INDIANA ESSAY
QUESTION I
July 2004

When he was seventeen years of age, Sam borrowed $5,000 from Neighbor to buy a sailboat. Sam signed a written document promising to pay to the order of Neighbor $5,000 with interest and delivered the document to Neighbor. Several months later, Neighbor signed the document and delivered it to Frances, in payment of a $4,000 debt Neighbor owed to Frances.

Several years later, after Sam's boat was damaged in a windstorm, Sam took his sailboat to Marina to be repaired. A Marina employee told Sam the boat would be ready for pick up in two weeks. After the boat was repaired, a Marina employee mistakenly placed Sam's boat in Marina's showroom for sale with Marina's other used boats. Two months later, buyer came to Marina and purchased Sam's sailboat from Marina. A month or so later, Sam returned to Marina to pick up his sailboat. At this time, Marina and Sam discovered the sale by Marina of Sam's boat. Marina contacted Buyer and asked Buyer to return the boat, but Buyer refused to do so. Marina then told Sam he should pursue Buyer to get his boat back and refused to do anything further for Sam.

That evening, when Sam arrived home, he had a letter from Frances advising that Frances was now in physical possession of the $5,000 promissory note. In the letter, Frances demanded the immediate payment in full of the note, plus interest at the rate of 12% per annum. Frances closed the letter with a statement that, if the note were not paid in full with interest within 10 days, she would file a lawsuit.

1. Identify and analyze the claims of Frances against Sam and the defenses, if any, Sam may have against Frances' claims. Based on your analysis, who should prevail? Explain.

2. Identify and analyze the claims Sam may have against both Marina and Buyer and the defenses, if any, Marina and Buyer may have against Sam's claims. Based on your analysis, who should prevail? Explain.

INDIANA ESSAY
QUESTION II
July 2004

Lumber Co. is a family-owned Indiana corporation engaged in the business of selling lumber. John, the grandson of the founder, holds 40% of its stock. John's grandmother held 35% of the stock until her death, when she bequeathed it to her granddaughter, Angela, John's cousin. Various persons and entities own the remaining 25% of the Lumber Co., but none of them has more than 5% of the shares.

John is the President and Chief Executive Officer of the company. Angela does not work for Lumber Co. in any capacity. Since its beginning in 1960, Lumber Co. has been profitable. It declared dividends in the amount of $300,000 on average to its shareholders from 1960 until 1998, but ceased doing so when Angela succeeded to her interest.

In 1998, under pressure from its bank, Lumber Co. procured policies of "key man" insurance on the life of John and other of its important executives. The bank was concerned that if any of these personnel died, Lumber Co. would experience losses. The purpose of the insurance is to keep the company stable while employee changes are made and to enable it to remain solvent. The policy amount on John's life alone is $10,000,000. The terms of the policies stipulate that upon the deaths of any of the executives, 2/3 of the proceeds are payable to Lumber Co. and 1/3 to beneficiaries designated by the executives. The policies also have a cash surrender value that executives may draw upon when they retire, under certain terms and conditions. The policy premiums are substantial, often equaling or exceeding dividends paid by Lumber Co. prior to 1998.

In 2002, as part of a package of legislation designed to promote family-owned businesses, Indiana passed a statute that restricts the time within which a shareholder may bring an action concerning the management of such a business. The statute requires such actions to be brought no later than one year from the date the cause of action accrues. In addition, the plaintiff must post a substantial bond as a condition to filing suit.

Angela is very disappointed that she has not made any money from her Lumber Co. stock. She has tried to sell it, but she has not been able to locate any buyer. Angela is unhappy with the management of the company. She would like to force Lumber Co. to declare dividends or liquidate her interest, or she would like some other remedy that would require Lumber Co. or its management to better promote her interests.

Angela has consulted you to determine what her rights as to the Lumber Co. and its management might be. Advise her as to what causes of action she might have and against whom they might be brought. Include as part of that advice your assessment of the validity of the Indiana legislation affecting the timeliness of her claim and the requirement that she post a bond to proceed.

INDIANA ESSAY
QUESTION III
July 2004

Larry and Joe, two brothers, recently passed away. Larry was a lifelong resident of Indiana and a successful engineering manager at ABC Chemical, Inc. Joe, an avid fisherman, spent his adult years in coastal Florida working on fishing boats. As Joe's health deteriorated and his finances grew lean, he moved to Indiana and placed his vintage motorcycle and personal belongings into storage. The two brothers enjoyed their remaining years together living at Larry's restored farmhouse and died peacefully within days of each other. Previously, Joe had named Nephew as the beneficiary of his $15,000 life insurance policy. Both men had executed wills before their deaths and both named Nephew as executor of their estates.

At his death Larry owned a restored farmhouse, 25 acres of adjoining land, a stock portfolio of mostly ABC Chemical stock worth $500,000 and $30,000 in a savings account. All of these possessions were left to Nephew under Larry's will. At his death Joe owned the Vintage motorcycle appraised at $7,500 and other personal property valued at $5,000. All Joe's property was left to Nephew under Joe's will.

Eager to take possession of his new belongings, Nephew, armed with Joe's will in hand, went to retrieve the motorcycle from the storage facility. The storage company questioned Nephew's claim of ownership and refused to release the motorcycle to him.

Nephew comes to you to find out how he can lawfully gain possession of the property left to him under his uncles' wills.

1. How can Nephew gain possession of the property left to him under Larry's will?

2. How can Nephew gain possession of the property left to him under Joe's will?

3. Explain the applicability of Indiana's inheritance tax, if any, to the property devised by Larry and by Joe.

INDIANA ESSAY
QUESTION IV
July 2004

Martha and Fred have twin girls, Amy and Beth, born on January 2, 1984. In 1997, an Indiana court dissolved their marriage and awarded Martha full legal and physical custody of the twins. The court ordered Fred to pay $220 per week in support to Martha for the twins' benefit pursuant to the Indiana Child Support Guidelines. Assume the twins have no disability of any kind, and assume that Fred made every payment due until the twins turned eighteen.

The twins turned eighteen years old on January 2, 2002, during their senior year in high school. Twin daughter Amy left school on January 3, 2002, without receiving a diploma. Amy remained at home and had no special employment skills. Assume at all times relevant to this question, Amy does not attend GED classes or seek any other post-secondary education or training. Also assume that Amy works at a local restaurant making seven dollars per hour for a thirty hour week and has no health insurance available to her through her employment.

Twin daughter Beth graduated from high school on June 1, 2002, and she now attends a state university located in her Indiana home town. Beth lives at home but has all her books, fees, and tuition paid by academic scholarships. Martha allows both girls to live at home without charging them for rent, utilities, or food.

On the first Friday after Amy left high school, Fred reduced his support payment to $110 per week, without filing any paperwork with the local court that granted the dissolution. Martha struggled to pay her bills. She finally consults her attorney, who files on Martha's behalf a petition to find Fred in contempt for failing to pay the $220 per week in support. Martha's petition is filed on September 1, 2002. Fred then responds by having his attorney file a petition on September 15, 2002, to terminate his support obligation for Amy.

You are a trial judge in Indiana. Rule on the pending petitions and give the reasons and analysis for your rulings.

INDIANA ESSAY
QUESTION V
July 2004

Malorie Jones, an Indiana resident, wanted to purchase a used Mercedes and decided to look on the Internet for a vehicle. From a friend's recommendation, she found a site called "The Marketplace," which claimed to link sellers with buyers for many different products. The Marketplace did not own the items or take title to the items; it provided a place for prospective buyers to find items they were interested in purchasing from willing sellers. Assume no written agreement existed governing the relationship between The Marketplace and the prospective buyers. Also assume that The Marketplace did not advertise in Indiana.

On The Marketplace website, Malorie found a Mercedes convertible with only 5,000 miles on the odometer for sale for $50,000. It was the vehicle she had dreamed about, and the seller, Sam Smith, stated on The Marketplace website that he had priced the vehicle $10,000 below retail value because he had a terminal illness and had to sell now. Sam provided his e-mail address on the website.

Malorie corresponded with Sam through the e-mail address. Malorie mailed a money order for a $20,000 earnest money deposit to Sam, along with a signed agreement that Sam had sent her through the regular United States mail. Sam stated that he lived in Los Angeles, California, and he said the vehicle was located there as well. Malorie hired a company to pick up the Mercedes and transport it to her Indiana home. When the company arrived at the address in Los Angeles Sam provided, they found a convenience store, but no Sam and no Mercedes.

After contacting representatives from The Marketplace, Malorie learned that six months before she sent the money order to Sam, The Marketplace had suspected Sam was an alias for a woman named Louisa Morrison, who had taken money from numerous buyers without providing any product. After Malorie's inquiry, The Marketplace determined that Louisa had fled the United States with all the proceeds from her "sales." Malorie was unable to locate Louisa to file any legal action against her for the $20,000.

Malorie did some investigation and found that The Marketplace had its only business offices in Boise, Idaho, and did business exclusively on the Internet. Persons in all fifty states and several foreign countries could access the website. As a new venture, The Marketplace did not have much money for advertising, so it advertised only in the State of California. It had ten Indiana residents as registered sellers and had facilitated purchases by 100 Indiana residents up to the time Malorie sent her money to Sam.

Malorie hired an Indiana attorney who filed a suit in an Indiana trial court for damages against The Marketplace, seeking the $20,000 that Malorie paid "Sam Smith." You are the attorney hired to defend The Marketplace in the Indiana trial court. Analyze any defense that you might raise to the complaint, and whether the defense is likely to succeed. (Do not discuss negligence or contract law.) Discuss what motion or pleading you would use to raise the defense and why.

INDIANA ESSAY
QUESTION VI
July 2004

Cal and Mark are insurance agents. In order to be insurance agents, they must be licensed by the Indiana Department of Insurance. Cal's license and Mark's license came up for renewal in January 2004. Cal and Mark both submitted applications for renewal. Both applications for renewal were denied due to complaints received from consumers concerning their sales practices. Cal and Mark received written notification of the denial of the renewal applications from the Department of Insurance. The written notifications informed Cal and Mark of their right to request an administrative hearing before an administrative law judge.

Cal contacted an attorney. His attorney advised him to immediately file a lawsuit in the local circuit court mandating that the Indiana Department of Insurance renew Cal's license. Cal took his attorney's advice and filed the lawsuit. Sixty days after the filing of the lawsuit, the Department of Insurance filed a motion to dismiss, which was granted by the trial court, and the dismissal was ultimately affirmed on appeal.

Mark also contacted an attorney. Mark's attorney advised him to request an administrative hearing before an administrative law judge. At the hearing, the Department presented evidence of consumer complaints, which consisted of two affidavits from consumers and testimony from three witnesses. Fifteen days after the hearing, the administrative law judge sent a letter to Mark's attorney by certified mail stating:

> "The Administrative Law Judge, having considered the evidence presented, hereby affirms the agency's decision in denying renewal of applicant's license."

1. Explain why the trial court dismissed Cal's lawsuit.

2. Discuss whether Mark has any judicial remedies available to challenge the decision of the administrative law judge and, if so, the nature of the remedies, the procedural requirements and the possible issues which could be raised.

Indiana Essay Question I
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

1) Francis v. Sam

Negotiable Instruments

The promissory note that Sam gave Neighbor is probably a negotiable instrument (NI). NIs are covered by Article 3 of the UCC. An instrument/document is a negotiable instrument if it is signed by the maker, a promise or order to pay, payable to bearer or order, unconditional, without any other undertaking, payable in a fixed amount of money, on demand or at a definite time. Here it seems that the note is an NI. While there does not seem to be a date certain, the note is payable on demand. It seems to be signed by Sam and is in a fixed amount of money. (The interest provision, while likely variable, does not defeat this.) Therefore, the note is a NI.

HIDC

Francis is probably a holder in due course (HIDC). A HIDC is a holder who takes in good faith, for value, and without any notice of claims or defenses on the instrument. (A holder is one who takes the instrument through negotiation. A note such as this one-that is, not bearer paper is negiotated through endorsement and transfer of the document (Since the note was signed by neighbor & transferred to Francis, it was negotiated.) Francis took this note for value because receipt of payment for past debts is considered value. Although he paid less than the face value of the note, a $4000 to $5000 disparity is not enough to put him on notice that anything may be wrong w/the instrument. Also, there is nothing in the facts to indicate Francis acted in bad faith. Therefore, he is likely a HIDC.

HIDC Defenses

A HIDC enjoys special status under the UCC. He takes the NI free from all defenses except for certain enumerated defenses. These include fraud in the factum, illegality insolvency, discharge for any other reason and incapacity. Sam will argue that he was a minor (17) when he executed the instrument. This is a "real" defense, not a personal one and is therefore good against a HIDC.

However, upon reaching the age of majority, Sam did not disaffirm the contract. He kept the boat for a long time (several years) and it would be unlikely that a Ct would state that his defense is not valid (this answer would be different if Sam was 18 or barely past the age of majority).

Interest Rate

However, even if a Ct does find for Francis, the interest rate is way too high. If an instrument does not specify the interest rate, interest will be computed at the judgement rate, which is currently 8%. Therefore, Francis will probably win (unless the age of the note gave him some notice that deprived him of HIDC status) but Sam will be required to pay 8%, not 12%. (Francis can also demand payment at anytime since this seems to be on demand)

2) The repair agreement between Sam and Marina likely created a bailment. A bailment is created when a bailor gives property to a bailee and the bailee agrees to hold it for the bailor. The bailee owes the bailor a duty regarding care of the property depending on who is receiving the benefit of the bailment.

If it is a bailment for the sole benefit of the bailor, the bailee owes a slight duty of care liable for gross negligence. If the bailment is for the sole benefit of the bailee, the bailee owes a high duty of care and will be liable for slight negligence. If the bailment eventually benefits both

parties, the bailee is held to an ordinary duty of care and is liable for ordinary negligence (The modern trend is to impose an ordinary negligence standard for all three types of claims).

Here this seems to be a mutual benefit bailment. Sam is receiving services (repairs) and Marina is receiving compensation (money). Therefore, the Std is ordinary negligence.

However, even if Marina was negligent, there is an exception. If the bailee deals in goods of that kind, a bona fide purchaser (purchaser in good faith, for value) is entitled to the goods. Here, Marina sold used sailboats. Buyer had no notice that this was Sam's, and took presumably in good faith. Therefore, Sam cannot go after Buyer but can recover from Marina.

Additionally, Sam was told the boat would be ready in two weeks. It seems from the facts that Sam waited 3 months to pick up the boat. The Marina could argue that this is abandoned property. Abandoned property is property the owner leaves with the intent of giving up both title and possession. Here there is no indication that Sam intended to give up title (in fact, it seems to be reasonable to assume that Sam wouldn't have it repaired if he wanted to give up title) and so this seems to be a fairly weak argument. Therefore, Sam should receive the value of the boat from Marina and has no recourse against Buyer, unless he can show that Buyer was not a bona fide purchaser.

Indiana Essay Question II
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

Angela, you have a few claims you may make regarding your rights to Lumber Co.

First, I want to address the fact that Lumber Co. has not made any dividends since 1998, and that you would like to force the company to declare dividends. Courts are resistant to forcing a corporation to declare dividends. There must be clear signs of abuse of discretion on the directors' part in order to have a court force them to declare dividends. Such abuse may be evidenced by the fact that the directors are paying themselves large wages or profiting handsomely from the profits of the corporation without paying out to the corporation's shareholders. Ultimately, to determine whether dividends could be paid out, a court will look to the solvency test and see if dividends can be made based on profits. (This test falls within the Business Judgment Rule-described below.).

Angela, you can claim that John as President and CEO is abusing his discretion by not declaring dividends. You can further support this with a claim that John, as President and CEO, has breached his fiduciary duties he owes to the shareholders. Directors and officers, particularly those in close corporations, owe fiduciary duties of care and loyalty. The duty of care requires the director/officer to discharge his duties in good faith and with the care that an ordinarily prudent person would do under similar circumstances, and he must reasonable believe it is in the best interests of the corporation. The director/officer will not be personally liable unless he fails this standard and also acts in a willful and wanton manner. This is the Business Judgment Rule and the burden of proving the director/officer breached this duty of car is on the plaintiff.

It is possible to show John did not discharge his duties in good faith as he has allowed a life insurance policy in the amount of $10 million to be taken out on his life, and other policies for other key personnel. The premiums for the policies equal or exceed dividends paid out before 1998. There is a definite argument that John has breached his duty of care he owes a President by choosing to pay such high insurance premiums instead of paying any dividends to shareholders.

Directors and officers also owe a duty of loyalty. This fiduciary duty prohibits the officer/director from self dealing or from usurping any corporate opportunities for personal profit. If there is an interested director transaction (a transaction affecting the corporation and benefiting a director in some way) that transaction will be void unless the director shows either 1) the transaction was fair when entered into or 2) the material facts were disclosed to either the board of directors or the voting shareholders and the transaction was approved.

This transaction involving corporate money to pay for insurance premiums appears to directly benefit John. The policies have a cash surrender value that John may withdraw from and 1/3 of the proceeds at death go to beneficiaries designated by the executive. Angela, I am given no evidence whether John secured approval from the board or voting shareholders to make this transaction regarding the insurance policies, but hat is something that should be looked into. There is substantial evidence based on these insurance transactions that John is self dealing and has breached his duty of loyalty.

A route you may take is to bring a derivative suit, on the corporation's behalf, to challenge these policies. One a shareholder may bring a derivative suit if he/she can show he is an adequate representative, he/she has made a demand to the corp. to bring a suit, he/she was a

voting shareholder when the claim arose and throughout the litigation and a verified complaint is filed.

However, a direct suite against the directors is allowed in close corporation where the shareholder can show that there will not be multiple suits against the corporation, that creditors are protected and that the other shareholders are protected. As the evidence indicates this is a close corporation, you probably may bring a direct suit against the director's based on their actions and breaches of fiduciary duties owed to you as a shareholder and in the alternative you can bring a derivative suit.

It is important to address the statute enacted in Indiana in 2002 which bars claims brought more than one year after the claim arose. There are two arguments that may be made here. First, you could argue the law is not germane – it is not solely limited to one subject. It was part of a "package of legislation" and it could be argued it is unconstitutional by dealing with more than one subject. However, I would need to know more facts about the whole legislation for this argument and courts are very deferential to legislators if there is any relation in subject-matter of the laws.

The better argument would be that the statute is a violation of due course of law. Based on the Martin v. Richey case, a statute of limitations is unconstitutional when it bars a claim that could not have been discovered due to the latency of the dangers. The Court in Richey held that in such cases the statute of limitations must be discovery-based as opposed to occurrence-based and there needs to be 2 years from the discovery to bring a claim. I would need to know when you discovered these breaches of fiduciary duties within the corporation.

Indiana Essay Question III
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

1. Nephew, here is how you can get possession of your Uncle's property.
Property Under Larry's Will

Restored Farmhouse and 25 acres of Adjoining land; stock portfolio

Larry's will will have to be offer for probate before Nephew, you can get possession of the farmhouse, land and stock. Nephew, you will need to offer the will for probate within one year of Larry's death. If Larry's estate had been a small estate, probate would not have been necessary merely an affidavit or summary would have sufficed. However, because Larry's estate's larger than the required $25,000 for a small estate, probate is necessary. While will is in probate, Larry's creditors will have to be notified. They have 3 mths in which to state a claim. If Nephew knows of the creditors then actual notice must be given, but if he does not know who they are then publication will suffice. Publication in the local newspaper is adequate.

Once the will is probated, you are entitled to the farmhouse, land and stocks, minus any debts, liens, that are owned. In addition, administrative funeral expenses, taxes, and medical bills must also come out of the estate. If there are no debts or taxes, then you Nephew get the property. However, as stated if there are debts taxes (federal & state), medical bills and funeral expenses, these must be taken from Larry's property before Nephew can take.

In addition, if the will is contested, this may prolonge your ability to take. If you are successful in the will contest, then you get his inheritance minus the debts, etc. At this time I should tell you the order of the claims against the estate. The order is as follows: (1) unsecured liens (2) administrative fees (attorney, etc) (3) funeral expenses (4) federal taxes (5) Most recent medical bills (6) state taxes (7) other claims.

As for Larry's savings account, I should tell you that you are entitled to that amount now if your name is on the account with Larry's name. You just need to show the appropriate documentation to receive the funds. This type of account is called Joint tenancy account. You will need to find out if you were named as a joint tenant on the account. Your uncle may also have set up a Payable on Demand (POD) bank account naming you as beneficiary. If this is the case, then you can get possession of bank proceeds by showing the appropriate documentation. These accounts are not probated. Joint accounts and POD's are non probate items.

2. As far as Joe's property is concerned, you can get the proceed's from Joe's life insurance police upon a showing that you are the beneficiary. You merely have to contact the insurance company and show the necessary documentation and identification. The insurance company will have a copy of the insurance policy if you do not have a copy.

As to Joe's motorcycle, you will not be able to get it with just your will in hand. Joe's will will have to be probated as was Larry's will if the amount is 25,000 or more. Once the will is

probated, then you can take possession of the motorcycles. You will need to present the necessary documentation to the storage company who is a bailor for Joe who was a bailee. Upon the required showing the storage company will need to produce the motorcycle. If fees or charges are owed to the storage company, then they will need to be paid paid before the company will relinquish the motorcycle. If the will property is less than 25,000, you can treat is as a small estate and just an affidavit to the court is all that is necessary. This may be the case here. If the life insurance policy is excluded, we will treat as a small estate.

3. Indiana's Inheritance Tax

Nephew you will be taxed on your inheritance. You fall into Category C of the Indiana Inheritance Tax. There are four such categories. (1) Category is for spouses. They are Exempt from such tax; (2) Category B is for lineal descendants (children, parents). They are exempt $100,000 of their inheritance and taxed at 1% to 10% on the remainder. (3) Category C is for other relatives such as nephews, nieces etc. They are taxed at 7% - 15% percent and are allowed a $500 exemption. You fall into this category. (4) Category D is for nonrelatives and they are allowed only a $100 deduction and are taxed at a much higher rate (20%). You will need to pay taxes on the following items: farmhouse and adjoining land; stock; savings account; motorcycle and Joe' s other personal belongings and insurance policy. As stated you can exempt the 1st $500.

Finally, Nephew, I should add one thing about Joe's estate. I will do a bit more research, but I believe that since the estate is 25,000 or less we will definitely treat it as a small estate and provide an affidavit to the court as to the debts, etc. I just need to double check the, exclusion of the 15,000 life insurance policy.

Indiana Essay Question IV
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

Martha's Motion for Contempt

Under Indiana law, a court may find a parent in contempt for failure to pay child support in accordance with the divorce agreement.

Parents have an obligation to support their children. Pursuant to Indiana law, a parent must support a child until they are 21, emancipated, married, in armed services, or drop out of school and are supporting themselves.

In addition, parents may not unilaterally modify a support agreement when one child is no longer eligible to receive support. A parent must petition the court. In addition, a parent must petition the court for a modification if at any time after 1 yr from the agreement date, circumstances materially change.

Here, Fred has unilaterally reduced his support payments without authorization from this Court. Even if Fred is entitled to a reduction in payments, he may not do so without prior court approval.

Thus, because Fred has unilaterally withheld nine months of child support, Martha's motion is granted. Fred is hereby ordered to pay the back child support.

Fred's Motion to Amend Support

Any time after one year a party may seek a modification of a support award. A modification may be based on a child illegibility to receive support do to being 21, emancipated, married, in the service, out of school and self-sufficient, or a substantial change in the circumstances.

There are no substantial changes in Fred's circumstances that would warrant a modification. Nor does Fred assert that there has been a change in Martha's situation that would warrant a modification. His sole argument is that a modification is in order because of Amy's situation.

Amy in no longer in school. However, at no time has Amy ever filed emancipation documents. She is neither married, in the armed services, or 21. Fred's only argument for her would be that she is 18 and self-sufficient. However, being self-sufficient requires that one is living on her own and supporting herself. Amy's job only pays $7 and hour. She has no form of insurance and still lives at home rent free. This is hardly self-sufficient. Thus, none of the factors which would warrant a reduction in child support with regards to one particular child are met. Amy does not meet any of the requirements that would allow Fred to stop paying support based solely on her. Thus, Fred's motion is hereby denied.

Indiana Essay Question V
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

The clearest defense available to The Marketplace is that of lack of personal jurisdiction. In International Shoe, the U.S. Supreme Court held that a court may not exercise its jurisdiction over a person unless that person had "minimum contacts" with the jurisdiction (the state). Minimum contacts, according to the Court, meant that there had to be a sufficient nexus between a defendant and the state that being haled into court there did not offend the traditional notions of fair play and substantial justice. (International Shoe). The court has held that general in personam jurisdiction exists where a person's (or organization's) contacts with the state are continuous and systematic. General jurisdiction allows the defendant to be found to be subject to personal jurisdiction of the court regardless of whether the action before it arose from those contacts. Specific jurisdiction exists where a defendant has had infrequent, specific, limited contacts within the state and the action before the court arises from one of those contacts. Most states have long-arm statutes describing when specific contacts giving rise to claims are sufficient to subject the defendant to personal jurisdiction there. Indiana's long-arm statute appears in Trial Rule 4.4. Though not an exclusive list, some of the contacts giving rise to personal jurisdiction under the Rule are: doing business within Indiana; causing personal injury or property damage in Indiana; committing an action outside the state while doing business in Indiana which action causes injury or property damage within the state; entering into and executing a contract for land in Indiana; contracting to insure in Indiana; living in a martial relationship in Indiana; breaching the peace or violating a restraining or protective order in Indiana.

I would argue first that The Marketplace lacks the minimum contacts required under Supreme Court jurisprudence to be subject to personal jurisdiction in Indiana. The Marketplace has had only 10 sellers in Indiana and only 100 purchasers from Indiana. This is not enough to constitute "continuous and systematic" contacts with Indiana sufficient to give rise to general jurisdiction. Further, The Marketplace does not enter into any contracts with its purchasers. Even if The Marketplace contracts with sellers through "registration," the action here arises out of a purchaser's claim. The Marketplace had no specific contacts within Indiana giving rise to this action so no specific in personam jurisdiction exists. Under the long-arm statute, the action does not appear to be for personal injury or property damage, and it is arguable that The Marketplace cannot be said to be doing business in Indiana since it does not advertise here, has no offices or personnel here, and only enters into a small number of contracts with sellers from here. The success of this defense will likely turn on whether a court finds that The Marketplace is "doing business" in Indiana. The defense could very well fail on this point since the level of contacts with Indiana purchasers and sellers and the fact that the Internet website is widely available to Indiana residents may result in a finding of minimum contacts sufficient for personal jurisdiction. Nevertheless, I would argue that merely because the Internet is widely accessible does not automatically mean a business "purposefully availed" itself of the laws and privileges of doing business in a particular state.

Note that it is not entirely clean from the facts that we could not ask for a more definitive statement, depending on the actual language of the complaint, or even file a motion to dismiss

for failure to state a claim on which relief can be granted (12(B)(6)) since it is not clear what the complain alleged as the plaintiff's claim. However, assuming these defenses are inappropriate, the personal jurisdiction defense is the best argument/defense against the action.

The defense could be raised as an affirmative defense in our answer to the complaint or we could file a Rule 12(B)(2) motion to dismiss for lack of personal jurisdiction. I would prefer the latter since it could alleviate any need to provide a complete answer to the complaint. We would have 10 days after denial of the motion to dismiss in which to answer the complaint (if the motion was denied). It is important that this be among (if not THE) the first defenses raised because it can easily be waived by submitting to the court's jurisdiction in any way (even for transfer of venue). The court will not raise a motion based on personal jurisdiction sua sponte.

Indiana Essay Question VI
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

1. The trial court dismissed Cal's lawsuit because he failed to exhaust his administrative remedies before filing suit with the trial court. When an Indiana administrative agency makes a determination that an individual wants to challenge, the individual must file a petition with the agency for a hearing to be held. An administrative law judge is appointed to hear the case and listen to evidence on the matter. The proceedings are informal, although parties are entitled to representation. An impartial administrative law judge will issue written findings or fact and make a conclusion. Before appealing to a trial court, an individual must exhaust all administrative remedies. The only way exhaustion is excluded is if exhausting remedies would be futile. There is no evidence that Cal could not exhaust his remedies. Because the Indiana Department of Insurance is an administrative agency. Cal needed to pursue administrative remedies before filing in the trial court. (The Administrative Orders and Procedures Act would have governed the process at the administrative hearings).
2. Mark may seek judicial remedies so long as he has exhausted administrative remedies. Assuming this has been done, Mark may appeal to a trial court seeking a reversal of the administrative law judge's order within thirty days of the ALJ's determination. On appeal, the trial judge generally will not hear new evidence, but rather, will make its determination from the record provided from the administrative proceeding. The trial court judge generally will not reverse the determination of an administrative law judge unless the decision was capricious or contrary to the weight of the evidence (It is a very high standard to satisfy). Parties may be represented at appeal.

One possible issue that Mark could raise involves the absence of any written findings by the ALJ. When the ALJ hears a case, he/she is required to make written findings of fact based on the evidence and include them in the order. If ALJ is the final authority the written findings are used on appeal. If ALJ is not the final authority, its written findings are presented to the final authority and incorporated into his/her order. In this case, the ALJ saw two affidavits from consumers and testimony from three witnesses. Although the ALJ affirmed the Department's decision, it did not provide any written findings. While the evidence was in the favor of the Department of Insurance, in order for the court to adequately review the record on appeal, the administrative law judge's findings supporting his/her decision should have been in writing.

Multistate Performance Test I
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2004

Andrews Ewing & Oakman
1656 Barrington Boulevard
Cascade, Franklin 33339

July 27, 2004

Dear Mr. Drake:

I recently met with Dr. Nicole Hall regarding letters, journals and speeches written by her late mother Dr. Marian Bonner. These papers were bequeathed to Dr. Hall by her mother. These papers have, by some unknown means, surfaced in the possession of your client, Success for Every Child Associates (SECA). SECA has publicly announced its intention to (1) change its name to the Marian Bonner Educational Group and (2) to reproduce portions of Dr. Bonner's writings in pursuit of its commercial goals.

Dr. Hall has retained this firm in this matter and hereby demands that her rights under copyright and right of publicity be respected. Specifically, Dr. Hall demands that (1) no reproduction of her mother's works be made and that (2) no name changes to incorporate her mother's name, in whole or in part, into the organization currently known as Success for Every Child Association shall occur.

The facts in this case are relatively simple. Dr. Bonner was a nationally-known scholar, social reformer and advocate of educational reform until her death in 2003. She has won numerous awards for her work, including the Franklin Education Association "Champion of Education Award," which has been presented only three other times in the association's history. During this time, as you know, she produced in excess of 300 letters, 50 speeches and 10 volumes of journals spanning a career of more than 50 years. She was a tireless advocate of schools that were publicly funded, operated and controlled. Dr. Bonner believed such a scheme was essential to a healthy school system.

Dr. Bonner's daughter has now learned that her mother's private papers are slated for publication by a for-profit corporation as it attempts to privatize the Franklin public school system to which Dr. Bonner devoted a lifetime of effort, study and devotion.

Copyright Infringement

If SECA reproduces, distributes or displays the copyrighted work, it will have violated copyright law.

Copyright is governed by Title 17 of the United States Code. Copyright protection covers original literary works of authorship. Section 102(4). The title to works vests initially in the

author(s) of the work and may be bequeathed by will. Section 201. This owner has exclusive rights in the copyrighted works, including reproduction, distribution and, in the case of literary works, public display. SECA is proposing both to reproduce and to distribute Dr. Bonner's works. Barring an acceptable price from a collector, SECA might also plan to exhibit some of these private papers in conjunction with their planned name change. This is not legal; it is not ethical; and it would damage SECA's reputation immeasurably if the truth about their use of this venerated woman's papers were to come out. Publicity naming SECA as "an infringer" would be nothing but detrimental.

While SECA may claim a "fair use" exception to the restrictions on copyrighted works this exception does not even begin to allow the use of Dr. Bonner's works which SECA threatens. This is especially true give that fair use is an affirmative defense. Campbell. The burden of proof would be on SECA and it simply and clearly could not meet it.

"Fair use" of a copyrighted work is allowed for purposes such as "criticism, comment, news reporting, teaching..., scholarship or research." SECA's proposed use does not fall within any such use.

The U.S. Supreme Court visited this issue in Campbell v. Acuff-Rose Music, Inc. (1994). In Campbell, the Court discussed the four factors in 17 U.S.C. Section 107 that permit the finding of a fair-use exception. These four factors are to be considered together, in light of the purposes of copyright. Campbell.

First, subsection (1) addresses the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes. Campbell.

This factor does not inure to SECA's benefit. This proposed use in clearly commercial. SECA has already been awarded contracts to run pilot programs by state legislation. It is to these state legislators that SECA plans to distribute the proposed volume of excerpts. It is clear that the effort is designed to turn a three-city "pilot program" into a full-pledged statewide enterprise.

The second factor addresses the nature of the copyrighted work. Campbell. Section 101(2) demands recognition that some works are closer to the core of intended copyright protection than others. Section 101(2). Specifically, Campbell notes that a key factor against a finding of fair use is whether the work is unpublished, stating that it is a key factor and that such a finding weighs heavily against a finding of fairness. Campbell.

This factor lends strong support to a finding that there is "fair use" exception available here. Dr. Bonner's works were unpublished. Further, Dr. Bonner had made no visible beginning to prepare the handwritten notes for such preparation.

Third, the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Campbell.

SECA had not informed Dr. Hall of the extent to which it plants to co-opt Dr. Bonner's private papers. Regardless, even the smallest excerpt can fail this factor of the test. Campbell. In

Campbell, the Court allowed that a lengthy quote might qualify as fair use in, e.g., a news account of a speech. Campbell. However, a quote as small as 300 words has been found to violate this prong if it goes to the "heart" of the work. SECA's proposed use does not remotely qualify as a new account. It is a commercial solicitation, pure and simple. Even if SECA were to make the excerpt short, it would surely go to the heart of her work, as that is the issue which it is addressing in its sales pitch. This factor cuts against SECA.

It is possible that the fourth factor could bend in SECA's direction. Regardless, the other three factors strongly weigh against SECA. As such, SECA is facing not only litigation regarding this matter but also the publicity of a judgement against them.

Violation of Dr. Bonner's right of publicity

Dr. Bonner's right of publicity has already been violated. If SECA changes its name to include hers, it will Dr. Bonner's rights will further be violated.

First, Franklin has long recognized the right of publicity. Bolen Products. This right extends to both celebrities and private citizens and grants the person the right not to have his or her name used, unauthorized, for the financial gains of others. Bolen Products. Such an unauthorized use is a tort and damages are available in an amount equal to the value of the appropriation to the user. Bolen Products.

Here, this right easily extends to Dr. Bonner. She was much more famous than the average private citizen. Her name was used to name more schools in Franklin than any other name. However, she was a private, perhaps even reclusive figure. Regardless of her classification, she had a protected privacy interest. Further, an improper intrusion on this right would result in a full disgorgement of any profits that can be associated with the misappropriation. Thus any additional profits from cities beyond the first three "pilot" cities, would be due to Dr. Bonner's daughter.

Second, the right of publicity would be found to survive in this case. The Franklin courts have not yet spoken on this issue. Bolen Products. Other courts are divided. Competing policies exist. On the one hand, courts want to give the benefits of person's work to that person's heirs. Bolen Products. On the other hand, other courts have found that the decision to exploit one's own name to be a personal decision. In the current case, however, both of these policies favor Dr. Hall. Under the first rationale, the right of publicity survives. Under the second, it may not. However, here it would. This very private decision was made during Dr. Bonner's lifetime. She chose not to publish her works. It is incredible to think that such a personal decision could now in any manner of equity be reversed by a for-profit corporation. Perhaps most disturbing is that SECA's goals are directly contrary to those of Dr. Bonner. Dr. Bonner argued throughout her career that a publicly funded, operated and controlled school system was essential to racial justice and democratic participation.

Because this is very nearly an issue of first impression in Franklin, SECA's chances of success on the merits are questionable at best. Further, as the Franklin Supreme Court last heard this issue in 1982, the issue is easily ready for a further review in the Franklin Supreme Court. While

Dr. Hall is not eager to be a party to protracted appellate litigation, she is unwavering in her commitment to her mother's memory and the preservation of her mother's lifelong work. She is sure that her community of physician-colleagues and library associations would stand beside her.

Finally, the owner of a right of publicity who avoids exploitation during life is entitled to have his or her image protected against exploitation after death just as much if not more than a person who exploited his image during lifetime. Bolen Products. We would like to settle this informally, if possible. Litigation is not in the best interests of either party, as it is expensive. In litigation, we could win damages for the already-committed breach of Dr. Bonner's right of publicity. We are interested in discussing the possibility of foregoing such damages in favor of our more immediate demands—copyright and future privacy rights—being met.

Very truly yours,

Denise Samuels

Multistate Performance Test II
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Claim: Breach of Franklin's Implied Warranty of Habitability

Legal Authority: §500 of the Franklin Real Property Law guarantees that in every lease for residential premises, the landlord shall warrant that the premises rented and common areas are fit for human habitation and the reasonable uses contemplated by the parties. §500 also states that a landlord warrants that a tenant will not be subjected to conditions that may be dangerous, hazardous, or propose a risk to their life, health, or safety. He also warrants that the premises are safe, clean, & fit and the warranty applied to all essential facilities of the residence. (Virgil v. Landy.)

Element 1: There was a lease between the landlord and the tenant for a residential residence (either oral or written)

Evidence available to show existence of lease:

- Testimony of Brenda Chapin of such a lease & residential
- Testimony of GRI representative that such a lease existed

Element 2: The tenant notified the landlord of the defect not known to the landlord, and gave a reasonable time to correct the problem (Virgil)

Evidence available to show that Chapin notified Herb London of problem and gave him reasonable time to correct the problem:

- Testimony of Chapin she has been notifying London of problems for over seven months
- Production of Chapin's notes regarding each communication made or attempted to London (states in her letter, according to my notes)
- Letter from Chapin to London dated May 21, 2004, notifying him of problems
- Copy of inspection report, dated July 6, 2004, showing notice of defects
- Testimony of maintenance man, Victor, that he inspected problems

Element 3: There must be a defect in the premises that has an impact on the health & safety of the tenant. (Virgil) Must prove more than 1 or two minor violations. Id.

Evidence to prove that the conditions affected the health & safety of Chapin and her children:

- Testimony of Daughter that she was hit on the head by loose plaster
- Testimony of children that they were afraid of the rats
- Chapin's testimony of the conditions regarding
    - Mold
    - No heat

    - Elevator
    - Rats
    - Ceiling & wall plaster
    - Using stove as a heat source which pose danger
    - No hot water and have to boil water to take baths
    - Presence of rodent droppings and the loss of food
- Copy of the inspectors report showing that three of the conditions were immediately hazardous and must be fixed immediately and two were hazardous
- Letter from Chapin to London stating that the conditions had actually harmed an occupant and that they were getting worse
- Copy of the hospital bills that an injury actually occurred
- Copy of the increased light bill showing an increase use in power since the heat was out
- Testimony of Victor, the superintendent, that he killed a mouse and witness conditions
- Pictures taken by Chapin to show horrible conditions
- Copy of bill of the space heater that proves heat was not working

Remedy: Compensatory Damages/Rent abatement

Legal Authority: § 240 of the Housing Division Court allows a court to award damages, which includes rent abatement. (Also cited in Virgil.)

Element: Once the above defects are proved, a court has wide latitude to award rent abatement that is based on the difference between fair market value of dwelling as warranted and the value of dwelling as rented. A percentage is then deducted based on the reduction of habitability attributable to the defects. (Virgil).

Evidence to prove fair market value, value as rented, and reduction of use.

- Testimony of Chapin of agreed upon rent of $1,000.00.
- All of the above evidence used to show the existence and severity of the defects.
- Testimony of Chapin stating how many months she has lived there

(Please note that these damages may not exceed the amount of rent that was originally due).

Remedy: Remedial damages

Legal Authority: § 240 also allows the imposition of remedial damages for measures taken by the tenant who has incurred out of pocket expenses to remedy the defect that a landlord has failed to correct. (Virgil).

Element: The tenant must have incurred an out of pocket expense to cure a defect that landlord knew of and failed to correct.

Evidence to prove out of pocket expenses suffered by Chapin to cure a defect.

- Above evidence that establishes that London had knowledge and failed to correct the problem

- Testimony of Chapin as to her remedial expenses regarding the over and space heater
- Receipt from space heater
- Copy of increased electric bill from increased use of the stove
- Letter from Chapin to London informing him that she had to buy the heater and run the stove

Remedy: Punitive damages

Legal Authority: § 240 allows a court to impose punitive damages for willful and wanton conduct that interferes with tenant's health and safety. (240 & Virgil).

Element: Willful and Wanton conduct by the Landlord in persistently failing to make repairs.

Evidence to prove London acted willfully and wantonly:

- Testimony of Chapin of her repeated requests to London
- Notes of Chapin documenting repeating requests
- Avon Gazette article incinuating that London trying to run his tenants out of the building and increased property value
- Testimony of Ms. Albert that London wanted to cash in on the apartment
- Testimony of Chapin that other neighbors have moved out
- Testimony of other tenants could probably be acquired

It is important to note that Chapin wants reimbursed for her daughter's medical expenses and lost wages. However, according to Bashford v. Schwartz, when questions of negligence, proximate cause and damage arise, those matters are not appropriate to determine at a summary hearing such as this. Thus, because the injuries are more an action for negligence based on premises liability, Chapin probably will not be able to be compensated for these injuries at this hearing. Thus, she must file a separate action if she wishes to recover these damages.