, and adding the handwritten note. The misrepresentation was likely material because Mr. Wright felt it important enough to add into the agreement when the original offer did not contain such language. It seems that Mr. Wright would not have signed the agreement absent the debt provision because he wrote it in himself. Therefore, because APF made this misrepresentation to Mr. Wright, and he signed the contract in reliance on the misrepresentation, Mr. Wright has a fraud claim against APF. He would also have a negligent misrepresentation claim, which exists when one person negligently misrepresents a fact to another by failing to exercise reasonable care in making the misrepresentation. APF's statement that the debt would not be used in the calculation would be negligent if Mr. Wright can prove that they failed to investigate or ask WCP whether the funds would have to be included in the calculation.

Essay 1 — Sample Answer 2

1. Whether Mr. Wright's handwritten note became an enforceable part of the Amended Agreement (AA)

The handwritten note is only enforceable if a valid contract was formed. That requires offer, acceptance, and consideration. The AA was a writing about the terms of Wright's employment agreement with APF, not a contract for the sale of goods. Because this is not a contract for the sale of goods, the UCC does not apply, nor does the UCC's battle of the forms provision. Instead, the common law's mirror image rule applies: for a valid contract to have been formed, the offeree must have accepted the offer under the same exact terms under which the offeror made the offer. The offeree cannot accept by saying "yes, but on the condition that " This would be a conditional acceptance, which is treated as a rejection of the original offer and a new counteroffer under the conditional terms.

Here, Wright signed the contract "but made a handwritten edit" The handwritten edit was a new condition not included in the writing and Wright's acceptance was likely contingent on the condition applying. Thus, one could argue Wright made a conditional acceptance. It is unclear if he signed and then made the edit or vice versa. If Wright signed first, a court might find that he accepted the contract as written when he signed and that the provision regarding deduction of the debt service expense does not apply. If he signed after the general counsel (GC) said "that's fine," the GC was essentially assenting to Wright's counteroffer or making a new offer that Wright then accepted by signing.

Alternatively, it does not matter when the contract was signed or when the handwritten edit was made because the edit was not a conditional acceptance or a counteroffer. Instead, Wright could likely succeed in arguing that his edit was not a change to the terms of the contract (and thus could not be a rejection and counteroffer or a conditional acceptance), but merely sought to align the writing with the true terms of the agreement between the parties. Before Wright made the edit, the GC told him that the debt service expense would not negatively impact his bonus. Thus, the parties had a meeting of the minds before the edit and the contract omitted the term by mistake. Wright's edit, in this case, did not change the contract, it only changed the writing.

The facts do not indicate the AA had a clause stating it was meant to be a full integration of the agreement. The AA seemingly does not directly contradict the term that Wright seeks to enforce. Thus, even if the edit is found not to be a part of the writing embodying the contract, the parol evidence rule does not bar Wright from testifying about his discussion of the debt service expense with the GC or introducing other evidence that the term existed.

Assuming the edit was assented to by APF through the GC before Wright signed or merely stated the correct terms of the actual agreement, it is an enforceable part of the contract. To be enforceable, certain contracts must be in writing under the Statute of Frauds (SoF). Contracts that require performance which must last at least three years are subject to the SoF and must be signed by the party against whom enforcement is sought. The AA provided for an initial term of employment of three years, which exceeds one year. Thus, the AA must be signed by APF to be enforceable. It is unclear whether the GC actually signed the paper, but it was likely printed on APF letterhead and other evidence supports enforcement regardless of the writing requirement. Wright has performed almost all of his end of the bargain (given that two and a half years have passed since he signed the three-year employment agreement), and APF has allowed him to work for APF under the belief he had an enforceable agreement with them. If APF argues no contract exists, Wright can raise a promissory estoppel argument because he detrimentally relied on the existence of a contract and the GC's verbal statement to him regarding the debt service expense.

APF could argue that there was no consideration given for the modification Wright seeks and that is is unenforceable under the preexisting duty rule. That rule states that a promise to perform a preexisting duty owed to the promisee cannot be valid consideration to form a contract. Here, Wright had already signed an employment agreement with APF which was identical to the AA except that it provided for lower compensation. APF could argue that Wright already had the preexisting duty under the original agreement to do his job as CFO and that the new agreement embodied in the AA fails as a matter of law because Wright provided no consideration. Wright can counter that he had the right to terminate the contract at any time as an employee at will and under the Thirteenth Amendment, so he provided consideration by agreeing to continue to work in the future.

2. Whether the facts and law support Mr. Wright's claims for breach of contract and anticipatory breach of contract

To support a claim for anticipatory repudiation, the plaintiff must show the defendant unequivocally indicated that it cannot or will not perform. A plaintiff can show breach by showing the other party did not perform as required by the contract. If the defendant's conduct giving rise to the plaintiff's insecurity does not rise to this level, the plaintiff can still demand assurances that the defendant will perform if the defendant has given the plaintiff reasonable grounds for insecurity. Because this contract is not governed by the UCC, the perfect tender rule does not apply. Instead, the common law rule of substantial performance applies. If a party substantially upholds its end of the bargain, it has not breached.

Assuming a valid contract was formed, APF has breached and may have anticipatorily repudiated the contract. One (likely implied) term of the AA signed in the beginning of 2022 was that Wright would not be asked to return the bonuses due to him under the terms of the AA. Thus, APF breached the contract by demanding the bonuses back. Since he has not yet remitted the money, though, he has no damages as a result of the breach.

APF informed Wright that it does not intend to pay him a bonus in 2024. This bonus would presumably not be paid for a significant while anyway. It is unclear whether this is an unequivocal indication that APF will not perform. APF likely did not commit anticipatory breach by informing

Wright of its intent not to pay him a bonus. This did, however, likely constitute grounds for Wright to demand reasonable assurances because it would make a reasonable person in his position feel insecure about obtaining the benefit of the bargain at the end of their performance. Thus, Wright can demand assurances and if APF fails to deliver them (such as by dropping its claims for reimbursement and stating in writing that it will pay him his bonus under the terms of the agreement), Wright can sue for recision.

3. Whether Mr. Wright has a claim against General Counsel/APF for mistake, apparent authority, fraud, or negligent misrepresentation

Mistake is a defense to contract formation, not a cause of action. It is relevant here though because the AA only omitted the debt service expense term by mistake. Both parties to the contract believed that term would be a part of the contract when it was entered in January 2022, at least based on the GC's statements to Wright.

Apparent authority is not a cause of action, but it is relevant here. As APF's lawyer, the GC has apparent authority. Here, the scope of representation on behalf of APF included getting Wright to sign an employment agreement with APF. APF authorized its Chairman to execute the AA, then authorized the GC to deliver it to Wright. The AA the Chairman drafted did not include the term and it is unclear whether the GC had actual authority from APF to include the term. But as to Wright, APF's allowing the GC to hold his or herself out as APFs counsel in the matter and to present the offer to Wright could reasonably have indicated that the GC had authority to assent to the term. This is more reasonable because the GC had previously told Wright this is how his bonus would be calculated.

Thus, the GC likely had apparent authority to bind APF to the AA as edited even if APF did not actually authorize the GC to do so. This authority would be based only on Wright's reasonable interpretation of APF's conduct, not the GC's conduct.

Fraud has five elements: intent to induce reliance; actual reliance; reasonable reliance; fraudulent misrepresentation or omission; and damages. Here, Wright actually and reasonably relied on representations that he would receive a bonus calculated before deduction of the debt service expense. If he is not paid such a bonus, and if he is made to reimburse APF for past bonuses, these amounts would constitute his damages ($3 million plus whatever his bonus would have been up to this point this year). He likley cannot establish a claim for fraud, though, because there is no evidence APF intended in January, 2022 to not uphold its end of the bargain. Actually, it appears APF did intend to perform because it paid bonuses under the agreement for two years. Further, the GC's assistant made the edit and only negligently failed to include the edit in the final embodiment. Thus, it appears APF entered the transaction in good faith and without the requisite intent to defraud Wright.

Wright may have a claim for negligent misrepresentation, which requires a showing of: duty; material misrepresentation; reasonable reliance; damages. Here, APF had a business duty to Wright as his employer to state the correct terms. Wright reasonably relied on APF's conduct to his detriment, likely satisfying the reasonable reliance and damages elements. But it is unclear if APF made a material misrepresentation or not. If it did not intend to pay him his bonus subject to the terms conveyed by the GC, the Gc's statement to Wright about the term is a material misrepresentation on behalf of APF. However, there is no evidence it did not intend to so pay him at the time. Instead, it appears Wright just has contract, not tort, claims arising out of this transaction.

Essay 1 — Sample Answer 3

Question (1)

The issue here is whether the handwritten note was an accepted counteroffer to the amended agreement.

The contract at issue is and employment contract meaning that it will be governed by the Georgia's common law and not the UCC. A valid contract requires an offer, acceptance, and consideration. An offer exists where the offeror manifests an intent to be legally bound by the offer. An acceptance occurs where there has been an assent to the terms of the offer. Consideration requires an exchange of promises where a promise is induced by the others promise to perform. Under the common law mirror image rule an acceptance must mirror the terms of the offer. Any difference in terms constitutes a counter offer and not an acceptance. Here, the General Counsel provided Mr. Wright with the employment offer.

General counsel was manifesting an intent on behalf of the APF to be legally bound to the terms. However, under the mirror image rule Mr. Wright did not accept because his written note changed the terms of the offer by adding that the debt service expenses will not be deducted from the pre-tax income. Mr. Wright's written note constitutes a counter offer. Mr. Wright's written note mainfested his intent to be legally bound by the terms of his counter offer. General counsel subsequently accepted the counter offer by saying "thats fine".

General counsel's response showed his assent, on behalf of APF, to be bound to the terms. There is valid consideration here because APF is promising to pay Mr. Wright a higher base salary and APF is return was promising to employ Mr Wright for three years and to not deduct the debt service expense from the contract. Because this was a valid counter offer that APF accepted it will become a part of the amended agreement.

Additionally, the amended agreement is enforceable because it is a written agreement as it is required to under the Statute of Frauds as it cannot be completed in under a year.

Question (2)

The issue here is whether APF has anticipatorily repudiated the contract when it said that it refuses to pay the 2024 bonus.

An anticipatory repudiation occurs when one party unequivocal tells the other party that they will not perform the contract. The non-repudiating party is then able to treat the contract as at its end discharging the non-repudiating party from its duties and sue for damages. Additionally, the non-repudiating party may hold out until the date for performance and then sue for damages. A repudiating party may revoke their repudiation unless the non-repudiating party has detrimentally relied on the repudiation or informed the repudiating party that it considers the repudiation final. Here, APF's statement that it "does not intend to pay any bonus to him in 2024" may be an anticipatory repudiation. The issue is whether this was an unequivocal repudiation and whether Mr. Wright was actually entitled to a bonus in 2024. If Mr. Wright was entitled to a bonus in 2024 then APF must pay that bonus, however, the facts do not make it clear whether he would have. If there had been sufficient profits that he was entitled to a bonus then this may be a anticipatory repudiation because APF made it clear that they do not intend to pay him any bonus.

However, it could be argued that it does not rise to the level of unequivocal because they did not state that "will not" rather they just said they "intend" which could be understood to be not absolute. However, it seems like that in the even Mr. Wright was entitled to a bonus in 2024 that this would be sufficient for an anticipatory repudiation which would let Mr. Wright sue for damages and treat his duties under the contract as dischraged.

Additionally, a refusal to pay when he is entitled to a bonus would be a breach of contract. A breach of contract occurs when performance is due by one party and they fail to perform. However, only a material breach allows the non-breaching party to treat the contract as at its end. A material breach occurs when the non-breaching party fails to receive the substantial part of their bargain. Here, Mr. Wright's comepnsation is made up of a base salary and a bonus. Depending on the size of the expected bonus each year it may be a "susbtantial" part of the bargain. If the bonus is typically expected to be large then it may be a material breach. However, if the bonus is usually minor then it would only be a minor breach and Mr. Wright would have to continue to perform, however, he could sue for damages for the recovery of the bonus owed.

Question (3)

Mr. Wright may have a claim for unilateral mistake of fact that would entitle him to treat the contract as voidable. Unilateral mistake of fact occurs when one party is mistaken about a material fact and does not bear the risk of the mistake, and the other party knows of the mistake. If the General Counsel knew that APF would not accept the terms proposed by Wright or add them into agreement then he may have a unilateral mistake of fact claim.

Additionally, he may have a unilateral mistake of fact claim if General Counsel knew that the handwritten agreement would not be an enforceable modification. In that case General counsel would have known of Mr. Wright's mistake. The mistake would be material because its clear that Mr. Wright was only agreeing to the terms if his proposal was added, otherwise he wouldn't have added it in the first place.

Mr. Wright can argue that General counsel had the apparent authority to accept his counter offer. Apparent authority is the reasonable authority that a third party beleives an agent has based off of the conduct and representations that principal has made to the third party. Here, General Counsel is employed in the role of General Counsel, which could reasonably make Mr. Wright believe that General counsel had the authority to negotiate the terms of the contract. Typically one's attorney has the authority to neogtiate on the behalf of their client so it would be reasonable for Mr. Wright to think this. If General Counsel is found to have had the apparent authority to neogtiate with Mr. Wright then APF will be bound by the agreement. However, it could be argue that Mr. Wright as the Chief Financial Officer (CFO) of APF may have been aware that APF never gives the General Counsel authoirty to negotiate on its behalf. If so, then it would not be reasonable for Mr. wright to think that General Counsel had apparent authority. Additionally, one cannot rely on comments from the agent themself to establish apparent authority.

There may be a case for fraud or neglgient misrepresentation. Fraud occurs when there is a material misrepresentation of fact with the knowledge of its falsity and with intent to induce the plaintiff, and the plaintiff justifiably relies and actualy relies on it, and suffers damages. Additionally, neglgient representation occurs when in the busienss context a business misrepresent a material fact and that misrepresentation causes plaintiff to rely on it and suffer damages. Here, the facts show that General Counsel told Mr. Wright that APF and WCP came to an understanding that the debt service expenses would be excluded from the calculation of bonuses. If General Counsel knew this not correct and was saying it to induce Mr. Wright into entering an agreement then there may be a claim for fraudulent misrepresentation. However, if General Counsel did not know of its falsity but instead was negligent then it may be negligent misrepresentation. Mr wright likely relied on this statement when entering in negotiations and thats what formed the basis for him making the hand written agreement. It would be reasonable to rely on the General Counsel of the company and it seems clear that Mr. Wright did so rely. He will have suffered damages in the amount of however much of the bonus is required to be paid back. Both of these claims may have potential just depending on whether General Counsel knew of its falsity or if he was just negligent in making this statement and thus did not act like an ordinarily prudent person.

Essay 2 — Sample Answer 1

1. The issue is whether Article 2 of the Georgia UCC govern the contract between Big City and Smith.

Generally, there are two types of contract, a service contract and a goods contract. A mixed contract however, is a contract that request both a service and a sale of goods. When there is a mixed contract, the dominant reason that the contract was entered into governs.

Here, the contract request the sale of 100 55-inch TVs to Big City by Smith. The contract also request that Smith install all of the TVs in the built-in cabins. Here there is a mixed contract since it is requesting the sale of the TVs and the service of installing the TVs. Here, article 2 of the GA UCC would govern because the primary reason that the contract was entered into was for the sale of 100 55-inch TVs.

Essentially, the service for the installment of the TVs would not be required if the TVs would not have been purchased from Smith. Thus, the contract is governed by Article 2 of the GA UCC.

2. The issue is what rights does Big City have under the UCC as the buyer of the TVs given the non- conforming delivery by Smith.

Under the UCC, a seller must comply with the perfect-tender rule, which states that the goods must be the items that were requested by the seller. A seller can send non-conforming goods if they provide notice to the buyer that the nonconforming shipment would be an accommodation beforehand, or if the seller has reason to believe that the buyer would accept the nonconforming goods. If a buyer is provided a nonconforming shipment, then the buyer has the right to inspect the goods (within a reasonable time) and either accept the goods, accept the goods and sue for breach of contract, or reject the goods and sue for breach of contract.

Here, Smith did not provide nonconforming goods by shipping 65 inch TVs when Big City had requested 55 inch TVs. Smith did not inform Big City that the shipment would be an accommodation nor did Smith have a reason to reasonably believe that Big City would accept the nonconforming goods since this was their first transaction. As such, Big City has the right to accept the 65inch TVs, accept the 65inch TVs and sue Smith for breach of contract. from the nonconforming goods, or reject the shipment and sue for breach of contract. Here, I would advise Big City to accept the shipment and to sue Smith for breach of contract for the 40 TVs that were not 55 inch TVs. Big City would be able to mitigate its damages by selling those TVs to Dogwood Apartments, who does use 65inch TVs.

3. The issue is what duties does Big City have to Smith regarding both the 55in and 65in TVs. Can Big City sell the 65in TVs to Dogwood?

A buyer who obtains nonconforming goods owes a duty to the seller to take care of his goods for a reasonable time. The buyer may hold the goods until the seller manages to get them shipped back (the buyer may require the seller to cover costs for storage) or the buyer may sell them to another buyer on behalf of the seller and obtain a small commission fee for the sale.

Here, Big City does owe a duty to not damage Smith's TVs. Big City can pay for storage for a reasonable time so that Smith can arrange a method to obtain their TVs, or Big City can act on behalf of Smith and sell the 65in TVs and request a small commission fee for finding a buyer from Smith.

Regardless, Big City must, for a reasonable time, not damage the TVs while Smith can either get the shipment back or agree to allow Big City to sell the to Dogwood Apartments.

4. The issue is whether Smith has the right to cure its nonperformance.

Under the UCC, a seller has the right to cure a non-conforming shipment when the shipment is sent before the due date of the contract by informing the buyer that they would like to cure the nonconforming shipment. When the seller reasonable believes that the buyer would accept the nonconforming goods, then the seller has the right to cure the nonconforming shipment within a reasonable time.

Here, Smith does not have the right to cure the nonconforming goods. The due date of the contract was on contract was "the last Monday of July," here Smith delivered the nonconforming shipment on the "last Monday of July." Because of this, Smith does not have any time left on the contract to cure the breach. Further, this is the first time that Smith and Big City entered into a contract, therefore Smith had no reason to believe that Big City would accept the non-conforming shipment.

Thus, Smith does not have the right to cure its nonperformance of the contract.

Essay 2 — Sample Answer 2

1. The issue is whether Article 2 of the Georgia UCC governs the contract between Big City and Smith.

The common law governs contracts for services, while Article 2 of the UCC governs contracts for goods. When a contract covers both services and goods, the predominant purpose test applies. Whichever is more heavily implicated in the contract governs. Here, the contract is for the sale of 100 TVs and their installation. The sale of the TVs appear to be the predominant purpose of the contract, as Big City would not be contracting for the installation services without the sale of the TVs. Therefore, the UCC governs this transaction.

Under the doctrine of severance, if a contract can be easily split into the parts containing the goods and the parts containing the services, a court has the authority to do so, and govern the part of the contract relating to goods under the UUC and govern the part of the contract relating to services under the common law. Here, even if a court were to do so, the portion of the contract at issue here is the delivery of the TVs, and the UCC would still govern these issues.

2. The issue is what rights Big City has under the UCC as a buyer of the TVs given the nonconforming delivery, and the best way for Big City to proceed to protect and exercise its rights.

Under the UCC, sellers of goods have the duty to deliver perfect tender, meaning the delivery complies with the terms of the agreement exactly, otherwise there is a breach. The only exception to this rule is when the contract involves installment contracts, through which the buyer delivers the goods in multiple shipments. In that case, the seller is performing according to the rules of the contract as long as the goods substantially conform to what is described in the contract, and the seller is in breach only if a shipment is substantially nonconforming and substantially reduces the value of the overall contract. Here, there is no installment contract; there is only one delivery, where 40 out of 100 of the televisions contracted for were non-conforming. Under the UCC, this constitutes a breach of the contract and Big City is entitled to remedy. Of note is that even if the contract were being performed in installments, Smith would still be in breach because 40% of the TVs contracted for being nonconforming likely constitutes a substantial portion of the contract's value.

Upon delivery from a seller, the buyer has the right to inspect the goods. This must occur during a reasonable time after the shipment is delivered, and the buyer is allowed to accept the goods prior to inspection, and revoke the acceptance upon discovery of a defect in the shipment. Once a defect is discovered, the buyer must give notice to the seller. If a buyer does not give notice of nonconformity or rejection within a reasonable time, the buyer is assumed to have accepted the goods. Here, Big City should notify Smith that the shipment was nonconforming such that it has the right to reject the nonconforming goods if it chooses to do so.

When a seller delivers nonconforming tender, the buyer may: reject all of the goods and sue for the contract price, reject some of the goods and accept some of the goods (most likely accepting the conforming and rejecting the nonconforming) and sue for the cost of the nonconforming goods, or accept all of the goods and pay the appropriate price (original contract price minus any damages suffered due to the nonconformity), Here, the best course of action would likely be to accept all of the goods and pray the appropriate price. Here, Big City is contracting with someone it already knows to not comply with contracts, so attempting to get 40 more TV's from them would be risky. Additionally, Big City could mitigate some of its costs by selling the TVs to Dogwood, and use that money to buy TVs from a more reputable source, recovering from Smith any extra costs incurred. However, Big City could also reject all or some of the nonconforming tender and sue for the nonperformance, and purchase the TVs from a different source in the meantime (as it has not paid yet, there isn't as much risk here),

3. The issue is what duties Big City has to Smith regarding the the 55-inch and 65-inch TVs, and if Big City can sell the 65 inch TVs to Dogwood.

If Big City proceeds as mentioned in the previous question (accepting all of the goods with a reduction in the payment price), Big City may sell the 65 inch TVs to Dogwood, and Big City owes no further duties to Smith.

If Big City rejects all or part of a nonconforming delivery, under the UCC the buyer has no duty to return the goods to the seller. The buyer simply has to take reasonable care of the objects until the Seller either comes back to receive the nonconforming goods, or gives instructions as to what to do with them. The buyer need not ask for such directions but may do so. Additionally, the buyer may not act recklessly with regards to the goods (i.e. damaging them). The seller is responsible for all costs of maintenance of the goods and transporting the materials back to the seller, Here, if Big City rejects the televisions, Big City has to take reasonable care of the goods until Smith tells it what to do with the TVs or comes to get them. That is the only duty owed by Big City.

4. The issue is whether Smith has the right to cure its nonperformance.

If a seller provides imperfect tender under the UCC, generally they do not have the right to cure. There is an exception where the seller knows that they are going to be sending nonconforming tender to the buyer and reasonably believes that the buyer will accept it as a substitute for the contracted for goods (accommodation), and does so prior to the conclusion of the performance period. They must also give notice of the intent to provide acommodation. If that is the case, the seller has until the time of performance to cure the breach after the buyer notifies them that they do not accept the non-conforming tender.

Here, there is no evidence that Smith sent the 65-inch TVs with the belief that Big Smith would accept them in exchange. This is especially the case because Big City contracted with Smith to install the TVs in the built in cabinets (which do not fit 65-inch TVs). Smith also did not give Big City any notice of such nonconformance. However, even if Smith did in good faith believe that Big City would accept the 65-inch TVs, Smith waited until the very last moment before it delivered the TVs, and the performance period was over by the time Big City notified Smith of the breach, Therefore, Smith does not have the right to cure its performance.

Smith may argue that because Big City did not inspect the goods until the next day, they should have more time to cure the breach post-notice. However, this is only the case if the seller had a good faith belief that the buyer would accept the goods and gives notice to the buyer that they will be sending nonconforming goods; then they may have extra time to cure after the period of performance ends. However, none of the requirements are present here, so Smith has no right to cure.

Essay 2 — Sample Answer 3

1) Governing Law

The issue is whether article 2 of the Georgia UCC governs the contract between Big City and Smith.

Contracts are generally governed by either the UCC or common law. The UCC applies to contracts for the sale of goods, which are generally tangible, movable personal property at the time they are identified in the contract. The common law generally controls contracts for services. If a contract is for both goods and services, the predominant purpose test determines which law controls. If the predominant purpose of the transaction is for the sale of goods and the services are merely incidental, the UCC controls. To make this determination, courts look to allocation of price between goods and services, each party's purpose in entering the deal, the way the parties describe the goods and services in their agreements, and sometimes whether the breach relates to the goods or the services portion.

Here, Big City sent a "Purchase and service" order to Smith for 100 TVs. The TVs are tangible, movable personal property when identified, so they are goods. However, the contract also required that Smith would install the TVs in the built in cabinets, which is a service. The service portion was necessary only because Big City does not employ technicians with the necessary expertise and knowledge for the job. Thus, a court would likely conclude the predominant purpose was the sale of the TVs, not the installation.

Thus, the Georgia UCC controls.

2) Big City's Rights.

The issue is what rights Big City has for the nonconforming delivery of TVs by Smith, and how Big City should proceed to protect and exercise its rights, assuming the contract is governed by the UCC.

Under the Georgia UCC, the perfect tender rule requires that a seller's tender of goods conform perfectly to the contract by being both perfect goods and perfect delivery. If tender is not perfect, the buyer has a few options. The buyer can accept the goods and sue for breach, or reject the goods. A buyer accepts by communicating acceptance, failing to reject in a reasonable time, or treating the goods as his own. A buyer must have a reasonable opportunity to inspect the goods upon delivery.

Here, Smith delivered 100 TVs 10 minutes before quitting time on the last day acceptable under the contract, the last Monday in July. However, 40 of the TVs were 65 inch rather than the 55 inch specified in the contract. Thus, it was perfect delivery but not perfect goods. Big City's foreman did not have time to inspect the TVs before quitting time, but he did it first thing in the morning. Though he did not reject the goods immediately, he inspected within a reasonable time. However, Big City has not contacted Smith yet though today is the last Tuesday in July so the foreman only discovered the problem this morning. Since Big City knows Dogwood could use the 65 inch TVs, it could notify Smith of the problem, accept the entire shipment, and sell the 65 inch TVs to Dogwood, and then sue Smith for breach seeking any resulting damages. However, since Big City has not yet accepted or rejected the TVs, it is likely less hassle to simply reject the non-conforming TVs and sue Smith for damages.

Thus, Big City can accept, sell the 65 inch TVs, or reject them. Either way, it likely has a claim for damages.

3) Big City's Duties.

The issue is what duties Big City has to Smith regarding the 55 and 65 inch TVs, and whether Big City can sell the 65 inch TV to Dogwood, assuming the UCC controls.

A buyer who has received a delivery of nonconforming goods must notify the seller and follow its instructions, or ship them back, store them at the seller's expense, or sell them on the seller's account.

As stated above, Big City should accept the 55 inch TVs and reject the 65 inch TVs. It should promptly notify Smith of the problem and see whether Smith intends to come pick up the TVs. If it cannot communicate with Smith, it should ship the 65 inch TVs back to Smith, store them, or sell them to Dogwood on Smith's account.

4) Smith's Right to Cure.

The issue is whether Smith has the right to cure its nonperformance assuming the UCC controls.

Under the UCC a seller who delivers nonconforming goods has a right to cure if either there is still time left for performance on the contract, or the seller reasonably believed the nonconforming goods would be acceptable to the buyer. In the latter case, the right to cure may extend even after the initial deadline for performance.

Here, Smith delivered the non-conforming TVs 10 minutes before quitting time on the very last day of the delivery window. Thus, it appears there is no time to cure, especially since Smith is located in Savanna which is many hours away from the delivery location in Atlanta. Additionally, there is no evidence Smith reasonably believed Big City would accept the 65 inch TVs. In fact, since the contract included installation into the built-in cabinets by Smith, Smith probably knew the TVs had to be exactly the right size to fit.

Thus, it could not have reasonably believed the 65 inch TVs would be acceptable. Smith has no right to cure.

Essay 3 — Sample Answer 1

TO: Partner

FROM: Examinee

DATE: July 30, 2024

RE: Vic Hall's Claims

A. Claims Against P&P and Applicable Defenses

The issue is what claims Vic can make against P&P, along with damages and defenses. Negligence Claim

Vic could bring a claim against P&P for negligence. The elements of negligence are duty, breach of that duty, factual causation, proximate causation, and damages. A duty is owed to foreseeable plaintiffs to exercise reasonable care under the circumstances. Factual cause is but for the breach, the injury would not have occurred. Proximate cause means that damages are limited to only those that are foreseeable from the breach. Finally, an employer is vicariously liable for the negligence of its employees that is committed with the scope of their employment under the doctrine of respondeat superior.

Here, Pedro Parker owed a duty to operate the forklift in a reasonable manner, and he breached that duty by failing to take the keys with him when he went to the bathroom, and leaving the keys in the ignition. This breach was a factual cause of Vic's injuries because but for Pedros breach, Vivian would not have been able to operate the forklift and run over Vic. Pedro's breach was the proximate cause because it is foreseeable that someone else would get on a running forklift and run Vic over. As a result Vic has been paralyze from the waist down and is clinically depressed. Finally, Pedro is employed by P&P and Pedro's negligence happened with the scope of his employment, so P&P is vicariously liable for Pedro's negligence. Therefore, Vic has a good claim against P&P for negligence.

Vic could also bring a claim against P&P for negligent supervision, hiring, or training. The basic elements for this tort are the same as above, but it is a direct suit against the P&P for its own negligence rather than one for vicariously liability. There are facts no facts to support this claim of action, but ifVic can show that P&P had prior knowledge of Pedro's tendencies to leave the keys in a forklift but did nothing to attempt to remedy that issue, or it failed to train Pedro not to leave the keys in during breaks, then P&P could also be found liable.

Defenses

Under Georgia law, assumption of the risk is a complete defense to negligence. If plaintiff had full knowledge of a harm that was apparent to an activity, but decided to perform that activity anyways, it can be a complete bar to recovery in Georgia. Georgia law also has the defense of partial comparative negligence where the plaintiff's recovery can be reduced by the amount they are found negligent. If the plaintiff is found to be 50% or more negligent, they cannot recover.

Here, Vivian made a statement that Vic was aware of the dangers of standing in the loading zone, but he did it anyways. Further, the facts indicate that Vivian had repeatedly driven the forklift when she was not authorized. If Vic has worked with Vivian before or is aware of her violations of riding the forklift, then Vic likely assumed the risk of harm by standing in the loading zone when Vivian got on the forklift and would be completely barred from recovering. Vic could also be found to be contributorily negligent by standing in the loading zone. However, it was dimly lit in the workplace, so Vic may not have been aware that Vivian was the one on the forklift when the accident happened.

P&P could also argue that Vivian's actions where a superseding cause to Vic's injury.

Superseding causes cut off a defendant's negligence. However, Pedro's negligence increased the risk of harm that someone else would negligently operate the forklift. Therefore, this defense would not be successful.

B. Claims Against Jones and Applicable Defense

Vic could bring a claim against Jones for negligence based on Jone's keeping the loading zone of the farm barely lit. The elements are the same as discussed in Part B. Jones had a duty to keep the premises lit for the workers on the loading zone, likely knowing thaey would be working there before daybreak. However, the issue is whether the lack of light was a factual or proximate cause of Vic's injuries. The facts do not indicate that the lack of light contributed to Vic's injuries in anyway or to Pedro or Vivian's negligence. Absent facts to show causatoin, Jones is likely not negligent.

Defenses

A landowner owes a non-delegable duty to keep his premises safe. There could be liability under this duty even if a independent contractor was the real cause of someone injuries.

If Jones is found liable for negligence, they could argue that it was P&P or Veggie Hills fault becuase they were independent contractors that were not hired by Jones, but were hired by CPJ. However the duty to keep the premises safe and well lit would likely be found as a non-delegable duty, so this defense would not work for Jones.

Jones could also argue the defense of assumption of risk, comparative negligence, and superseding cause as argued above by P&P.

C. Vic's Damages

General damages do not need to be plead and are decided by "the enlightened conscious of the jury." Special damages must be plead with specificity and come from loss incurred due to injury. Punitive damages punish the defendant but are only available in intentional, willful, or wanton tortious acts.

Vic has suffered general pain and suffering, which is a general damage and will be decided by the jury. Vic is also paralzyed and clinically depressed. Therefore, he must plead medical expenses, therapy visits, and lost wages, and all will be likely given, but reduced to present value. Punitive damages are not available because there is no proof of specific intent to harm.

D. Vic's Recovery

The issue is Vic's recovery, as stated above, Georgia is a partial comparative negligence state, and has got rid of joint and several liability. Each Defendant will pay his % of injury and plaintiff cannot recover at all if over 50% negligent.

Here, Vic is 30% at fault, P&P is 60%, and Jones in 10% and Vic has 5 million in damages. Vic can recover up to 500k from Jones and up to 3.5 million from P&P. Vic cannot recover the remaining portion because he was found to be partially negligent, but under 50% negligent.

Essay 3 — Sample Answer 2

To: Partner From: Associate

Re: Forklift Fiasco

Date: July 30, 2024

Part A - Claims Against and Defenses of P&P

1) Vic's Claim

P&P is an independent contractor that was responsible for harvesting, packing, and loading the crops the day of the accident. Pedro Parker operated the forklift on behalf of P&P that day. The crew leader and other employees were also present. Any tort liability of P&P will be vicarious liability for the negligence of P&P's employees committed in the scope of their employment.

Pedro may have acted negligently by getting off the forklift with the key in it. Negligence requires a showing of injury, duty, breach, and causation. Here, Vic is seriously injured. Pedro had the general duty to exercise reasonable care to avoid injury to those around him. Because he was operating a forklift, he owed the duty to all foreseeable plaintiffs to exercise the level of care a prudent person in his position (a prudent person driving a forklift around others in a dimly lit area) would exercise. Thus, Pedro likely owed a somewhat higher duty than the general duty of reasonable care.

Pedro may have breached this duty by getting off the forklift while it was running. This alone was not dangerous, but given context it may have been foreseeable that another person would operate the forklift in his absence if he did this. Then, a person nearby might be injured by the forklift, and this would be attributable to Pedro's breach of the duty. Foreseeability is a fact question. Pedro's negligence is attributable to P&P, as is the conduct of other P&P employees. P&P's crew leader said he already had to tell Vivian ten times not to operate the forklift and that she has repeatedly violated the rules. Pedro presumably knew that Vivian was present given that he made three trips to the loading zone already and Vivian was standing nearby—close enough that she had to move out of Pedro's way. Thus, it may have been foreseeable to Pedro and P&P that another person unqualified to operate the forklift might operate it in a dangerous manner if Pedro left it unattended with the keys in it.

To support a claim, the alleged breach must be the actual and proximate cause of the plaintiff's injury. Here, Pedro's leaving the forklift unattended is an actual cause of Vic's injuries because Vic would not have been injured but for Pedro's action. The closer question is whether Pedro's breach proximately caused the injury. This is a question of fairness, probability, and foreseeability. An intervening act of a third party (Vivian) generally does not break the causal chain and does not relieve the originally negligent party (P&P) of liability where the original negligence increased the risk that the subsequent act would cause harm to the plaintiff. This is especially true where the intervening act is foreseeable, even if negligent. Here, it appears it was foreseeable Vivian would operate the forklift if Pedro left it unattended and running given her track record. Further, P&P knew she was not authorized to operate it, so her driving presents a risk of harm to those around, such as Vic. Thus, her negligence is likely merely an intervening cause, not a superseding cause that relieves P&P of liability. Pedro (and P&P) increased the risk of the harm that befell Vic to Vic by exiting the forklift while it was running.

2) Defenses

P&P can argue that Pedro had no duty to remove the keys and that his failure to do so did not proximately cause Vic's injuries because the sole proximate cause was Vivian's negligence or a combination of Vic's and Vivian's negligence. This argument will probably fail because it was likely foreseeable that Vivian would do something like this, so her negligence will likely be found to be an intervening cause but not a superseding cause that relieves P&P of liability. But this argument will, to the extent it persuades the factfinder, reduce P&P's level of fault.

P&P can argue that Vic assumed the risk. This is a complete defense meaning P&P would have no liability if it succeeds. A plaintiff who assumes the risk is totally barred from recovering. A plaintiff assumes the risk where he understands the present risk, but proceeds with his course of action in the face of that risk. Here, P&P can argue that Vic assumed the risk of being crushed by a forklift because he knew how risky it is to stand in the loading zone, according to Vivian, and he stood in the loading zone which was barely lit during the loading operation. The forklift presumably made noise. Vic may counter that he did not know the risk existed at the time he was injured because Pedro, the person who was supposed to be doing the loading, was in the bathroom and not operating the forklift. Thus, Vic had no reason to know that a forklift would be driving over where he was standing. P&P could retort that it was foreseeable that Vivian would do this. This is a fact question.

Part B - Claims Against and Defenses of Jones

Jones owns the forklift in question but does not operate them because he knows how dangerous they are. He seeks to avoid danger. He still may be liable, though, either as the owner of the premises or as a negligent party.

1) Premises Liability

The owner of land has a duty to all invitees to inspect the premises and make safe any dangerous conditions that could harm an invitee. The owner has a duty to all licensees to make safe or warn of any known, non-obvious dangerous condition on the premises. These are non-delegable duties based on public policy.

Jones owns the land including the loading zone where Vic was injured. Vic may claim that he was an invitee at the time and Jones violated duties owed to him by failing to make thepremises safe. Vic might argue that Jones should have provided better lighting and that the failure to do so caused his injury because Vivian would have seen Vic standing there if there was better lighting. Maybe Vic will argue that Jones should have clearly demarcated the loading zone so that bystanders would know not to stand in it during loading.

Jones can argue that Vic was not injured by a dangerous condition and that there was no dangerous condition on the land itself. Vic was not harmed by a hazard such as a hidden step that is actually part of the land itself. He was injured by a negligently conducted activity, and premises liability claims cannot be predicated on dangerous activities. Jones can argue that Vic would not have been injured even in perfect lighting but for Vivian's negligent operation of the forklift and that demarcation was not needed to protect Vic from the premises themselves (as with a hidden step or wet floor), but rather from an activity that was likely to be conducted in the area. The premises liability claim would likely fail.

2) Negligent Hiring and Entrustment

Vic could sue Jones for negligence on a theory that Jones negligently hired P&P or negligently entrusted Pedro with the forklift. An employer can be liable for the torts of an independent contractor if the employer was negligent in selecting the independent contractor. This is not respondeat superior: the employer must have been directly negligent in its own conduct of choosing the particular contractor. Thus, Vic would need to show evidence indicating that Jones should have known that P&P was not fit to do the loading job. Maybe this claim could be based on P&P's failure to prevent third parties from operating Jones' forklift in the past. Vic would have to show that Jones knew or should have known of this. Jones might argue that because Vic also knew this, Vic should have known to stay away from the forklift when Vivian was around.

Vic could argue that Jones negligently entrusted Pedro with the forklift. Vic would have to show that, at the time Jones gave Pedro access to the forklift, he knew or should have known that doing so posed a risk of harm to a foreseeable plaintiff. Anyone around the forklift would likely qualify as a foreseeable plaintiff. The question becomes whether it was reasonably foreseeable that Pedro would leave the running forklift unattended and again whether this would make it reasonably foreseeable that someone could be injured.

3) Defenses

In addition to the arguments discussed above, Jones' can also raise the contributory negligence and assumption of the risk defenses. This would follow the same analysis as discussed in Part A.

Jones should argue that choosing P&P was not a negligent choice because there is no indication P&P has caused any accident like this in the past. It was a Veggie Hauling employee who ran Vic over, after all. Jones should argue that, even if Vic was an invitee, no dangerous condition on the land existed or caused his injuries.

Part C - Damages Vic may Seek

As a plaintiff in a personal injury suit, Vic could seek general and specific compensatory damages and potentially punitive damages. Punitive damages would only be available if the jury finds a defendant acted grossly negligently, recklessly, in bad faith, or intentionally. They are likely not available here against Jones or P&P.

Vic's compensatory damages will be general, amounts the factfinder (likely a jury) must determine based on their enlightened conscience, or specific, amounts that are fixed and provable. Specific damages will include medical bills and lost wages. General damages will include past, present, and future pain and suffering; loss of enjoyment; and past, present, and future mental anguish and distress. Vic can recover for reduced future earning capacity and future medical bill. If he is married or has children, his spouse or children may recover for loss of consortium for any affection, companionship, and services that Vic can no longer provide as a result of the injury.

Part D - Award

Georgia has a partial contributory negligence system under which a plaintiff's own negligent reduces his award in proportion to the degree to which he was at fault. This is a fact question. If the plaintiff was 50% or more at fault, he gets no recovery at all. Georgia does not have joint and several liability. Instead, the factfinder apportions fault among all responsible, including nonparties, and each party is responsible for the total dollar amount of the injury times their percentage of fault.

If Vic is found 30% at fault, 30% of the total award is deducted. Thus, 30% of $5 million is deducted from the $5 million. This is $1,500,000. So Vic can only recover $3,500,000 at most because he was contributorily negligent.

If P&P is found to be 60% at fault, it must pay 60% of the total damage award of $5 million. This is equal to $3,000,000. P&P must pay because the plaintiff was less than 50% at fault.

If the jury attributes 10% of the fault to Jones, it apportions 10% of the liability to Jones. 10% of $5 million is $500,000. Thus, Jones owes Vic $500,000.

Essay 3 — Sample Answer 3

To: Partner From: Associate

Re: Memorandum for Client Vic.

MEMORANDUM

The Facts

CPJ is a manufacturer of chicken-flavored vegetable products. Each year CPJ supplies a variety of vegetable seeds to Jimmy Bob Jones, who is contracted to plane and grow vegetables. Jones owns forklifts but does not operate them, especially not to harvest and load because he knows how dangerous forklifts are.

CPJ separately contracted with P&P to harvest Jones's crops, place them in large plastic containers, and use forklifts owned by Jones to load the containers onto delivery trucks for pickup.

CPJ contracted with Veggie Hill to provide pickup of the crops for delivery to CPJ where they will be processed into veggie-based food products with the logo "Tastes Like Chicken."

In September 2023, a Veggie Hill truck arrived at the Jones farm, driven by Veggie Hill employee Vic Hall. Vic was accompanied by his co-worked Vivian Harper. Vic and Vivian exited the truck when they arrived at the loading zone, which was barely lit. They moved aside as the first forklift approached with a container. Pedro Parker, P&P's forklift driver, made three trips to the truck before backing up the forklift to pick up a fourth container. Before picking up the fourth container, Pedro needed a bathroom break, so Pedro jumped off the forklift and left it running with the key in it.

Anxious to get going, Vivian walked back to the forklift, mounted it, grabbed a container with the lift, and headed for the truck. She loaded the container, backed up the forklift, and accidentally ran over Vic. P&P employees began running, including Pedro who burst out of the bathroom.

The P&P crew leader said to Vivian, "I've told you ten times that you are not authorized to drive the forklifts. But you have repeatedly violated the rules. And now, look what you have done!" Vivian replied, "I never thought Vic would still be standing in the loading zone. He knows ho risky that is. Oh, Vic, I am so sorry, so sorry!"

Vic survived but is paralyzed from the waist down, and one of his arms had been removed. He has been in extreme pain and is clinically depressed.

Part A: The claims against P&P and defenses of P&P.

The issue is what claims might be made against P&P and what defenses P&P might assert. Vic may have a claim against P&P based on the doctrine of respondeat superior.

In tort law, the elements of negligence are duty, breach, actual and proximate causation, and damages. Generally, individuals owe a duty of ordinary care to foreseeable plaintiffs within the "zone of danger." Under Georgia law, a principal may be responsible for the negligent acts of their employees while acting in the scope of employment. This is the doctrine of respondeat superior, which imposes vicarious liability on employers. Generally, employers are not responsible for the intentional torts of their employees unless the conduct was authorized pursuant to the employee's employment, the conduct was performed in furtherance of the employer's business purpose, or the conduct was implicit to the nature of the employment. Even where a court may not impose vicarious liability, an employer may still be independently liable for their own negligence where they fail to properly supervise or educate their employees, or investigate into their employees background prior to employment.

To determine whether an employee was acting within the scope of employment, courts primarily consider the degree to which the principal was able to exercise control over the means of carrying out the employment and to what purpose the employee was serving during the commission of the tort. Other factors may include: type of payment, duration of employment, tools or premises used, understanding between the parties, and timeframe. Where an employee makes a substantial deviation, a frolic, the employee is deemed to have acted beyond the scope of employment; where an employee makes a minor deviation, a detour, the employee is deemed to have acted within the scope of employment.

Here, P&P was responsible for the following: harvest Jones's crops, place them in large plastic containers, and use forklifts owned by Jones to load the containers onto delivery trucks for pickup. P&P's employee, Pedro, operated the forklift during the incident. Before picking up the final container, Pedro needed a bathroom break, so Pedro jumped off the forklift and left it running with the key in it. This action allowed Vivian to get into the forklift, operate it, and run Vic over. P&P employees began running, including Pedro who burst out of the bathroom. The P&P crew leader said to Vivian, "I've told you ten times that you are not authorized to drive the forklifts. But you have repeatedly violated the rules. And now, look what you have done!" Vivian replied, "I never thought Vic would still be standing in the loading zone. He knows ho risky that is. Oh, Vic, I am so sorry, so sorry!"

Pedro was acting within the scope of his employment. P&P may try to argue that Pedro was on a frolic, or a substantial deviation, when the incident occurred, thereby leaving the scope of employment to use the restroom. However, this argument fails as a court would likely find it to be but a detour as it was only a minor deviation in but time and scope. Ultimately, by using the restroom, Pedro was ensuring he could adequately fulfill his obligations without worry or anxiety. Therefore, Pedro was acting in the scope of employment when Vivian accessed the vehicle and ran over Vic.

Pedro was negligent. Pedro left his keys in vehicle and left it running during an active forklift operation. Pedro owed a duty of reasonable care to foreseeable plaintiffs like Vic under the circumstances to ensure that only individuals affiliated with P&P or at minimum had sufficient training utilized the forklifts. Pedro breached this duty by leaving the keys in the ignition and leaving the forklift running, knowing Vivian frequently violated the rules by operating the forklifts. An ordinary person under these circumstances would have taken the keys with him and turned off the machine.

Pedro's breach was the actual and proximate cause of Vic's injuries. When two negligent acts combine to form one, inseparable injury, the two acts are considered together to constitute the entire injury. But for Pedro leaving the keys in the forklift and leaving the forklift running, Vic would not have been run over. Pedro's breach was the proximate cause of Vic's injuries. P&P may argue that Vivian's negligence was a superseding factor, cutting off Pedro's negligence as P&P is not responsible for the superseding negligent acts of third parties. P&P will argue that it is not responsible such unforeseeable acts. However, this defense lacks merit. Defendant's are still liable where their negligence increases the risk that injury will result. Here, Pedro's negligence by leaving the keys in with the forklift running increased the risk that someone may operate the vehicle an injure another, which is exactly what happened. P&P was aware of Vivian's repeated violation of operating forklifts without authority or authorization. Therefore, it was foreseeable that Vic's injury would occur. Finally, Vic suffered severe damages: paralysis from the waist down, arm amputation, extreme pain and depression.

Vic may also attempt to argue that P&P should also be liable for negligent supervision and education of its employees. Such supporting facts include evidence that P&P employees were aware of the extensive violation of other contracting parties as to forklift operation. P&P should have made sure to have proper supervision of its service providers in use of such equipment or instill policies/procedures for not leaving active running forklifts with keys inside. While not necessary given the strong vicarious liability claim, counsel should be aware that P&P may be independently liable on this basis.

P&P has a few defenses.

First, P&P may argue that Vic assumed the risk. Assumption of the risk may be express or implicit. Assumption of the risk is a total bar to plaintiff's recovery. Express assumption of the risk is, for example, within the corners of the contract. Implicit assumption of the risk arises where the plaintiff knows of a risk and voluntarily proceeds in light of that risk. P&P may claim that Vic was well aware of the dangers of forklifts as evidenced by Vic moving aside out of harms way when the forklift approached the first few times. P&P will show that Vic likely knew of Vivian repeatedly operating forklifts in violation of the rules. P&P will claim that despite that risk Vic continued employment and decided to remain in the path of the forklift. However, this defense lacks merit as a court would be reluctant to find that Vic assumed the risk that the forklift may be operated by one not authorized to use it and run him over. Vic neither expressly or implicitly assumed such a risk. Therefore, this defense lacks merit.

Second, P&P may defend using plaintiff's last clear rule. In Georgia, plaintiff's last clear chance is a total bar to plaintiff's recovery. Where plaintiff, through ordinary care, could have avoided the negligent act, notwithstanding defendant's own negligence, plaintiff may not recover. P&P will argue that Vic had the last clear chance to avoid injury. That Vic, himself was negligent in failing to move, and because he had the last opportunity to avoid P&P's negligence, Vic should be denied recovery. However, we need more facts as to the degree of Vic's understanding -- was he facing Vivian? Did he see her get in the forklift and/or coming near? Did he stumble into its path? Nothing indicates Vic had any chance to avoid harm. Therefore, this defense lacks merit.

Third, P&P will argue that Vic was contributorily negligent that contributed to his injuries by failing to exercise ordinary care in protecting himself. P&P may claim that Vic was well aware of the dangers of forklifts as evidenced by Vic moving aside out of harms way when the forklift approached the first few times. P&P will show that Vic likely knew of Vivian repeatedly operating forklifts in violation of the rules. Georgia follows a partial comparative negligence theory, which would merely preclude Vic's recovery based on his percentage of fault assigned by the jury. This is P&P's strongest claim.

In conclusion, Vic has a strong claim against P&P based on respondeat superior but may be limited by his own negligence through application of Georgia's comparative negligence.

Part B: The claims and defenses as to Jones.

The issue pertains to the claims, elements, and defenses as to Jones. Vic may assert a premise liability claim against Jones.

In tort law, the elements of negligence are duty, breach, actual and proximate causation, and damages. Generally, individuals owe a duty of ordinary care to foreseeable plaintiffs within the "zone of danger." However, more particularized standards of care may be employed depending on the type of defendant, such as a landowners (described below).

Under Georgia law, a landowner has a duty those that may enter his land depending on the type of entrant. A landowner owes no duty to unknown trespassers who may enter their land. A landowner owes a duty to known trespassers to warn of and make safe any known artificial hazards that may cause death or bodily injury existing on his or her land. A landowner owes a duty to invitees to warn of or make safe any known hazards that may cause death or bodily injury existing on his or her land. Invitees are those who may come onto the landowner's land for their own purposes, such as solicitors, delivery drivers, or social guests. A landowner owes a duty to licensees to warn of or make safe any known hazards or should have known of any hazards that reasonable inspection would have revealed that may cause death of bodily injury. Licensees are those the landowner permits on his or her land for business purpose or some other purpose to serve the landowner.

Invitees and licensees may lose their status by exceeding the scope for the purposes they were admitted onto the landowners land.

Here, Jones owned a farm where Jones would plant and grow the vegetables for CPJ, consistent with their contract. Jones was aware that CPJ contracted with others such as Veggie Hill and P&P to fulfill their contracts. To this extent, Jones allowed employees of the respective companies onto his premises to fulfill the contractual obligations for CPJ. Employees such as Vic are licensees because Jones invited them on his property for a business purpose that served the Jones: complying with the terms of his contract with CPJ.

While Jones did not himself occupy forklifts, Jones had a duty to those on his premises to make any hazards on his property safe. The loading zone was barely lit. While nothing in the facts indicates Jones' knowledge regarding the lack of sufficient light, a reasonable inspection could have yielded discovery of this hazard. Further, Jones was aware of the dangers of forklift, which is why he doesn't operate them -- knowing how dangerous forklifts may be, Vic had a duty to ensure the conditions the workers used the forklifts in were nonhazardous. Having improper lighting did not comport with this standard of care.

Therefore, Jones owed a duty to make safe the insufficient lighting because a reasonable inspection would have led to its discovery. Because Jones failed to make his premises safe or at minimum warn of such conditions, Jones breached his duty to Vic.

This breach was the actual and proximate cause of Vic's injuries. When multiple negligent acts combine to form one, inseparable injury, the two acts are considered together to constitute the entire injury. But for the poor lighting, Vivian would have seen Vic still standing in the loading zone and would not have run Vic over. Jones' breach was the proximate cause of Vic's injuries because the poor lighting increased the risk of injury as forklift drivers would not be able to safely load the products onto the vans with diminished vision capacity due to the poor lighting. Jones was aware of the dangers of forklift operation and aware that those of his premises used the loading zone for that purpose -- it was foreseeable should there be poor lighting, an injury would occur. Finally, Vic suffered severe damages: paralysis from the waist down, arm amputation, extreme pain and depression.

Jones may defend on a few grounds.

First, Jones may argue that the poor lighting was not the cause of Vic's injuries. Jones will argue that Vivian's negligence was a superseding factor, cutting off Jones' negligence. Jones will argue that he is not responsible for the negligent acts of third parties that are unforeseeable. Jones will argue that it is unforeseeable that Vivian will get into the forklift and operate it. Jones will point to the fact that this was outside Vivian's scope of employment, so Jones would not even know that Vivian was driving the forklift. Jones will argue that Vivian never stated she could not see Vic, only that she didn't think he'd still stand in the loading zone. However, this argument fails to consider that Jones may still be negligent for the acts of third parties where Jones' negligent increases a foreseeable risk of injury. Jones was aware of the dangers of forklift operation and aware that those of his premises used the loading zone for that purpose -- it was foreseeable should there be poor lighting, an injury would occur. Therefore, this defense lacks merit.

Second, Jones may argue that Vic was not a licensee, but instead, a licensee. Jones will argue because of this Jones did not have a duty to make reasonable inspection of his premises. Since he did not know of the lighting, he cannot be held for an injury that may result. Jones will argue that Veggie Hill and P&P employees were on site for their own purpose, not for any purpose of the landowner. However, this argument lacks merits as explained above.

Finally, Jones may argue that Vic assumed the risk. Assumption of the risk may be express or implicit. Assumption of the risk is a total bar to defendant's recovery. Express assumption of the risk is, for example, within the corners of the contract. Implicit assumption of the risk arises where the plaintiff knows of a risk and voluntarily proceeds in light of that risk. Jones may claim that Vic was well aware of the dangers of forklifts as evidenced by Vic moving aside out of harms way when the forklift approached the first few times. Jones will claim that despite that risk Vic continued employment and decided to remain in the path of the forklift. However, this defense lacks merit as a court would be reluctant to find that Vic assumed the risk that the forklift may be operated by one not authorized to use it. Vic neither expressly or implicitly assumed such a risk. Therefore, this defense lacks merit.

In conclusion, Vic has a strong premise liability claim against Jones.

Part C: The potential damages Vic might seek.

The issue is what kinds of damages Vic might be able to seek.

Vic will seek compensatory damages. These damages need not be specifically proven and plead as they are presumed to flow naturally from the breach. Such expenses may include employment diminution in light of his injuries.

Speculative damages must be particularly plead and proven because they are not presumed to flow naturally from the breach. Such damages may include medical expenses, hospital expenses, and lost profits from lack of future employment reduced by the present applicable rate. Vic may also seek pain and suffering damages, along with mental pain and suffering damages. These damages must be specifically plead and proven. Further, with pain and suffering Vic would show that he was conscious and experienced grave pain as a result of the negligent act, including loss of body movement and parts. Additionally, recovery for his mental pain and suffering could be plead as a result of the extensive physical injuries. Courts would be reluctant to grant mental pain and suffering for Vic's extreme depression for defendant's negligent act where there is no accompanying physical injury or aggravation of prior mental health disorder. Here, Vic lost movement of his body along with his arm -- this would be sufficient evidence to allow evidence regarding defendant's extensive depression to award mental pain and suffering damages.

Punitive damages, which seek to punish or deter defendant's conduct, likely would not be available here absent some wanton or willful behavior of the defendants part. These must be specifically proved and plead. Nothing in the facts anything other than negligence. In Georgia, there is a cap on statutory damages of $250,000 unless its a products liability action (in which case a large percentage of the award goes to the state), or defendant was under the influence of drugs or alcohol at the time. Likewise, punitive damages must be awarded reasonably, which usually means in a 10:1 ratio with compensatory damages. Should more evidence come to light regarding behavior that would warrant damages, counsel should be mindful of the limitations and pleading requirements as described above.

In conclusion, the amount and kind of damages is left to the enlightened conscious of the impartial jury. Vic has a claim for compensatory, speculative, pain and suffering, mental pain and suffering damages, and potentially attorney costs and fees.

Part D: Vic Recovery.

The issue is how much will Vic recover and from whom where the damage awarded is $5 million and the jury finds Vic 30% at fault, P&P 60% at fault, and Jones 10% at fault.

Georgia follows a partial comparative negligence theory. Here, a plaintiff may not recover for their injuries where they are 50% or more at fault. If plaintiff is not 50% or more at fault, a plaintiff's recovery is reduced by the amount they are negligent.

Likewise, Georgia does not follow traditional joint and several liability. Traditionally, defendants who are jointly or severally liable for plaintiff's injuries may both be pursued, together or independently, for the total amount owed to the plaintiff. However, in Georgia, a defendant is only liable for their percentage of fault assigned by the enlightened conscious of the impartial jury.

Here, Vic was 30% at fault. This would not bar his recovery under Georgia. The defendant's fault is considered together: 70%. Because Georgia does not follow traditional joint and several liability, P&P would be responsible for 60% and Jones would be responsible for 10%. Vic may only receive 70% of the total $5 million recovery: recovering 60% from P&P and 10% from Jones.

In conclusion, Vic may recover less his percentage of fault by taking 60% from P&P and 10% from Jones.

Essay 4 — Sample Answer 1

1) The first issue is to determine whether the new ordinance is in violation of the Dormant Commerce Clause.

The Commerce Clause of the Constitution allows Congress to regulate interstate commerce. The negative implication of this is the Dormant Commerce Clause, which allows states to regulate interstate commerce so long as Congress has not regulated in the area, and as long as i) the regulation does not discriminate against out of state commerce, ii) the regulation does not unduly burden interstate commerce, and iii) the regulation does not regulate wholly out of state commerce. Where a regulation discriminates against out of state commerce, the regulation is permissible if Congress authorized the regulation, the state is acting as a market participant, or the regulation is the only way that an asserted government interest can be achieved, and there are no other less restrictive alternatives. Where a regulation appears to burden interstate commerce, the regulation is permissible if the Pike's balancing test is satisfied, or in other words if the burden on interstate commerce does not clearly exceed the local interest in the regulation.

Overall the ordinance does not appear to violate the Dormant Commerce Clause.

The ordinance does not require the renters to be from Georgia or otherwise burden out of state participants. It also does not appear to be unduly burdensome of interstate commerce. Even if it was, the city's interest in the regulation in order to combat the increasing crime, reduced availability of homes and increased prices, the decreasing diversity due to fewer affordable housing opportunities, and increased hotel vacancies outweighs any burden on interstate commerce that might result from the license, occupancy, tax, and safety standard requirements of the ordinance.

The Dormant Commerce Clause is also relevant in considering whether a state's taxing of interstate commerce is constitutional. A state can tax interstate commerce where there is a substantial nexus between the activity and the state, where the tax is fairly related to the asserted government interest, where it is fairly apportioned among the states, and where it is not discriminatory against out of state commerce or unduly burdensome of interstate commerce.

Here, the ordinance requires that a tax of 10% of the gross rental fees be paid to the city. There is a substantial nexus between the tax and the rental units due to the impact of the short term rentals on the state and the city, and it appears to be related to the government interest in decreasing crime and stabilizing home prices and improving the availability of affordable homes if the tax is used for that purpose. It also appears to be fairly apportioned as no one in particular is taxed at a different rate, and it also is not discriminatory as it does not depend on location.

Also, a tax of 10% does not seem to be unduly burdensome to interstate commerce as it is a low rate.

As an added note, the Fourteenth Amendment requires due process before a person is deprived of their life, liberty, or property. Substantive due process requires that where someone's fundamental rights are being restricted, the statute is viewed under strict scrutiny. Strict scrutiny requires that the law be necessary to meet a compelling government interest, and is usually therefore struck down. Durational residency requirements are often determined to be unconstitutional where they force a person to live somewhere in order to obtain an important right, as this would burden the fundamental right to travel and thus would be viewed under strict scrutiny.

In this, case the ordinance requires that someone, the "primary occupant" who has lived at the property for at least 6 months and who will continue to live in the dwelling in the 6 months after the rental be required to reside in the rental property for the duration of the rental, if the rental is less than 30 days. It also requires that the primary occupant reside in the unit for 6 months following the date the license is obtained or renewed. This appears to be a durational residency requirement. However, given that the durational requirement is not to obtain an important service, like healthcare or benefits, but is rather so that a person can rent their property, this part of the ordinance would likely not be seen as unconstitutional.

Overall, the ordinance does not appear to violate the Dormant Commerce Clause.

2) The second issue is to determine whether the proposed ordinance constitutes an inverse condemnation under the Takings Clause of the Constitution.

The Takings Clause of the Constitution requires that if the government takes a person's property for public use, they must pay just compensation. A regulation amounts to a Taking under the clause, and is therefore an inverse condemnation, where it interferes with a person's reasonable invest-backed expectations about the property such that the property is not usable for the intended purpose.

Here, many investors have invested in properties in the City in order to rent them and receive profit. The ordinance burdens this investment as it requires a long term tenant to reside at the property, and several of the investors are corporate investors who do not reside or plan to reside on the property. It also reduces the number of people the investors can rent to as they cannot have more than 2 per bedroom. However, because the regulation does not totally interfere with investors' investment-backed expectations as they can still rent their property, albeit for less of a profit and with more hurdles, the proposed ordinance is likely not an inverse condemnation under the Takings Clause.

Essay 4 — Sample Answer 2

Dormant Commerce Clause

The Dormant Commerce Clause (DCC) is the negative implication of the Commerce Clause, and it prohibits states from enacting statutes that interfere with interstate commerce in the absence of congressional action in that field. Under the DCC, states may not enact legislation that facially discriminates against out-of-state business and interferes with interstate commerce, because the regulation of interstate commerce is vested in Congress through the Commerce Clause. Any state or local ordinance that facially benefits intrastate commerce while discriminating against out-of-state commerce is presumptively invalid. A law which incidentally benefits intrastate commerce but does not facially discriminate is valid so long as there exists a legitimate governmental purpose, unrelated to any economic purpose, that can be accomplished through no other means.

The DCC also does not apply where the state is acting as a market participant or where the law involves a traditional government function.

The ordinance proposed by the City of Lumpkin does not on its face discriminate against interstate commerce. The ordinance requires that primary occupants be long-term tenants or owners of the dwelling units at issue. However, the ordinance on its face does not contain a restriction on out-of-state renters or owners. Therefore, the ordinance is not presumptively invalid. In effect, however, the ordinance incidentally favors in-state owners and renters because the ordinance requires primary occupants to have lived in the dwelling for a period of time and to live in the dwelling for the duration of the rental. This prevents out of state investors and owners from renting property in the City. The ordinance also imposes a transit occupancy tax, which will be borne by renters who will likely be from outside the state. The effect of the ordinance will be to discriminate against out-of-state short-term renters who wish to vacation in the City of Lumpkin. However, the City of Lumpkin has a legitimate governmental purpose in enacting the ordinance, because of the effect that short-term rentals have on the City. The City can point to the need to (i) maintain the City's residential character; (ii) promote cultural and economic diversity through the availability of single-family homes; (iii) protect the local workforce; and (iv) prevent the increased crime due to transient renters. These purposes are unrelated to economic protectionism that the DCC seeks to prevent but instead are legitimate government purposes related to the health, safety, and welfare of the City's citizens. However, the breadth of the ordinance negates the argument that the City's goals can be accomplished through no other means.

Takings Clause

Under the Takings Clause of the U.S. Constitution, applicable to the states through the Fourteenth Amendment, the government may not take a citizen's property without just compensation. A taking can be a physical taking, where the government physically enters and occupies the property, or an inverse condemnation, i.e., a regulatory taking, where the government enacts a regulation depriving the citizens' property of all its economic use. To determine whether a regulation constitutes a regulatory taking, the court balances the government's interests against the investment expectations of the property owner and the individual's interest in the property. Both physical and regulatory takings require the government to pay just compensation.

Because the City is not physically occupying or possessing the short-term rental units, the ordinance could only be an inverse condemnation to qualify as a taking under the Takings Clause. The government's interests are keeping housing costs low; protecting the residential nature of the City's neighborhoods; ensuring the maintenance of short-term rental houses; eliminating nuisance behavior, such as loud parties; promoting cultural and economic diversity through single-family houses; boosting the work force in the hotel industry; and preventing the uptick in crime. These interests are balanced against the property owners' interests in profiting from short-term rentals, which investors bought for the purpose of renting to short-term tenants. The ordinance does not deprive these investors of all economic use of their properties because the ordinance still permits short- term rentals despite the restrictions, and the government is tasked with legislating for the general welfare of its citizens, making this ordinance permissible under the City's police powers. The homes are also still valuable properties that can be sold to residents or other individuals who constitute primary occupants under the ordinance. The fact that the ordinance prevents investors from using the property in the way they wish does not deprive it of all its economic value. Although some owners who have already entered into contracts will suffer a loss from the ordinance, they still have economic use becaus they could sell their land. Because the investors have not been deprived of all the economic value of their property, no inverse condemnation has occurred and the City is not required to pay the property owners just compensation.

Essay 4 — Sample Answer 3

I. Dormant Commerce Clause Analysis

The issue present is whether short term rental ordinance implicates the dormant commerce clause. A challenge under the dormant commerce clause is likely to fail because the law is not facially discriminatory and effects in state and out of state owners of property in Lumpkin Island the same. Under the Dormant Commerce Clause, a state is prohibited from enacting protectionist laws that burden interstate commerce (e.g., outlawing trucks of a certain length that are common in interstate commerce). Here, the "primary occupant" rule of paragraph 1 of the ordinance requires that, in order to rent your home on a short term basis, the primary occupant must be on site for the duration of the rental. This rule seemingly does seem to hamper out of state and transient owners who would not be available to satisfy the rule requiring a primary occupant because they live out of state. Although, the rule similarly burdens in state residents with the exact same standard. Thus, the law is not facially discriminatory toward out of staters and is not protectionist in nature. Courts will uphold a law that merely burdens out of staters the same as in state residents so long as it is rationally related to a government objective.

Nonetheless, the ordinance is admittedly attempting to mitigate some of the impact of out- of-state investment, and in turn decrease the short term rentals that out of state transient owners largely utilize. The dormant commerce clause is inapplicable because the regulation treats both in-state residents and out-of-state residents equally. Additionally, the law is not facially discriminatory. Although, the law may have a disparate impact on property owners that are transient out-of state residents who rent their homes on a short term basis when they are not around the law does not target the out of state residents in application. A disparate impact on out of state owners will not be sufficient alone to bring a claim under the dormant commerce clause and the city will have a valid defense - that the law burdens in and out of state residents equally in its application. Challengers to the law may also argue that their is discriminatory intent behind the purpose of the law and that it, in function, will primarily only apply to out of state owners and thus their right to interstate travel and equal protection is violated and try to invoke a strict scrutiny standard which would require the City to show that the law is necessary to achieve a compelling government interest in which case the law would likely fail. Nonetheless, under the dormant commerce clause, the law is likely to pass constitutional muster and be found to not implicate the rule because it applies equally to in state and out of state residents and because there is no right to recognized right to short term rentals, need only be rationally related to a government interest.

II. Takings Clause Analysis

The issue present is whether passage of the proposed ordinance would constitute an inverse condemnation requiring the local government to pay just compensation. Under the Takings Clause, more commonly referred to as the "just compensation" clause of the United States Constitution, the government is generally barred from taking private property without paying the owner just compensation. Under the Takings Clause, private property may only be taken for a public purpose, although the Supreme Court has held that so long as the purpose for the taking is rationally related to a public purpose, it is sufficient to pass constitutional muster. See Kilo. A taking a private property requiring just compensation occurs through one of two ways: i) an eminent domain action, or ii) an inverse condemnation (commonly referred to as a regulatory taking. An inverse condemnation action is generally referred to as a regulatory taking, because, unlike a physical taking, it merely deprives the owner of the lands economic benefit. In order to establish a claim for inverse condemnation the challenging party will need to show that the regulation deprives their land of near total economic value (economic obsolescence). In considering whether the subject land has been deprived of nearly all of its economic value, the court may consider the investment backed expectations of the owners, whether any feasible use remains, and balance the governments interest in the regulation.

Here, a court is unlikely to find an inverse condemnation or regulatory taking. Although this amendment does greatly restrict an ability for an owner to lease out their property for short term rentals, it does not deprive the land of virtually all economic value. For example, a landowner could still lease their property out to longer term tenants (above 30 days) without triggering application of the statute. Additionally, a party wishing to lease out their premise on a short term basis could merely comply with the regulations and apply for a license, pay the mandated tax, and ensure a primary occupant is on the premises.

Because the regulation still leaves other viable economic uses for the land, it is unlikely that a challenge to the regulation under an inverse condemnation theory could prevail. Although one of the new purchasers of a home on Lumpkin Island that purchased the home primarily for the revenue producing short term rentals may have a valid investment backed expectation interest, they could still likely not prevail on the claim due to the aforementioned carveouts that both still permit short term rentals and leave the option for long term rentals unaltered. Additionally, when balancing an owner's investment backed expectations, the City has valid reasons for the regulation such as an uptick in crime associated with the transient nature of short term rentals, reduced home availability for locals, impact on the communities hotel industry, and decreasing cultural and economic diversity.

In conclusion, an inverse condemnation claim seeking compensation under the Takings Clause is likely to fail because the regulation leaves open various feasible economic uses rather than leaves the property with near zero economic value.

MPT-1 — Sample Answer 1

MEMORANDUM

TO: Hannah Timaku

FROM: Examinee

DATE: July 30, 2024

RE: Laurel Girard Matter

We represent Laurel Girard in a landlord-tenant dispute. Girard rents an apartment at Hamilton Place apartment complex, where she has lived since January 2023. On July 29, 2024, she received a "Three-Day Notice to Cure or Quite" (Notice) from her landlord, Hamilton Place LLC (Hamilton) alleging that (1) Girard failed to pay a portion of her rent in violation of Paragraph 2 of her lease agreement, and (2) violated the no-pet clause in Paragraph 15 of her lease. The Notice gives Girard three days to either "cure" the violations or "quit" (vacate) the premises.

Furthermore, Hamilton is threatening to file and eviction action against Girard seeking a court order terminating the lease if she remains in the apartment and doesn't cure the violations within three days. I have prepared an objective memorandum analyzing whether the alleged violations in the Notice are valid bases for termination and what steps we should advice the client to take.

1. FAILURE TO PAY RENT

Girard has lived at Hamilton place since January, 2023. Girard's initial monthly rent at Hamilton was $1,500. On June 1, 2024, Hamilton notified Girard that her rent would be increasing 10% (to $1,650) effective July 1, 2024. Alarmed by this increase, Girard paid her initial rent of $1,500 for the month of July 2024, and did not pay the additional $150. in rent owed or the $50 late fee.

Girard's Rental Lease Agreement states the initial rent amount of her two year lease term of $1500 in clause (2) and in clause (3) states that "Tenant agrees that Landlord may raise rent no sooner than 12 months after the commencement of this lease." Furthermore, in clause (10) the lease specifies a late charge of $50 to be incurred if rent is not paid when due. If rent is not paid when due and Landlord issues a "Notice to Cure or Quit", Tenant must tender payment of any amounts owed by cashier's check or money order only.

The Lease also includes a default provision in clause (20) stating that Tenant's performance of and compliance with each of the terms of the Lease constitute a condition on Tenant's right to occupy the Premises. It further states that if Tenant fails to comply with any provision of the lease within the time period after delivery of written notice by Landlord specifying noncompliance and indicating Landlord's intention to termite this lease by reason thereof, Landlord may terminate the lease. Here, the time period is three days.

The lease here is subject to the Franklin Civil Code and Franklin Tenant Protection Act because it is in Franklin's jurisdiction. Franklin Tenant Protection Act of Franklin Civil Code § 500(a) states that "after a tenant has continuously and lawfully occupied a residential rental property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate." A "Tenant" is further defined as a person lawfully occupying residential real property for 30 days or more." FR. CIV. CODE § 500(b)(3). Here, Girard is both a Tenant, as she has lived in the property for more than 12 months, and is also therefore subject to the "just cause" provision above. "Just cause" to terminate tenancy includes a material breach of a term of the lease. FR. CIV. CODE § 500(a)(1). Courts have consistently concluded that "a lease may be terminated only for material breach, not a mere technical or trivial violation. Kilburn v. Mackenzie (Fr. Sup. Ct. 2003). To constitute a "material breach", the breach "must 'go to the root' or 'essence' of the agreement between the parties" such that it "defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. (Kilburn, quoting Walker's Treatise on Contracts § 63 (4th ed.1998).

In Westfield Apartments LLC v. Delgado (Franklin Court of Appeal (2021)), Delgado and Westfield entered into a residential lease agreement containing a forfeiture clause stating that "any failure of compliance of performance by Renter shall allow Owner to forfeit this agreement and terminate Renter's right to possession." The lease also contained an insurance clause stating that Delgado "shall obtain and pay for any insurance coverage necessary to protect Renter" " for any personal injury or property damage" (Insurance Clause). Delgado refused to obtain renter's insurance or move out and Westfield commenced an eviction against Delgado. In that case, the court determined that not every default by a tenant justifies the landlord's termination of the tenancy, especially where the breach involves a nonmonetary covenant or a provision for the tenant's benefit. There, the court determined breach of Insurance Clause was trivial because it was not related to the payment of rent, Westfield had the ability to detect and cure the breach far in advance of bringing the suit and chose not to, it benefited Delgado by protecting her against loss.

Here, on the one hand, the case is related to the payment of rent. However, on the other hand, not every payment related to rent constitutes a material breach worthy of termination. In Vista Homes v. Darwish (Fr. Ct. App. 2005): the landlord brought an eviction action against a tenant who failed to pay $10 out of a total $1000 rent owed. While the court recognized that the payment of rent in accordance with the terms is an essential obligations of a tenant, and the failure to properly discharge this obligation is a legal cause for dissolving the lease, but because the rent shortfall was de minimis (only 1% of rent owed) the court concluded the breach was not material.

Here, the breach of $150 out of the possible $1,650 is more than de minimis, as it constitutes a 10% increase, as opposed to the 1% increase in Darwish.

Furthermore, FR. CIV. CODE § 505(a) states that an owner of residential real property shall not, within any 12 month period, increase the renal rate for a dwelling more than 10 percent. This increase was not within the 12 month period, as it went into effect in July, after Girard had already lived there for twelve months. Furthermore, Girard had notice of the increase, as well as a notice of the violation and an opportunity to cure within FR. CIV. CODE § 501(b).

Furthermore, while case law specifies that the FTPA was born out of the shortage of affordable housing with the goal of providing stale affordable housing to Franklin residents and that these goals outweigh free market and freedom to contract principles allowing a landlord to include a unilateral forfeiture clause in a residential rental contract. FTPA prohibits landlords from terminating leases without a specific enumerated "just cause". Fr. Civil Code § 501(a) and seeks to safeguard tenants from excessive rent increases by imposing statutory limitations and obligations on landlords that landlords would otherwise not be subject to under normal freedom to contact principles. Fr. Civil Code § 505(a), Stark v. Atlas Leasing (Fr. Ct. App. 2003) Free market principles don't apply to residential leases due to unequal bargaining power. (As here, where the unilateral forfeiture clause entirely benefits Westfield as landlord). Permitting landlords with superior bargaining power to forfeit leases based on minor or trivial breaches would allow them to circumvent FTPA's "just cause" eviction requirements and disguise pretext evictions under the cloak of contract provisions. Ms. Girard could try to argue that her breach is minor, like the one in Darwish or in Pearsall v. Klien (Fr. Ct. App. 2007) (the court concluded there was no material breach where the tenant left minor amounts of debris outside the apartment because the debris did not damage the apartment and the landlord could remove the debris and back charge the tenant for the cost), the apartment complex will likely distinguish these by pointing out that Rent is a material element of the lease and the default was 10% as opposed to 1% and more extensive than minor debris.

In conclusion, because the failure to pay the rental increase is likely not de minimis and likely is a material breach, I would advise Ms. Girard to pay the rental increase and applicable late fees.

2. VIOLATION OF NO PET CLAUSE

Girard experiences anxiety, including feelings of overwhelm and, at times, panic attacks. About six months ago (around January 2024), Girard's therapist, Sarah Cohen, recommended that Girard consider getting an emotional support animal to help alleviate the symptoms of her mental health condition. Despite initial reluctance, about two months ago (around May 2024), Girard adopted a kitten named Zoey. Since adopting Zoey, Girard has noticed dramatic improvements in her mental well being, including fewer panic attacks and less overwhelm. Two weeks ago, Girard needed to take Zoey to the veterinarian and, after putting Zoey in a cat travel carrier, Girard ran into the on-site property manager for Hamilton Place. The manager told Zoey she was not allowed to have pets. When Girard responded that Zoey is an emotional support animal, the manager rolled her eyes and sarcastically commented, "Sure! Whatever!". That day, Girard asked her therapist, Sarah Cohen, if she could write a letter explaining how important Zoey is for Girard's well being.

Girard's rental lease agreement states that no pet of any kind may be kept on Premises, even temporarily, absent Landlord's written consent. If Landlord consents to allow a pet to be kept on the Premises, Tenant shall sign a separate Pet Addendum and pay the required pet deposit and additional monthly rent. (Agreement, Cl. 15).

As discussed above this agreement is subject to the Franklin Fair housing act, including Franklin Civil Code § 750. FR. CIV. CODE § 755(c) defines "Disability" broadly, including defining "Mental disability to include having any mental or psychological disorder or condition that limits a major life activity, including anxiety." There is little argument that Girard has anxiety.

FR. CIV. CODE § 755(m) defines a support animal as an animal that provides emotional, cognitive, or other similar support to an individual with. a disability and does not need to be trained or certified. Assistance animals include service animals and support animals. Here, Zoey helps alleviate the symptoms of Girard's mental health conditions and has dramatically improved her well being. Therefore, Zoey is a support animal and therefore an assistance animal.

Assistance animals under FR. CIV. CODE § 756(a) are permitted to live in "all dwellings" and an individual with an assistance animal may not be required to pay any pet fee, additional rent, or other fee, including security deposit or liability insurance, in connection with the assistance animal. (It is unlikely that the above rent increase would apply as it seems unrelated to this provision). However, reasonable conditions may be imposed, such as restrictions on waste disposal and the assistance animal may not be allowed if the animal constitutes a direct threat to the health or safety of others. Here, Zoey the kitten likely causes minimal damage, and likely does not threaten health or safety. The Code further specifies that information confirming that the individual has a disability or confirming that there is a disability related need fro the accommodation may be. provided by a medical professional or health care provider. Here, Ms. Girard got Zoey before providing any information to her apartment complex regarding that disability, so her apartment complex could allege that this is a violation of her lease. However, now that she has gotten a letter from her therapist specifying her need for Zoey, including her diagnosis of an emotional disability and her need to alleviate her associated difficulties to function, any provision in Ms. Girard's lease specifying animals not being allowed is invalid as applied to Fr. Civil Code § 756(a). Despite case law, which Ms. Girard's apartment complex will likely cite, including Sunset Apartments v. Byron (Fr. Ct. App. 2010)(the court concluded that harboring a pet when a lease contains a "no-pet clause" constitutes a material breach of the lease agreement) Fr. Civil Code clearly indicates an intent to allow support animals in apartments for conditions such as anxiety, and is therefore valid.

Furthermore, the above discussed materiality requirement has the benefit of preventing potentially unmeritorious litigation. Permitting forfeiture for trivial breaches of a lease could unleash a torrent of unmeritorious evictions. Tenants potentially would be in jeopardy of defending frivolous eviction actions for trivial breaches. For example, the court in Delgado discussed that Delgado's lease prevented her from bringing a musical instrument on the premises, and if that was upheld, she could risk forfeiture of the lease, and eviction, for "absurdly trivial reasons" such as hanging a violin with no strings on the wall for decoration or having a gift wrapped electronic keyboard for a niece's upcoming birthday. Preventing ANY animals for ANY reason seems that it could be trivial -- for example, taking in a kitten wandering around outside the complex or housing a wounded dog for a short period of time.

In conclusion, I would recommend that the client should notify her apartment complex of the Franklin Civil Code regarding assistance animals and request that they waive any applicable fees in connection with this code.

MPT-1 — Sample Answer 2

To: Hannah Timaku

From: Examinee

Re: Laurel Girard Matter

Date: July 30, 2024

This memorandum evaluates whether the alleged lease violations are valid bases for termination of Gerard's tenancy and recommends the steps we should advise her to take. It predicts that a court would find Girard's failure to pay the $150 and $50 late fee before the deadline to be grounds for termination, but that Girard's ownership of Zoey is not grounds for termination. It recommends that Girard pay the amount due by cashier's check within the three-day deadline and continue to maintain control over Zoey.

A. Applicable Law

As a valid contract, lease agreement is controlling, but only to the extent it does not contradict the Franklin Tenant Protection Act (FTPA). The FTPA creates statutory non-waivable rights in all tenants that endure even if the lease agreement purports to waive them. Westfield Apts. LLC v. Delgado, Franklin Ct. App. 2021.

The FTPA applies because Girard is a tenant who has continuously and lawfully occupied a residential real property for 12 months. Apartment 12 at Hamilton Place is a "residential real property" as defined by the act because it is a unit intended for human habitation. Girard is its tenant because she is a person lawfully occupying the unit and has done so fore more than thirty days pursuant to the January 1, 2023 lease (the Lease). Girard has occupied it from January 1, 2023 to July 30, 2024, more than 12 months, so the protections of FTPA 500(a) apply: Hamilton Place LLC ("HPLLC") cannot terminate Girard's tenancy without just cause stated in written notice. Under the FTPA, just cause includes material breach of the lease agreement and the maintaining or committing a nuisance.

Because Girard suffers from a disability as indicated by her therapist Sarah Cohen, the Franklin Fair Housing Act (FFHA) applies to her tenancy at Hamilton Place. The FFHA broadly defines disability to include any mental disorder or condition that limits a major life activity, such as anxiety. Girard suffers from anxiety resulting in panic attacks. Her Licensed Professional Counselor stated in writing to HPLLC that Girard's conditions meets the definition of a disability under the FFHA. This seems reasonable because a panic attack limits any and all life functions during the panic attack. Without accommodations, Girard cannot "function optimally." Thus, Girard has a disability under Franklin Law.

The FFHA states that assistance animals include service animals and support animals. Support animals are animals that provide emotional, cognitive, or other similar support to an individual with a disability. They need no special training or certification. If the animal's support alleviates one or more identified symptoms or effects of the individual's disability, they qualify as an assistance animal. FFHA 775(o). Any tenant with a disability may have an assistance animal and may not be required to pay any pet fee, additional rent, or other additional fee in connection with the animal, so long as a reliable third party in a position to know the relevant facts provides information confirming the individual has a disability or confirming there is a disability-related need for the accommodation (animal). The animal can be any breed and any size, so long as the animal remains under the control of the individual, does not constitute a nuisance, does not pose a direct threat to the health or safety of others, and would not cause substantial physical damage to the property of others.

B. Whether Girard's Failure to pay $150 in rent owed for July 2024 plus a $50 late fee constitutes adequate grounds for HPLLC to terminate the Lease

This may be grounds for termination, but is probably not assuming Girard complies in the future. Under the FTPA, which applies here, HPLLC (the Owner) may not increase Girard's rent in a 12 month period by more than 10%. Here, HPLLC increased the rent by $150, which is exactly 10% of $1500, the previously charged amount. Thus, HPLLC validly increased the rent to the maximum extent permitted by the FTPA. Further, this increase was permitted by the Lease, which states in Paragraph 3 that HPLLC may raise the rent no sooner than 12 months after the commencement of the Lease. The Lease commenced on January 1, 2023, so HPLLC gained the ability to raise the rent under the contract on January 1, 2024. HPLLC raised the rent effective July 1, 2024, with notice provided on June 1, 2024. Thus, HPLLC had the right to raise the rent to $1,650 when it did so and Girard must pay under the terms of the contract.

Girard did not pay the full rent by July 3, so she breached the contract. Her breach, however, may not be "material" and thus may not be just cause for HPLLC to terminate the lease under the FTPA. A breach is material if it "goes to the root or essence" of the contract or "defeats the essential purpose of the contract or makes it impossible for the other party to perform. . ..." Delgado. Paying rent is one of the "essential obligations of the tenant" and failure to pay is a legal cause for termination. Id. Failure to pay the entire amount owed for rent is not a material breach in some cases, however, including where the shortfall is de minimis. Vista Homes v. Darwish, Fr. Ct. App. 2005. In Darwish, the tenant failed to pay only 1% of the lease and the court held that such shortfall was not a material breach justifying termination. A breach may be found not to be material where the harm to the landlord can simply be remedied by "back charg[ing] tenant" Sunset Apts. v. Byron, Fr. Ct. App. 2010. Thus, Girard must comply with her rent obligations but failure to to so does not automatically warrant termination.

Here, Girard failed to pay $150 of the $1,650 owed, a substantial shortfall. This is likely not de minimis like the shortfall in Darwish, so it could constitute a material breach and grounds for termination. The harm to HPLLC can be remedied by late payment, however, and HPLLC has indicated it is amenable to this based on its Cure or Quit notice seeking payment with a late fee. The late fee is only $50, so the court would likely uphold it. If Girard pays the $150 plus $50 for the late fee promptly, a court would likely find she is not in material breach and that termination of the lease is not justified under the FTPA.

It does not matter that the Lease states that HPLLC may terminate the lease if Girard fails to comply with any provision of the lease within the time period provided in HPLLC's written notice. This clause seeks to waive Girdard's FTPA rights, which are unwaivable on public policy grounds given the unequal bargaining power of landlord and tenants. It is like the forfeiture clause in Delgado, and will be similarly disregarded in this case under the FTPA. "The FTPA makes clear that its tenant protection provisions cannot be wavied." Delgado (citing Fr. Civ. Code. 501(g)).

C. Whether Girard's ownership of a cat is a valid reason for HPLLC to terminate the lease

HPLLC cannot terminate the lease based on Girard's ownership of Zoey the cat. As discussed above, Girdard is an individual with a disability and the cat is an emotional support animal, which falls into the broader category of support animal. Much like the forfeiture clause in Delgado that was void to the extent it contradicted state law, Paragraph 15 in the Lease is void as to Girard's ownership of Zoey under the FFHA.

The cat greatly alleviates the symptoms and effects of Girard's disability. Sarah Cohen is a reliable third party under the FFHA because she is in a position to know about Girard's disability given her history of treating Girard and Girard's need for the cat. Cohen prescribed the cat.

Cohen is a health-care provider or the equivalent, so she fits within the Act's nonexclusive list of reliable third parties. Cohen provided information confirming there is a disability-related need for the cat to HPLLC in her July 26, 2024 letter or email. Thus, the FFHA applies and controls over contradictory provisions in the Lease.

Paragraph 15 of the Lease states that no pets may be kept on the premises without HPLLC's consent and that if HPLLC consents, it may charge a pet deposit and additional monthly rent. This provision would be valid to most tenants under general freedom of contract principles, but not as to Girard, an individual with a disability. Instead, the on-point statutory provisions control here. The FFHA's public policy goals of requiring landlords to reasonably accommodate disabled tenants outweigh HPLLC's interest in not having cats on the premises and charging extra rent for disabled people with service animals. Further, the public policy goals of equalizing to some extent the unequal bargaining power of landlords and tenants make tenant's statutory protections unwaivable. Delgado (citing Stark v. Atlas, Fr. Ct. App. 2003). Thus, the FFHA's provisions for service animals apply, not Paragraph 15.

The cat seemingly meets the requirements of the FFHA. It alleviates Girard's symptoms, as indicated by her statements that she can take on anything that comes her way when she has Zoey. Girard keeps Zoey under control, such as by using a carrier when she takes Zoey out of the apartment. Thus, Zoey's behavior and waste pose no risk of nuisance. Further, Zoey is not a direct threat to anyone because she is just a house cat and the facts do not indicate she has any vicious propensities. Further, a house cat is unlikely to cause substantial damage to the property of others, and HPLLC can pursue reimbursement for any damages she does cost without violating the FFHA. If Zoey does cause any actual problems, the problems could likely be effectively mitigated by conditions that do not prevent Zoey from achieving her purposes as a support animal.

Zoey meets the requirements of the FFHA and the FFHA controls here. Thus, Girard has the right to enjoy the protections of the FFHA: she may keep the cat, pursuant to 756(a), and need not pay any pet fee, deposit, or additional rent, pursuant to 756(c). If the cat causes any damage besides ordinary wear and tear, Girard will be liable to HPLLC for that amount. Girard already had Cohen, a reliable third party, send information confirming her need for the support animal to HPLLC. Thus, Girard has complied with the FFHA already, as of July 26, 2024.

In addition to the strong textual reasons supporting this conclusion, public policy weighs in favor of allowing Girard to keep the cat. Some tenant-protective legislation serves the public policy against pretext evictions and unmeritorious litigation by landlords. Delgado. Here, Girard possessed Zoey for two months. HPLLC took no action, but an employee commented that the cat was not allowed two weeks ago. This was after Girard failed to pay the additional $150. Then, three days after receiving the necessary information from Sarah Cohen, HPLLC issued Girard a cure or quit notice based on both the $150 and the cat. It appears HPLLC may be pre- textually raising the cat issue as ground for termination in retaliation for Girard's failure to pay the extra rent and/or for exercising her FFHA rights. Thus, a court would likely find that Girard has the right to keep the cat there under the clear terms of the statute and on public policy grounds.

D. Recommendations

We should advise Girard to promptly pay $200 in overdue rent and late fees to HPLLC by cashier's check, as required by her Lease and the June 1, 2024 Notice. She must do this by August 1, which is within three days of her receiving the Notice. If she does, she will have cured the violation and HPLLC will likely not have grounds to terminate the lease. She must comply in the future by paying $1,650 by the third of each month.

As to Zoey, Girard very likely has the right to keep her there (at least as long as her disability and Zoey's effectiveness in alleviating it endure) and not to pay any additional fees, unless the cat causes actual damage beyond ordinary wear and tear. Girard should continue to keep Zoey well under control by cleaning up waste, controlling her behavior, controlling her noise level, and using the carrier when she takes Zoey out of the apartment.

MPT-1 — Sample Answer 3

To: Hannah Timaku

From: Applicant

Re: Laurel Girard Matter

Date: July 30, 2024

Memorandum

The purpose of this memorandum is to assess whether Ms. Girard's alleged violations are a sufficient basis for Hamilton Place (Hamilton) to terminate the lease. Additionally, the memo will contain the steps that Ms. Girard should take moving forward.

Termination Of Lease

Franklin Tenant Protection Act (FTPA) §500 states that "after a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate the tenancy." The FTPA further defines an owner as "any person, acting as principal or through an agent, having the right to offer residential real property for rent"; and a tenant as "a person lawfully occupying residential real property for 30 days or more, including pursuant to a lease." The FTPA §501(a)(1) states that just cause for terminating a lease includes a "material breach of a term of the lease" or "maintaining or committing a nuisance." In Westfield, the Franklin court of appeals cited the Franklin Supreme Court which confirmed that "a lease may be terminated only for material breach, not a mere technical or trivial violation." The Franklin Supreme Court further stated that to be material "the breach must go to the root or essence of the agreement between the parties" and that the breach "defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." Importantly the court stated that this limit applies even when the lease attempts to remove the materiality requirement.

In Westfield, the Plaintiff terminated the lease of the defendant tenant for failure to obtain rental insurance. The plaintiff argued that the failure was a violation of the lease and pursuant to the lease's forfeiture clause the landlord could terminate the lease for "any failure of compliance or performance" by the defendant tenant with the terms of the lease. The Franklin Court of Appeals disagreed reasoning that the FTPA does not allow the tenant to waive the materiality requirement imposed by the FTPA. In Stark, the court noted that freedom to contract is an important principle, but that by enacting the FTPA, Franklin concluded that "free market principles do not apply to residential leases" reasoning that there is a great disparity between the bargaining power of tenants and landlords.

Ms. Girard is similarly protected by the FTPA materiality requirement. Ms. Girard has been a tenant of residential real property for over 12 months as she signed the lease back in January of 2023 and it is now July 2024. This means that she is protected by the FTPA and that the lease may only be terminated for "just cause" and with written notice. As stated above, "just cause" requires a material breach of the lease. Just like in Westfield, Ms. Girard's lease contains a clause stating that a failure to comply with any provision of the lease allows Hamilton to terminate the lease. However, as noted in Westfield the addition of this clause does not waive the materiality requirement, thus Ms. Girard's lease can only be terminated if there is a material breach. Ms. Girard's failure to follow a provision does not automatically justify termination, rather the failure must be material.

The Failure To Pay Increase In Rent

Ms. Girard's lease provided that the rent could be increased after the first 12 months. This is in accordance with the FTPA §505 which states that a landlord cannot increase the rent more than 10% in any 12 month period. Hamilton increased the rent from $1,500 to $1,650 on July 1, 2024 which is more than 12 months after the start of the lease and is exactly a 10% increase. This issue here is whether Ms. Girard's failure to pay the additional increase constitute a material breach of the lease enabling Hamilton to terminate the lease. In Vista Homes, the tenant failed to pay $10 of the $1,000 rent owed which equaled only 1% of the total rent. Even though the court stated that the payment of rent is an "essential obligation" of the lease, and while normally the failure of an essential obligation constitutes just cause for termination, the failure in this case was not material because the amount was "de minimis." Here, Ms. Girard's failure to pay rent constitutes 10% of the total rent owed. This is likely going to be considered more than just "de minimis." Additionally, the failure to pay rent is an "essential obligation" that would constitute material breach. While one of the goals of the FTPA is to protect tenants from excessive rent increases, the rent increase at issue here is within the allowed limit by the FTPA as noted above. Thus, public policy is not offended by the lease allowing the $150 increase in rent and treating the failure to pay it as material. Because the renal increase was within the 10% threshold and the amount is likely more than "de minimis", Ms. Girard's failure to pay is a material breach. I would advise Ms. Girard to comply with the written notice and cure the breach by paying the $150 in past due rent and the $50 fee for late rent within the three day cure period.

No-Pet Provision

Ms. Girard's lease provides that no pets are allowed in the premises without the Landlord's written consent, and if the landlord consents then the tenant must pay the required pet deposit and additional rent. FTPA §756(a) provides that a tenant's with disabilities are permitted to have "assistance animals" in all dwellings. The FTPA states that assistance animals include "support animals" which is defined as "animals that provide emotional, cognitive, or other similar support to an individual with a disability." At issue here is whether Ms. Girard's cat is a support animal and is thus considered to be an assistance animal which is permitted in all dwellings for a tenant with a "disability. The FTPA states that the term disability should be broadly construed and includes "mental or psychological disorders or condition that limits a major life activity." It further provides examples such as "anxiety, post-traumatic stress disorder, or clinical depression." FTPA §756(b) requires that Ms. Girard obtain information confirming her disability from a "reliable third-party who is in a position to know about the individual's disability or the disability-related need for the requested accommodation, including a medical professional or health care provider." Here, Ms. Girard has a disability and can provide the confirming information. She has been treated by Franklin licensed professional counselor Sarah Cohen for four years and Ms. Cohen is familiar with Ms. Girard's mental health condition. Ms. Cohen's letter states that Ms. Girard has an "emotional disability" due to anxiety, and in order to help Ms. Girard function she uses her cat Zoey as an emotional support animal. The FTPa provides that anxiety is an example of a disability, thus Ms. Girard suffers from a disability because of her anxiety. Her cat Zoey is also qualified support animal because she provides Ms. Girard with emotional support relieving her from her anxiety symptoms. This was noted in the interview transcript as Ms. Girard stated that she has "noticed a dramatic improvement in her overall mental well being" and has suffered "fewer panic attacks" since getting Zoey. The FTPA does no require that a support animal have specialized training so that is not an issue here. Since Ms. Girard properly suffers from a disability she is permitted to have her cat Zoey in her apartment because Zoey is properly defined as a support animal which is a type of assistance animal allowed under the FTPA. Thus, in accordance to the FTPA she can not be prohibited from having Zoey.

Additionally, the failure to get Hamilton's written consent is not a material breach of the lease either. In Sunset, the court held that having a pet in violation of a no-pet clause in the lease was a material breach. However, that is not the case here because the FTPA specifically allows Ms. Girard to have a an emotional support pet due to her disability. To hold otherwise would be against public policy. As noted in Westfield, the FTPA's goals outweigh the ability to freely contract. Hamilton sits in a position of higher bargaining power and by upholding the no pet clause would be contrary permit landlords to disregard the protections put in place by the FTPA.

I would advise Ms. Girard that having Zoey is not a violation of the lease. Additionally, she is not required to pay any additional "pet deposit" or pet fee that is described in section 15 of her lease. Pursuant to FTPA §756(c) an "individual with an assistancce animal shall not be required to pay any pet fee, additional rent, or other additional fee, including security deposit, or liability insurance, in connection with the assistance animal." Thus, Hamilton can not require Ms. Girard to pay anything extra because of having Zoey. However, the FTPA does provide that the landlord can impose "reasonable conditions" on her use of Zoey as long as they don't "interfere with the normal performance" of Zoey's duties. So I would strongly advise Ms. Girard to follow any reasonable conditions that might be imposed.

Conclusion

In conclusion, Ms. Girard's failure to pay the additional rent likely consittutes a material breach as described above, and she must cure that breach within the three day period. However, she is not in breach of her lease by having her support animal Zoey and shall not be required to pay any additional fees related to her support animal.

MPT-2 — Sample Answer 1

To: **Damien Breen**

From: **Examinee**

Date: **July 30, 2024**

Re: **Sidecar Design Matter**

MEMORANDUM

This memorandum addresses two questions: (i) whether Sidecar Design is liable to Conference Display Innovations ("CDI") under the CFAA; and (ii) assuming Sidecar is liable, what damages CDI can recover under the CFAA. This memorandum assumes that Sidecar is liable for its former employee, John Smith's, actions.

I. Sidecar's Liability under the CFFA

The Computer Fraud and Abuse Act ("CFFA"), codified at 18 U.S.C. § 1030, governs this dispute. A person violates the CFFA where they either (i) intentionally access a computer without authorization or exceeds authorized access, and thereby obtain information from any protected computer; or (ii) knowingly and with the intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value. Id. The CFFA provides for a civil action against a violator of the Act, but only if the conduct involves losses during any one year period totaling at least $5,000. At issue here is Smith's diverting of CDI's customer's funds into his own account, so the relevant inquiry is not whether he obtained information from a protected computer, but whether his actions are actionable under prong (ii) of the CFFA. Further, there can be no dispute as to whether Smith acted knowingly and with the intent to defraud, and that he obtained something of value, because he clearly consciously diverted funds from CDI's customer to his own account. Further still, Smith, as an employee of Sidecar hired for the purpose of creating a website and secure payment system for CDI, clearly did not access a protected computer without authorization, as he had express authorization by virtue of his employment. Consequently, the only relevant inquiry as to Sidecar's liability is whether Smith "exceed[ed] authorized access."

The CFFA defines the term "exceeds authorized access" as accessing a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter. § 1030. The meaning of "exceeds authorized access" was clarified by the United States Supreme Court in Van Buren. The Court in Van Buren determined that a person exceeds authorized access only when a person accesses data that the person does not have a technical right to access. In other words, where a person has a computer and login credentials that give access to information, that person does not exceed their authorized access by accessing that information. See Van Buren. More simply, where a person does not need to use technical means to circumvent password protection, the person has not exceeded authorized access. See Homefresh LLC v. Amity Supply. However, the analysis is not so simple as that. Once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the credentials to access those computers. Id. In other words, whether a person exceeds authorized access turns on whether they had a legal right to access information, not just whether they had a technical ability to do so. See id.

Here, whether Sidecar, through Smith, exceeded their authorization under the CFFA turns on the timeline. Sidecar through Smith did not exceeds it authorized access for the first $25,000 stolen, but it did for the second $50,000 stolen. When Smith first stole $25,000 from one of CDI's customers, Sidecar and CDI had a contract that entitled Sidecar to access CDI's customer data. This data was password protected, but Smith had the password and was able to access the Data through his employment. In other words, Smith had a legal right to access CDI's customer data when he stole the first $25,000. Further, Smith did not use any hacking or methods to circumvent the password protection of CDI's customer data, he merely typed in the password and accessed files available to him. As the Homefresh Court instructs, where a person has a legal right to access data and does not use technical means to circumvent protection of the data, that person does not exceed their authorization, and here that is exactly the case with Smith. He had a legal right to access the data under Sidecar's contract with CDI, and needed no technical circumvention to access it. Thus, for the first $25,000 stolen, Smith did not exceed his authorized access and thus Sidecar is not liable for that $25,000 under the CFFA.

However, Sidecar is likely liable for the second $50,000 stolen by Smith. Crucially here, SIdecar and CDI's contract terminated once Sidecar completed setting up CDI's website and arranging secure payment systems. Once that contract ended, Sidecar and its employees no longer had a legal right to access CDI's customer data. By accessing CDI's customer data after the legal right terminated, Sidecar, through Smith, exceeded their authorization by accessing the data, just as illustrated in Homefresh. The fact that CDI did not change their login credentials despite Sidecar's warning to do so is immaterial; the Homefresh Court clearly states that technical ability to access information alone is not dispositive. Although Smith could technically access CDI's data, he no longer had a legal right to do so. Thus, he exceeded his authorization. Consequently, Sidecar, through Smith, will likely be liable for the $50,000 stolen by Smith.

II. Damages available to CDI

This section assumes that Sidecar is liable to CDI under the CFFA for the full amount stolen by Smith. Under the CFFA, a civil action only may be brought by an aggrieved party who suffered more than $5000 in damages in one year. § 1030. Damages for violation of the CFFA are limited to economic damages only. The CFFA further provides that "losses' include "any reasonable cost to the victim, including the cost of responding to an offense, conducting a damage assessment, and restoring data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." Id. Franklin Courts have interpreted this provision to exclude costs incurred to upgrade the plaintiff's security system. Slalom Supply v. Bonilla. However, a plaintiff company can recover amounts paid to an external cybersecurity company for the costs of investigation, as well as amounts paid to its own employees to assist in the investigation into the breach. Id. Further, punitive damages are categorically not permitted in civil cases under the CFFA.

The CFFA also allows for recovery of consequential damages, but only if such damages result from the interruption of service. Id. Slalom Supply is instructive on the issue of consequential damages in the present case. In Slalom Supply, the defendant diverted two payments of funds from the plaintiff's customers to his own account. Id. In order to preserve its relationship with the customers, the plaintiff covered that expense out of its own coffers. Id. The Court held that such an expense did not result from an interruption of service, and thus was not recoverable under the CFFA. Id. The interruption of service occurred when the plaintiff had to shut down its website, not when the funds were diverted, so the expense could not be a result of the interruption. Id.

Here, Sidecar will be liable for costs incurred in investigating the security breach, including payment to CDI's own employees, but it will not be liable further. CDI alleges damages of $606,000, consisting of: $4000 paid to a cybersecurity firm to investigate and fix the breach; $500 paid to upgrade the security system; $1,500 paid in overtime to CDI's employees to help with the security firm's investigation; $75,000 in restitution for the amount taken; $125,000 for the termination of the pending contract; and $400,000 in punitive damages. Preliminarily, punitive damages are categorically disallowed under the CFFA, as stated by Slalom Supply, and thus CDI cannot recover such damages. Further, CDI clearly cannot recover the $500 spent to upgrade their security system, because payments to upgrade security systems are expressly not recoverable according to Slalom Supply. More complicated is the $75,000 refunded to CDI's customer and the $125,000 lost in the cancellation of the contract. These expenses are not recoverable because they did not result from an interruption in serve as required by the CFFA, but rather were incurred prior to any interruption. Any interruption of service CDI suffered would have been when they investigated the security breach, but at the time the funds were stolen and the contract canceled there had been no interruption yet. Just as in Slalom Supply where the plaintiff could not recover for the cost of covering a customer's order out of its own coffers, CDI here cannot recover for the costs incurred in reimbursing their customer and the contract cancellation. There had yet been no interruption, and so consequential damages are not available. As a result, Sidecar would be liable only for $5,500 - the costs paid to the cybersecurity company and to CDI's own employees in investigating and remedying the breach. Note that because this amount exceeds $5,000, CDI is able to bring a claim, but their damages will be limited to $5,500.

MPT-2 — Sample Answer 2

To: Damien Breen

From: Applicant

Date: July 30, 2024

Re: Sidecar Design Matter

Memorandum

The purpose of this memorandum is to assess whether Sidecar is liable to Conference Display Innovations Inc. (CDI) under the federal Computer Fraud and Abuse Act (CFAA) and if so what damages CDI may recover from Sidecar.

Sidecar's Liability Under The CFAA

The Computer Fraud and Abuse Act (CFAA) was enacted in response to the growing number of computer hackers (HomeFresh). The CFAA is interpreted to cover any computer that can be connected to the internet. Initially the CFAA was created to impose criminal violations, however, is has since been expanded to allow for civil causes of action and should be applied in the same manner regardless of whether it is being used in a criminal case or civil case. To establish liability under the CFAA, §1030 requires that the defendant access a computer "without authorization or exceeds authorized access and thereby obtains information from any protected computer." The United States Supreme Court (SCOTUS) in Van Buren, held that the phrase "exceeds authorized access" means that "an individual exceeds authorized access when he accesses a computer with authorization but then obtains information located in particular areas of the computer -- such as files, folders, or databases -- that are off limits to him." In Van Buren, the defendant was a police officer who accessed a women's license plate information at the request of a third party who paid him for the information. SCOTUS said that this was not a violation of CFAA because his login credentials and work computer gave him access to that information and the access was only prohibited by department policy. Because there was no "technical barrier" in gaining access to the information it did not constitute a violation. The Franklin District court in HomeFresh, citing to Van Buren, stated that a "only when a person accesses data that the person does not have the technical right to access" do they exceed authorized access. In HomeFresh, the plaintiff's employee quit and began working for a competitor but never returned his laptop. His role when working for the plaintiff allowed him to use a company computer and have access to all its data, and his login credentials allowed him access to all of the customer information. While still working for the plaintiff, the employee downloaded data regarding the plaintiff's customers, and then after he quit he downloaded more of the plaintiff's customer data. The Franklin court ruled that the data downloaded while still employed by the plaintiff did not violate the CFAA because he did "not use technical means to circumvent password protection" as he had valid access. However, the Franklin court took the approach that "once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers." This decision does not conflict with SCTOUS's ruling in Van Buren because in that case the court refused to address the issue whether a person can be liable under the CFAA for access after their employment. The Franklin has taken the side that an employee may be liable under the CFAA for access after leaving the employment.

Here, Smith accessed CDI's payment system at two distinct times, once during employment with Sidecar and once afterwards. Following the rules laid out above in Van Buren and HomeFresh, Smith did not violate the FCAA when he accessed the CDI customer payment system on June 5th, 2024. This is because Smith was employed by Sidecar at this point and part of his job requirement was to work on the CDI project. The CDI project involved providing Sidecar with a password giving it full access to all data in the system. Thus, Smith rightful had access to all that data through his employment on the project. Under Van Buren, there is no technical barrier here so Smith is not liable under the CFAA for his access of CDI's data on June 5th. This means that Sidecar is also not liable under respondeat superior for Smith's access on June 5th, because Smith himself is not liable. Even though CDI specifically told Sidecar not to use any customer data once it was entered into the portal, this does not change the analysis. As described in Van Buren, departmental policy that prohibits the specific use is not the determining factor of whether liability exists under the CFAA, rather its whether a technical barrier existed.

However, Smith may be liable under the CFAA for the access to customer information on July 5th. As stated above, the Franklin court in HomeFresh, has ruled that a person may be liable under the CFAA for accessing information after employment has ended. Here, Sidecar's employment and contract with CDI ended on July 2nd, thus Sidecar no longer had authorization to access that information. Like in HomeFresh, the employment here had ended, so the use of the passwords to access the information constitutes a violation of the CFAA. CDI had terminated Sidecar's right to use the password and thus terminated Smith's right to use the password even though he was still employed by Sidecar. Since Smith has violated the CFAA by accessing CDI customer information on July 5th, Sidecar is liable under respondeat superior for Smith's violation.

Recoverable Damages

Because Sidecar is responsible under respondeat superior for Smith's violation of CFAA, CDI may recover from Sidecar for Smith's violation. The CFAA §1030 permits recovery for any person who "suffers damage or loss" by a violation and may recover "compensatory damages and injunctive relief or other equitable relief." It further states that a civil action may only be brought if the "losses to claimant during any one-year period totaling at least $5,000." Additionally, damages are limited to economic damages. Section 1030(e)(11) states that losses include" cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." In

Slalom, the 15th circuit held that money spent to "upgrade the security system" does not count as costs for "restoring the system" under §1030(e)(11). Thus the $500 incurred to upgrade the CDI system will not be recoverable. Slalom does not permit the victim to be reimbursed for upgrading their own system. However, the court permitted recovery for the money paid to the victim's employees to assist in investigating the security breach as well as cost paid to a security firm for investigating the breach. Slalom court reasoned that §1030 does not require only "external help" in investigating a breach. Thus, CDI can recover the $4,000 it spent on employing a security firm to investigate the breach as well as the $1,500 CDI paid its' own employees for assisting in the investigation. Additionally, CDI has proven that they can recover $5,500 which is above the statutory requirement of $5,000 making this recovery permissible.

However, CDI may not be able to recover consequential damages from Sidecar. Consequential damages can only be recovered for losses that occurred from an "interruption of services." (Slalom). Slalom cites Selvage Pharm which further states that §1030(e)(11) shall be read narrowly and "lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." The damage must result from the interruption of services. Like in Slalom, the reimbursement to CDI's customer occurred before the interruption of service, and thus was not a result of the interruption. This means that the $75,000 refund paid by CDI to its customer is not recoverable and Sidecar will not be held liable for this amount. Additionally, the court in Ridley Mfg., stated that "most cases based on lost revenue and consequential damages involve such things as deletion of critical files that cost plaintiff a lucrative business opportunity, or the alteration of system-wide passwords. Neither of these issues occurred here. CDI's customer cancelled their $125,000 contract because of the breach by Smith not because of interruption of service, deletion of business files, or alteration of passwords. The contract was cancelled on July 9th while the interruption of services did not occur until July 11th. Just like in Slalom, there has been no evidence offered that the cancellation of the contract was in anyway tied to the interruption of services. Thus CDI cannot recover the $125,000 in lost revenues from the cancellation of the contract. Additionally, the Slalom court cited Demidoff confirming that "courts have consistently refused to include punitive damages within the definition of economic damages." Thus, CDI is also not able to recover any punitive damages.

Conclusion

In conclusion Sidecar is liable for Smith's violation of the CFAA when he accessed customer information on July 5th. Additionally, Sidecar will be liable for $5,500 in damages that occurred to CDI. However, Sidecar is not liable for the amount of money paid to upgrade its security system, that CDI paid back to its customer, nor are they liable for the cancellation of the contract between CDI and its customer.

MPT-2 — Sample Answer 3

TO: **Damien Breen**

FROM: **Examinee**

RE: **Sidecar Design Matter**

DATE: **July 30, 2024**

MEMORANDUM

I. Introduction

This memo addresses two questions regarding Sidecar's potential liability and damages to Conference Display Innovations (CDI) for violation of the federal Computer Fraud and Abuse Act (CFAA). The CFAA was created to address a public concern regarding hackers. The CFAA was expanded in 2021 to cover any computer with internet access. Van Buren v. US. The CFAA has been applied in both criminal and civil contexts. US v. Nosal.

II. Analysis

A. Is Sidecar liable to CDI under the CFAA?

To maintain a civil cause of action, a person violates the CFAA when they "intentionally access a computer without authorization, or exceeds authorized access... information from any protected computer." Section 1030. A person can also violate the CFAA by exceeding authorized access knowingly and with an intent to defraud to obtain anything of value. Id. Exceeding authorized access in the statute means obtaining or altering information the accessor is not entitled to access or obtain. Id. The Supreme Court recently overturned a police officer's conviction in Van Buren for searching the police database for a woman's license plate for payment because the officer only broke department policy, not a technical barrier. 141 S. Ct. at 1662. The Supreme Court found "exceeds authorized access" means accessing data a person does not have the technical right to access like locating files in areas of the computer off limit to the person. Id. The court in Homefresh v. Amity extended this decision as persuasive authority in 2022 to find that once an employee leaves their job, the employee may no longer use passwords or employer computers under the CFAA. The Homefresh court held an employee accessing customer data outside its work did not violate the CFAA because the employee still had access to the data while employed. However, any access after employment did violate the CFAA. Id.

Here, CDI contracted with Sidecar to create a website and payment system online. This payment system stored credit card information to bill CDI customers protected by a password that Sidecar knew while making the system. Sidecar's employee John Smith, an engineer, charged 25k to one of CDI's customers to be deposited into Smith's bank account. This payment likely did not violate the CFAA because John did not exceed authorized access by accessing data the engineer did not have the technical right to access. As an engineer, John had the ability to access the payment system he was helping to create. He even had the password to access this system. The payment system was not off limits to him. Sidecar will likely not be liable for this first 25k payment under the CFAA because John Smith did not perform the duties of a hacker under the CFAA. However, Sidecar may be liable for John Smith's 50k payment after Sidecar's contract with CDI ended. After the first charge, Sidecar's contract ended, and Sidecar recommended CDI change the password for the payment system. A few days later, John charged an additional 50k to the same CDI customer to be deposited into his bank account. In this payment, John acted as a hacker under the CFAA and exceeded his authorized access. Although John had the password, he was not supposed to be accessing any files as the contract had ended. This follows the persuasive authority under Homefresh, so this decision is not binding on this case.

Therefor, Sidecar is likely not liable to CDI under the CFAA for John Smith's payment of 25k because this was during the scope of his employment. There is persuasive authority to suggest that Sidecar may be liable to CDI under the CFAA for the 50k payment that occurred after Sidecar's contract ended.

B. Assuming Sidecar is liable, what damages can CDI recover under the CFAA?

The second issue assumes Sidecar is liable under the CFAA and asks what damages CDI can recover from Sidecar. CDI is alleging 606k in damages, and CFAA damages are governed by the CFAA and Franklin case law. It is helpful to divide these damages into three categories: (1) cost of investigation, (2) lost business, and (3) punitive damages.

1. Cost of Investigation Damages

Under Franklin law, a binding 15th Circuit case, Slalom Supply v. Bonilla, found a defendant liable under the CFAA for the costs of an investigation into a computer hacking and the plaintiff's own employees who assisted in the investigation, but the defendant was not liable for costs spent to upgrade a security system. The court in Slalom based its analysis on CFAA Section 1030. Under the CFAA, losses may be recovered if the claimant's losses exceed 5k during any 1 year period. Id. These losses include "the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense." Id. Based on this definition of losses, the Slalom court found the defendant liable for the payment to a cybersecurity firm to investigate and its own employees assisting the cybersecurity firm during the investigation. The defendant in Slalom was held not liable for any upgrades to the plaintiff's security system after the breach, because these upgrades did not restore the system to its condition before the offense. CFAA Section 1030.

Here, CDI is seeking the total cost of investigation damages, 6k, for a security firm to investigate the breach (4k), upgrade the security systems ($500), and use its own employees to assist the investigation ($1500). This case is similar to Slalom in that it has resulted from a misuse of a security system, and the analysis around damages is the same. Like the defendant in Slalom, Sidecar will be held liable for CDI's losses incurred in responding to the offense, conducting a damage assessment, and restoring the system to its prior condition. CFAA Section 1030. CDI will be able to recover the 5.5k paid to the security firm to investigate the breach (4k) and the overtime pay for CDI's employees to help assist with the investigation (1.5k). However, CDI will not be able to recover the $500 spent to upgrade its security systems because these upgrades do not restore the system to its condition before the offense. This upgrade restores the system to a better condition than the one before the offense.

Therefor, the plaintiff Sidecar will be liable to CDI for 5.5k for the cost of the investigation.

2. Lost Business Damages

Under the CFAA, a compensable loss includes "any revenue lost, cost incurred, or other consequential damages incurred because of an interruption of service." Section 1030.

Lost revenue cases usually involve costing the plaintiff a lucrative business opportunity (Ridley v. Chan) or altering passwords for internet systems (Marx Florals v. Teft). The "interruption of service" provision of the CFAA has been applied narrowly to dismiss actions that fail to allege facts showing an interruption of services (Selvage v. George), and find 10 million dollar revenue losses are not recoverable because the losses did not interrupt services (Next Corp v. Adams). This interruption of service need only be temporary to be recoverable, but the damages must result from the interruption. (Cyranos v. Lollard). The court in Slalom found a former employee who hacked into its former employer's network to divert two customer payments was not liable for lost business damages including the two payments. The Slalom court reasoned that although the employer was forced to pause its operations, the hacking did not impair or alter the system. In addition, the employer fulfilled the customer orders before the investigation. Id.

Here, CDI is seeking damages for Sidecar's employee charging 25k before Sidecar warned CDI to change its password, and the employee charging an additional 50k after this recommendation.This is similar to the Slalom case where a former employee diverted two customer payments to its own account, and CDI is unlikely to receive the 75k Sidecar's employee received from a CDI customer. This amount of money is not the result of a temporary interruption of service. This offense also did not impair or alter CDI's system. CDI chose to close down its website for 5 days after the money was moved, but this decision was made after the 75k was transferred from the client's account. In addition, the customer terminated a 125k contract it had with CDI for future work. Like the court in Next Corp which found a 10 million dollar revenue loss not recoverable due to no interruption in services, CDI has not shown how this 125k contract loss for future work was because of its interruption in services. This loss is more attributable to a client who lost 75k not wanting to continue to do business with said company. To recover for these lost business damages, CDI would have to specifically allege facts to show how the damages result from a temporary interruption of services. These damages resulted "before that interruption, not as a result of it." Slalom.

Therefor, without more facts, Sidecar is unlikely to be liable to CDI for lost business damages.

2. Punitive Damages

Under the CFAA, the recovery of damages in civil cases is limited to economic damages. The courts in the 15th Circuit have declined to include punitive damages into the definition of economic damages under the CFAA. Demidoff v. Park (15th Cir. 2014).

Here, CDI is seeking 400k in punitive damages from Sidecar. Because the 15th Circuit has found punitive damages do not fit under the definition of economic damages under the CFAA, Sidecar will not be liable for punitive damages to CDI under the CFAA.

Therefor, Sidecar will not be liable to CDI in punitive damages.

III. Conclusion

Sidecar could be liable under the CFAA to CDI for its employees access to a 50k customer payment after Sidecar's contract had ended based on persuasive authority. Under the CFAA, losses may be recovered if the claimant's losses exceed 5k during any 1 year period Sidecar will be liable to CDI for 5.5k relating to the costs of the investigation, and likely no liability for lost business or punitive damages. This 5.5k amount in losses satisfies the CFAA's requirement that losses exceed 5k during a 1 year period.