FIRST DAY SECTION TWO

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 27, 2004

Write your answers to Questions 6 and 7 in Answer Booklet D - (the <u>PURPLE</u> booklet)

6. Gulliver's Metal Fabricators ("Gulliver's") is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. Gulliver's has a fabrication plant in Roanoke, Virginia. True Restoration Corp. ("TRC"), a factory building contractor, is a Maryland corporation with its principal place of business in Silver Spring, Maryland.

In 2001, Gulliver's sustained significant damage to its Roanoke, Virginia, fabrication plant during a fire. Gulliver's contracted with TRC to undertake the rebuilding of the plant. TRC's engineers visited Gulliver's plant in Roanoke, evaluated the work needed, consulted with Gulliver's Roanoke plant manager about the scope of the work, and reported back to Silver Spring. TRC's vice president in Silver Spring prepared the written contract, signed it, and sent it to Gulliver's headquarters in Charlotte. The construction contract provided for repairs to be performed in Roanoke on a time-and-material basis. The construction contract did not contain a governing law provision. The vice president of Gulliver's in Charlotte reviewed and signed the contract and returned it to TRC in Silver Spring.

Over the next four months, TRC submitted bills to the Gulliver's factory in Roanoke. Each invoice described the work performed, the material supplied, and the labor hours devoted to the work applicable to that invoice. The plant manager forwarded the bills to the headquarters in Charlotte for payment directly to TRC. Gulliver's reviewed and timely paid all invoices with checks sent from Charlotte to Silver Spring.

A portion of the restored building collapsed within 30 days after all work had been completed. An insurance agent for Gulliver's investigated the loss and determined that much of the work reflected on the invoices from TRC, in fact, had not been done and that TRC had intentionally misrepresented the scope of actual repairs.

Gulliver's has filed a two-count complaint in Roanoke in the Federal District Court for the Western District of Virginia for the cost to repair the factory again and for punitive damages. Jurisdiction is properly based on diversity of citizenship. In Count I, Gulliver's alleges that TRC breached its contract with Gulliver's. In Count II, Gulliver's alleges that TRC defrauded Gulliver's by submitting fraudulent invoices for work not actually performed. TRC denies all wrongdoing and moves to dismiss both counts.

The presiding judge seeks guidance on which state's laws (North Carolina, Virginia, Maryland) govern the disposition of each count. Specifically, the Court has requested the parties to answer the following questions:

(a) Which state's choice-of-law rules apply in this action? Explain fully.

This question continues on the next page.

(b) As to Count I (Breach of Contract), which state's law governs (1) the interpretation of the contract and (2) questions relating to performance of contractual duties? Explain fully.

(c) As to Count II (Fraud), which state's law applies? Explain fully.

Reminder: Write your answer to the ABOVE question #6 in Booklet D - the PURPLE Booklet.

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7. In 2000, Bill Brown, a 50-year-old resident of Roanoke, Virginia, who had never been married, validly executed a will that had been prepared by his attorney, Joe Smith. This 2000 will provided:

"I give and devise my estate as follows:

1. My house on Main Street in Roanoke to my friend, Samantha;
2. $25,000 to my faithful employee, Geraldine;
3. All the rest and residue of my estate to the South Roanoke Baptist Church.

I name Samantha as the Executor of my estate."

In 2002, Brown had Smith prepare another will, which Brown also validly executed. This 2002 will provided:

"I hereby revoke all prior wills. I give and devise my estate as follows:

1. My house on Main Street in Roanoke to my friend, Samantha;
2. $25,000 to my faithful employee, Geraldine;
3. All the rest and residue of my estate to the Art Museum of Western Virginia.

I name Samantha as the Executor of my estate."

Smith retained the executed originals of both wills in his office.

In 2003, Brown learned that the Art Museum of Western Virginia was planning to build a $50 million facility, including an Imax theater, and vacate its present premises. Brown was infuriated at what appeared to him to be a senseless use of assets and decided that he preferred the provisions of his 2000 will over those of the 2002 will. He handwrote, dated, and signed the following letter to Smith:

> ***"March 1, 2003***
> ***I wish to revoke my 2002 will and want you to take the necessary action to accomplish this. I wish my 2000 will to be effective as my last will and testament.***
> ***/s/ Bill Brown"***

Upon receipt of this letter from Brown, Smith wrote "Revoked" in large letters across each page of the 2002 will. He attached Brown's letter to the 2000 will and placed both wills in his file.

Later in 2003, Brown sold the Main Street house that he owned at the times he had executed each of the wills and purchased a new house, also on Main Street in Roanoke.

Also in 2003, Geraldine died, survived by two children.

Brown died on January 15, 2004. He was survived by Samantha, Geraldine's two children, and Robert, a nephew, who would be Brown's sole heir under the Virginia laws of intestate succession.

Brown's estate consists of the new house on Main Street and stock, bonds, and checking accounts. Samantha, Geraldine's two children, Robert, Art Museum of Western Virginia, and South Roanoke Baptist Church all claim the right to take from Brown's estate.

Under which will, if either, and to whom should Brown's estate be distributed? Explain fully.

Reminder: Write your answer to the ABOVE question #7 in Booklet D - the PURPLE Booklet.

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➔➔ Now SWITCH to the GREEN Answer Booklet - Booklet E ←←

Write your answer to Questions 8 and 9 in Answer Booklet E - (the GREEN booklet).

8. In 1995, Clayton and Marcus formed Dolphin Car Rentals, Inc. ("Dolphin"), a Virginia corporation. They were the only officers, directors, and shareholders of the corporation. They regularly observed all corporate formalities. For several years, the business thrived, but increasing fuel prices and competition adversely affected their operations, and after 2001, Dolphin operated at a substantial annual loss.

In early 2004, Dolphin closed its doors and ceased doing business. At the time of its closing, Dolphin had millions of dollars in unpaid debt. The only asset it owned free and clear was the real property on which its main office was located in Norfolk, Virginia.

On February 10, 2004, Dolphin contracted to sell the Norfolk property to Purchaser for

$1,000,000. Purchaser retained ABC Title Insurance Co. ("ABC") to examine title to the property and insure that title was free of defects and that there were no unpaid liens on it. ABC assured itself that record title was free of defects and obtained an affidavit from Marcus as president of Dolphin that, to the best of his knowledge, the property was free of liens. ABC issued an owner's title insurance policy to Purchaser, and the deal closed on March 1, 2004.

In the closing instructions to the settlement agent, Clayton and Marcus directed that the $1,000,000 sales proceeds be distributed as follows: $200,000 to Dolphin's corporate checking account, $400,000 to Marcus's personal account, and $400,000 to Clayton's personal account. The funds were distributed accordingly. The $200,000 in the corporate checking account was used to pay some of Dolphin's trade creditors. Clayton and Marcus promptly moved the money elsewhere and closed these personal accounts.

Unbeknownst to Clayton and Marcus, on February 2, 2004, Fordham Motors, an automobile manufacturer from which Dolphin bought part of its rental fleet, obtained a default judgment against Dolphin for $400,000 in the Fairfax Circuit Court. On February 28, 2004, Fordham recorded an abstract of the judgment in the Norfolk Circuit Court. ABC's title examiner failed to include mention of the judgment in the title report to Purchaser.

In April 2004, when Fordham Motors learned of the sale of the real property to Purchaser, it presented proof of its judgment lien to Purchaser which, in turn, demanded that ABC clear the title to the property by paying off Fordham's lien. ABC settled the claim and paid Fordham $400,000. Fordham assigned to ABC all the rights it had against Dolphin, Clayton, and Marcus, thus conferring on ABC the right to sue them directly.

ABC then sued Clayton and Marcus, asserting the following claims: (i) that the court should pierce the corporate veil and hold Clayton and Marcus jointly and severally liable for the debt to Fordham; (ii) that, by distributing the funds to themselves, Clayton and Marcus violated Virginia corporation law; and (iii) that, by distributing the funds to themselves, Clayton and Marcus violated the Virginia law against fraudulent conveyances.

What is the likelihood that ABC will prevail on each of its claims against Clayton and Marcus? Explain fully.

Reminder: Write your answer to the ABOVE question #8 in Booklet E - the GREEN Booklet.

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9. Andy owns a retail seafood fish outlet in Virginia Beach, Virginia. On April 1, 2004, he received a phone call from Willa, a seafood wholesaler from whom Andy had occasionally bought frozen fish and whom he had found reliable. Willa said she had just received information on a shipment of frozen Atlantic salmon worth $8,000 and that she could get it for Andy for $5,000 if Andy was prepared to act quickly. Andy expressed interest, so Willa told him to wire the $5,000 to her bank account immediately so she could seal the deal with the shipper.

Relying on Willa's representations that the shipment contained first quality salmon that had been properly packed and handled, Andy wired the funds and, in due course, received the shipment. In fact, the refrigerated container in which the salmon had been shipped had malfunctioned, causing the salmon to thaw and spoil. Knowing this, Willa had acquired the shipment cheaply, refrozen it, and intentionally concealed the information from Andy.

Andy, unable to sell the spoiled salmon, subsequently learned the foregoing facts. When Willa refused to give Andy his money back, Andy filed the following two-count motion for judgment against Willa in Circuit Court for the City of Virginia Beach and properly served it:

"Plaintiff moves for judgment against defendant on the grounds and in the amount set forth below:

<u>First Count (Breach of Contract)</u>:

1. On or about April 1, 2004, plaintiff and defendant agreed in a transaction conducted over the telephone, that plaintiff would purchase and defendant would sell one shipping container of frozen salmon for $5,000.

2. Plaintiff paid the $5,000 price for the salmon by wire transfer of the funds to defendant's bank account as agreed.

3. Defendant delivered the frozen salmon, which was spoiled and not saleable.

Wherefore, plaintiff demands judgment against defendant as hereinafter set forth.

<u>Second Count (Fraud)</u>:

4. Plaintiff by this reference incorporates the allegations of the First Count as if fully set forth herein.

5. By defendant's acts as set forth in the foregoing allegations, defendant defrauded plaintiff.

Wherefore, plaintiff demands judgment against defendant as follows:

a) On the breach of contract count, in the amount of $5,000.

b) On the fraud count, in the amount of $5,000 plus punitive damages according to proof.

c) For costs expended in this action.

<u>/s/ Andy</u>
Appearing Pro Se"

(a) What type of pleading can Willa file to challenge the sufficiency of the allegations in Andy's motion for judgment, on what grounds can she challenge each of the counts, and how should the court rule on each ground of challenge? Explain fully.

(b) Assume Willa successfully challenges each count and that the court grants Andy leave to amend the motion for judgment. Based on the facts of the transaction as stated above, what facts can Andy plead in an amended motion for judgment that will survive further challenge to his breach of contract and fraud claims? Explain fully.

Reminder: Write your answer to the ABOVE question #9 in Booklet E - the GREEN Booklet.

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