



**California  
First-Year  
Law  
Students'  
Examination**

**Essay Questions  
and  
Selected Answers**

**October 2010**



The State Bar Of California  
Committee of Bar Examiners/ Office of Admissions

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## **ESSAY QUESTIONS AND SELECTED ANSWERS**

### **OCTOBER 2010 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the October 2010 California First-Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page ii.

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**October 26, 2010**



# **California First-Year Law Students' Examination**

**Answer all 4 questions.**

**Time allotted: 4 hours**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

You should answer the questions according to legal theories and principles of general application.

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## Question 1

Pam drove to Diner, a local restaurant, at about 5:00 p.m. When she got out of her car in Diner's parking lot, she was robbed at gunpoint by an unknown assailant, who took her purse and her cellular phone. Pam later discovered that she was not the first victim of a crime in the Diner parking lot. In the past year, two other customers had been the victims of auto burglaries, which occurred while they were dining inside the restaurant. Diner put two video cameras in the parking lot, but did not hire security guards to patrol the parking lot.

As the robber began to flee, Pam wanted to get help and decided to run into Diner to use one of its telephones. She hoped that by calling "911" quickly, the robber could be apprehended and her property returned. As Pam ran across the parking lot she tripped in a large pothole and fell and broke her arm. Diner had not repaired the pothole, although customers had been complaining about it for weeks. All of the complaints were from customers who had not spotted the pothole while driving, hit it, and worried that their tires would be knocked out of alignment. The pothole was readily visible to pedestrians. Had Pam not been so panicked by the robbery, she likely would have noticed the problem and avoided it.

When Pam entered the restaurant, she asked a waiter, Wayne, to let her use Diner's phone to call "911." Wayne refused to let her use the telephone. He said Diner's policy limited use of the telephones to employees making business-related calls and strictly prohibited calls by customers. In fact, Pam later found out that Wayne had misstated the policy, which included an exception for emergencies. When Wayne refused, another customer promptly called "911" for Pam, using his own cellular phone. The paramedics and police arrived shortly thereafter, enabling Pam to get immediate treatment. However, the robber was never apprehended and Pam never recovered her purse or her cellular phone.

Pam is suing Diner. Under what theory or theories might Pam bring an action against Diner, what defenses, if any, might Diner assert, and what is the likelihood Pam will be successful in obtaining damages for:

- 1) The loss of her purse, her cellular phone, and her emotional distress as a result of the robbery? Discuss.
- 2) Her broken arm? Discuss.
- 3) Exacerbation of her injuries due to Wayne's refusal to allow her to use Diner's phone to call "911"? Discuss.

## Answer A to Question 1

### Pam v. Diner

#### **Negligence – Pam’s loss of purse and cell phone**

*Negligence is breach of duty which actually and proximately causes damage to the person or property of another.*

#### Duty

##### General Duty

The diner has a general duty of due care to exercise due care in preventing harm to others.

##### Special Duty

*An invitee is one who comes onto a landowner/occupier’s premises to fulfill a business objective of the landowner/occupier. To an invitee, a landowner/occupier owes a duty to make a reasonable inspection of the premises and correct or warn of any dangerous conditions a reasonable inspection would reveal.*

The facts indicate that Pam had come to the diner most likely to fulfill a business objective of the diner. As such, she would [be] an invitee with respect to Diner.

Therefore, it will be found that Diner had a duty to make a reasonable inspection of the parking lot and correct or warn of the danger of criminal activity in the parking lot.

#### Breach

The facts do not indicate that the diner had warned of the danger of criminal activity in the parking lot. Further, they did not take steps to correct the situation by preventing entrance by thieves by way of a secure entry or posting security guards. Therefore, they breached their special duty to correct or warn of known criminal activity.

Diner will argue that they took reasonable steps to counter the risk of injury to invitees by placing the two video cameras in the parking lot. However, this will not meet the standard of their special duty to correct or warn.

This being the case, Diner will be found to have breached their duty because they neither corrected the dangerous condition nor did they warn of it.

### Causation

Actual Cause – But for Diner’s failure to correct or warn of the criminal activity, Pam would not have been robbed because it is likely that security would have prevented the presence of the robber or a warning would have given Pam the opportunity to avoid crime.

Proximate Cause – It is foreseeable that failing to correct or warn of the criminal activity could result in a robbery.

Diner will argue that the robbery act is an independent intervening cause cutting the chain of causation because it is a criminal act. However, this principle will not apply when the duty is to prevent criminal harm.

Having proven actual cause and proximate cause, Diner’s breach of duty will be found to be the cause of Pam’s damages.

### Damages

Pam suffered, as a result of the breach, the loss of her purse, cellular phone, and, most likely, emotional distress.

Having proven a breach of duty which actually and proximately caused Pam’s damages, Pam will have proven a prima facie case for negligence.

## **Defenses**

### Assumption of the Risk

*A plaintiff will be barred from recovery for negligence if it can be shown that they voluntarily encountered a known risk.*

Diner will argue that it was well known that criminal activity occurred in the parking lot and the video cameras were further evidence of that and, therefore, she voluntarily encountered the risk of robbery.

However, the facts indicate that Pam did not learn until later that auto burglaries had occurred there. Therefore, this will not be a valid defense.

### **Negligence – Pam’s broken arm.**

*Negligence is breach of duty which actually and proximately causes damage to the person or property of another.*

### Duty

#### General Duty

The diner has a general duty to exercise due care in preventing harm to others.

#### Special Duty

*An invitee is one who comes onto a landowner/occupier’s premises to fulfill a business objective of the landowner/occupier. To an invitee, a landowner/occupier owes a duty to make a reasonable inspection of the premises and correct or warn of any dangerous conditions a reasonable inspection would reveal.*

The facts indicate that Pam had come to the diner most likely to fulfill a business objective of the diner. As such, she would [be] an invitee with respect to Diner.

Therefore, it will be found that Diner had a duty to make a reasonable inspection of the parking lot and correct or warn of the pothole in the parking lot.

### Breach

The facts do not indicate that the diner had warned of the danger of the pothole in the parking lot. Further, they did not take steps to correct the situation by having the pothole repaired, despite the fact that customers had complained. Therefore, they breached their special duty to correct or warn of the pothole.

This being the case, Diner will be found to have breached their duty because they neither corrected the dangerous condition nor did they warn of it.

### Causation

Actual Cause— But for Diner's failure to correct or warn of the pothole, Pam would not have tripped and broken her arm, because it is likely that repairing the pothole would have avoided Pam's tripping, and warning of the pothole would have given Pam the opportunity to avoid tripping and breaking her arm.

Proximate Cause— It is foreseeable that failing to correct or warn of the pothole could result in Pam's tripping and becoming injured.

Diner will argue that the robbery act is an independent intervening cause cutting the chain of causation because it is a criminal act. However, this principle will not apply as Pam could also have tripped while walking at a normal pace and become injured.

Having proven actual cause and proximate cause, Diner's breach of duty will be found to be the cause of Pam's damages.

### Damages

Pam suffered, as a result of the breach, a broken arm, related medical bills, possibly loss of wages, and pain and suffering.

Having proven a breach of duty which actually and proximately caused Pam's damage, Pam will have proven a prima facie case for negligence.

## **Defenses**

### Assumption of the Risk

*A plaintiff will be barred for recovery for negligence if it can be shown that they voluntarily encountered a known risk.*

Diner will argue that the pothole was clearly visible, acted as its own warning, and she voluntarily encountered the risk of tripping.

However, if Pam can show that she acted in a reasonable manner, this defense will not apply. Therefore, this will not be a valid defense.

### Contributory Negligence

*In some jurisdictions, a plaintiff will be barred from recovery for damages for negligence if defendant can prove that the plaintiff negligently contributed to their own injury.*

Diner will argue that by running in a parking lot, Pam breached a duty to exercise ordinary care when running through the parking lot and, thus, negligently contributed to her own injury.

However, if Pam can show that she acted in a reasonable manner, this defense will not be valid.

### Comparative Negligence

*In some jurisdictions, the amount plaintiff can recover for damages for negligence will be proportionately diminished to the degree that plaintiff negligently contributed to his own injury.*

If Diner is successful in their argument discussed above under Contributory Negligence, and they are in a comparative negligence jurisdiction, they may be able to reduce the amount Pam is entitled to recover.

## **Negligence – Failure to Render aid.**

*Negligence is breach of duty which actually and proximately causes damage to the person or property of another.*

### Duty

#### **Vicarious Liability – Doctrine of Respondeat Superior**

*The master will be liable for the torts of his servants which are committed during the course and scope of their employment.*

Because Wayne is an employee of Diner, Diner will be held liable for his torts if it can be shown that they were committed within the course and scope of his employment.

### General Duty

The diner has a general duty of due care to exercise due care in preventing harm to others.

### Special Duty

*Generally, there is not duty to render aid unless there is a special relationship between the parties: by statute, contract, relationship, assumption of care or immediate peril.*

The facts indicate that the restaurant had a policy that allowed for the use of the phone for emergency purposes. Pam, as a customer, may have had a special contractual relationship that caused them to owe a duty to come to the aid of Pam in letting her use the phone to call 911.

If Pam can prove this special contractual relationship and, therefore, a special duty to come to Pam's aid by allowing her to use the phone to call for help, she may proceed as follows:

### Breach

Because Wayne did not allow Pam to use the phone, Pam will argue that Diner breached their duty.

This being the case, Diner will be found to have breached their duty.

### Causation

Causation will be a moot point; see below under Damages.

### Damages

When Wayne did not allow Pam to use the phone, a restaurant patron did and Pam was able to call for help. Therefore, she suffered no damages as a result.

If the court finds a duty and breach, there will be no cause for negligence because there were no damages.

## Answer B to Question 1

***What claims does Pam have against Diner, what defenses can Diner assert and what is the likelihood Pam will be successful in obtaining damages for:***

***1. The loss of her purse, her cellular phone, and her emotional distress as a result of the robbery? Discuss.***

### **Negligence**

A plaintiff may recover personal and property damages if it can be established that the defendant owed the plaintiff a duty, that the duty was breached, and that the defendant's negligence was the actual and proximate cause of the plaintiff's injuries.

### **Special Duty-Landowner**

Here, Diner is a local restaurant open to the public; thus, Diner is a landowner.

### **Business Invitee**

Here, Pam was trying to park her car in Diner's parking lot so that she could go into the restaurant to eat. Thus, she is a business invitee, as she was going onto Diner's property for the purpose in which it was being held open. Therefore, Diner owes a duty to make a reasonable inspection of dangers and to protect against and warn against known dangers.

### **Breach**

Diner knew that prior to Pam being robbed that two other incidents of auto theft had occurred. Diner placed two video cameras in the parking lot as a result but did not hire security guards. Under the Learned Hand formula, Diner has breached its duty if the burden of preventing harm to its patrons was outweighed by the possibility of harm occurring. Here, Diner will argue that the harm that it had a duty to protect against was that of auto theft, not robbery. However, Diner was aware that criminal activity was taking place in its parking lot and that some crimes have the potential to escalate into dangerous situations. Since the likelihood of a person being robbed and possibly

murdered was high and outweighed the cost of hiring security guards it can be argued that Diner breached its duty.

Therefore, Diner breached its duty to protect its customers from known criminal activities and failed to protect Pam by failing to hire security guards.

### **Actual Causation**

But for Diner's failure to provide security guards Pam would not have been robbed, as the security guards would have deterred individuals from committing crimes in that location.

Diner is the actual cause of Pam's injuries.

### **Proximate Causation**

Diner's failure to provide security guards was an indirect cause of Pam having her purse and cellular phone stolen, as the robber was an intervening cause. However, the robbery was dependent on the Diner's failure to provide security guards and was a foreseeable result of a failure to provide adequate security. Therefore, Diner is the proximate cause of Pam's loss of her purse and cellular phone.

### **Damages-General**

Pam may recover money damages for the loss of her purse and cellular phone.

### **Damages-Special**

There are no facts indicating that Pam suffered any consequential damages as a result of the loss of her purse or cell phone; Pam will not be able to collect special damages.

### **Negligent Infliction of Emotional Distress**

One owes a duty not to subject another to an unreasonable risk of harm that may cause unreasonable emotional distress.

### **Non-Bystander Rule**

All jurisdictions allow [damages to] a plaintiff who was directly impacted by the defendant's negligence. The majority of jurisdictions, and the general rule, require that the emotional distress results in a physical manifestation.

Here, Pam was the direct victim of Diner's negligence of failing to provide adequate security measures for its patrons. However, there are no facts that indicate Pam suffered physical manifestations of the emotional distress caused by the robbery. Therefore, Pam will not recover damages for emotional distress resulting from the robbery under a negligent theory.

### **Defense--Contributory Negligence**

Under the common law rule, one who negligently contributes to his own injuries will be barred from recovery.

Here, there are no facts that indicate Pam was negligent. She intended to eat at Diner and parked in its parking lot as a reasonable person would have. This defense will fail.

### **Defense--Comparative Negligence**

As discussed supra, there is no evidence that Pam contributed to her negligence. This defense will fail.

### **Defense--Assumption of the Risk**

One who has knowledge, comprehension, and appreciation for the danger and voluntarily chooses to encounter the risk will be barred from recovery.

Pam did not know that there had been a history of criminal activity in the parking lot at Diner's prior to her robbery; therefore, she did not assume the risk. This defense will fail.

**Outcome:**

Pam will recover losses for her purse and cell phone but will not be able to recover for emotional distress resulting from the robbery.

**2.) Her broken arm?****Negligence**

A plaintiff may recover personal and property damages if it can be established that the defendant owed the plaintiff a duty, that the duty was breached, and that the defendant's negligence was the actual and proximate cause of the plaintiff's injuries.

**Special Duty--Landowner**

As discussed supra.

**Business Invitee**

Here, Pam was at Diner's to eat. Pam was parked inside of Diner's parking lot and was attempting to cross the parking lot; thus Pam was a business invitee on Diner's land. Diner owes a duty to its business invitees to make reasonable inspections and to warn [of] and make safe known dangers.

**Breach**

Diner knew about the pothole in its parking lot. Diner had received numerous complaints, albeit complaints from drivers who had not seen the pothole. However, it is foreseeable that one not paying attention may hurt himself and thus the pothole posed an unreasonable risk of harm to persons crossing the parking lot. Therefore, Diner breached its duty.

**Actual Causation**

But for Diner's failure to cover the pothole Pam would not have tripped and been injured.

**Proximate Causation**

Diner's failure to cover the pothole was a direct and foreseeable cause of Pam's injuries. Thus, Diner was the proximate cause of Pam's injuries.

### **Damages--General**

Pam will recover general damages for her pain and suffering related to her broken arm.

### **Damages--Special**

Pam may recover special damages such as medical expenses and any wages she may lose due to her broken arm.

### **Defense-Contributory Negligence**

Defined supra.

Here, Diner will assert that Pam should have seen the large pothole, and that her negligence for failing to notice the pothole contributed to her injury. The court is likely to find that she should have seen the large pothole and that she did contribute to her own injury. Thus, if the court finds Pam contributed to her own negligence she will be barred from recovery.

### **Defense--Comparative Negligence**

Damages are weighed according to blameworthiness.

Here, if the court finds that Pam contributed to her injury she will be allowed recovery minus the percentage that she was negligent in a jurisdiction that follows the pure system. In a partial system, she will only be allowed recovery if she is 50% or less at fault. It is likely that [the] court will reduce Pam's damages based on a percentage that she was negligent.

### **Defense--Assumption of the Risk**

Defined supra.

Here, the facts indicate that Pam did not see the pothole; therefore, she did not know, comprehend, or appreciate the danger. Pam did not assume the risk.

**3.) Exacerbation of her injuries due to Wayne's refusal to allow her to use Diner's phone to call "911"? Discuss.**

### **Vicarious Liability**

Diner is vicariously liable for its employees' negligent conduct during the course of scope of their employment.

If it is found that Wayne negligently (see *infra*) misread the restaurant's phone policies and denied Pam use of the phone, [and] based on this mistake and this denial caused injury to Pam, Diner will be liable under the doctrine of *Respondeat Superior*.

### **Negligence**

Defined *supra*.

### **General Duty**

One owes a duty to act with due care to prevent unreasonable risks of harm and to act as a reasonable person would under the same or similar circumstances. Under *Palsgraf*, Cardozo argued that a duty is owed to foreseeable plaintiffs, and Andrews argued that a duty was owed to all.

Here, Wayne owed a duty not to subject persons to unreasonable risks of harm, such as an exacerbation of an existing injury by calling 911 at the request of Pam. Pam is a foreseeable plaintiff as she was injured in Diner's parking lot. Wayne was Diner's employee. As an employee he owed the patrons of Diner's a duty.

### **Breach**

The burden of prevention, that of calling 911, was greatly outweighed by possibility of increased harm to Pam. Therefore, Wayne did not act as a reasonable person would

have under the circumstances. A reasonable person would have called for assistance. Wayne breached his duty.

### **Actual Cause**

There are no facts indicating the Pam was injured or that her injury was exacerbated by Wayne's failure to call 911. The facts indicate that a patron immediately dialed 911 for Pam and as a result she was able to get immediate medical attention. Thus, Wayne's failure to call 911 did not cause Pam's injury to get worse in a matter of minutes that it took for the patron to call 911. Therefore, Wayne is not a factual cause of any injury to Pam.

## Question 2

Data is a data processing company. Data's business depends on the operation of several large computers. Data decided to employ an outside company to provide computer maintenance and service. Data's president and other corporate officers met with the president of Reboot to discuss a computer service agreement. The next day Reboot faxed its standard form contract to Data. The contract reads as follows:

Client hereby agrees to purchase computer maintenance services from Reboot at a cost of \$2,000 per month. Reboot hereby agrees to provide up to ten hours of service per month, with additional hours payable at \$300 per hour. Reboot further agrees that it will provide same-day service in response to every service request. This agreement shall expire one year from the date on which it is made. In the event that Client fails to make a payment required under this agreement, 80 per cent of the entire remaining balance under the agreement shall become immediately due and payable.

Data signed and returned the contract and made the first \$2,000 payment. During the first month of the agreement, Data made two service requests. Both requests were received by Reboot at 9:00 a.m. In each case Reboot personnel arrived at Data's offices at noon and quickly fixed the problem. In both instances Data's president complained about the delay but was told it was an unusually busy day. After the second service call, Data sent a fax to Reboot stating that Data would make no further payments under the contract. (Data later hired a different service company.) Reboot then sent a letter to Data demanding \$17,600, representing 80 per cent of the remaining balance. When Data refused to pay, Reboot filed a lawsuit.

The president of Data claims that during the initial meeting with Reboot's president, she told him that it was absolutely crucial that Reboot respond to service requests within one hour. She says that Reboot's president told the group, "I understand. If you sign up with us, I promise we'll be there within an hour."

Under what theory or theories might Reboot bring a lawsuit against Data, what defense(s), if any, can Data assert, and which party is likely to prevail? Discuss.

## Answer A to Question 2

### REBOOT V. DATA

#### Common Law v. UCC

*The UCC will apply to all transactions for the sale of goods, which are tangible, movable, and identifiable items of personal property. The common law will apply to all other contracts.*

The contract between Reboot and Data was for the service of maintaining Data's equipment. It is not for the sale of goods, and therefore the common law will apply to this contract.

#### FORMATION

*A contract will be formed when both parties reach mutual assent, consisting of a valid offer being given a valid acceptance, supported by consideration.*

#### Offer

*An outward manifestation of present contractual intent communicated in clear and definite terms to the offeree, in such a manner as to create in the offeree a reasonable expectation that the offeror intends to enter into a contract.*

When Reboot faxed a standard form contract to Data, Reboot will argue that it made a valid offer. The fax manifested present contractual intent, since Data could have reasonably interpreted it as inviting acceptance, and that such acceptance would form a contract.

Further, Reboot's fax contained the following definite terms:

Quantity: 10 hours per month, plus additional hours as needed.

Time for Performance: Over the following year.

Identity of the Parties: Data and Reboot.

Price: \$2,000 per month, or \$300/hour for additional services.

Subject Matter: Maintenance of Data's computer systems.

All of the required terms being specified, the court will determine that Reboot's fax was sufficiently definite. It will therefore hold that Reboot made a valid offer to Data.

### **Acceptance**

*An outward manifestation of unequivocal assent to the terms of an offer.*

The facts state that Data signed the fax sent by Reboot, and sent it back. In addition, Data paid the initial \$2,000. Both actions manifested unequivocal assent to Reboot's terms, and therefore the court will hold that Data validly accepted Reboot's offer.

### **Consideration**

*A bargained-for exchange of legal value, in which both parties incur a legal detriment and gain a legal benefit.*

Reboot would suffer the legal detriment of providing at least 10 hours of service to Data each month, but would gain the legal benefit of \$2,000 per month.

Data would suffer the legal detriment of paying \$2,000 per month but would gain the legal benefit of receiving Reboot's services.

Since both parties understood what they were giving up as the price for what they received, there is a bargained-for exchange.

Thus, the court will find valid consideration to support this contract.

## **DEFENSES TO FORMATION**

### **Parol Evidence Rule**

*Statements, whether written or oral, which are made prior to or contemporaneously with the formation of a contract cannot vary or alter the terms of an integrated contract.*

Data will attempt to enter evidence of Reboot's prior oral agreement that they would arrive at Data's location within one hour of each request.

Reboot will contend that the contract was fully integrated, and therefore Data's evidence should not be admitted, because it would vary or contradict the term in the offer stating that Reboot would only supply "one-day service", without specifying the lapse of time.

The court's decision will therefore turn on whether Reboot's offer constituted an integration.

Under the traditional "face of the instrument" rule, Reboot's offer would be considered an integration if it reasonably appeared to be an integration within the "four corners" of the document. Thus, since the document gives no indication that any other terms existed, Reboot would probably succeed in showing an integration under this test.

Under the Williston "Reasonable Man" approach, parol evidence will be admitted if a reasonable person would not have included the term in the contract. Here, it appears likely that a reasonable person would have placed this term in the contract, so Reboot would prevail.

However, under the majority any relevant evidence rule, any evidence may be admitted to determine whether the contract was an integration. Since the contract does not specify that it was limited, the court would accept Data's evidence, and find that the contract was not integrated as to that term.

In addition, Data could probably successfully argue that the evidence would explain the ambiguous statement in the offer, explaining what "same-day service" actually meant.

Therefore, under majority rule Data's evidence will probably be admitted.

### **Unconscionability**

*Where a contract or a term within a contract is unconscionable, the court may refuse to enforce it.*

Data may argue that requiring a payment of 80% of the remaining balance for the year for breach is an unconscionable term. However, since this was only one term, not the entire purpose of the contract, it will not render the entire contract unenforceable.

However, if the court considers the 80% payment term to be unconscionable, it could be stricken from the contract and not enforced.

### **CONDITIONS**

*An act or event not certain to occur, which if excused or satisfied gives rise to or extinguishes a duty to tender performance.*

#### **Condition Precedent – Payment of \$2,000 per Month**

Reboot's duty to perform the contractual services was conditioned on Data's payment for each month. In regards to the first month, Data did pay, and therefore Reboot's duty to perform its obligations arose.

This condition upon Reboot's performance was therefore fully satisfied.

### **BREACH**

*An unjustified failure to perform a contractual obligation.*

Data will contend that Reboot is in breach of contract, because it responded three hours after each one of Data's requests for help. As discussed *supra*, evidence concerning the parties' prior agreement as to response time will probably be admissible.

As a result, Data will show that it had specifically told Reboot that a one-hour response time was “crucial”. Time was therefore of the essence in this contract. Reboot’s failure to arrive at Data’s center on time will therefore constitute a material breach of contract, because a time of the essence clause is always a material term.

Therefore, if the evidence is admitted, Data’s refusal to perform was justified, since Reboot was in major breach. In this case, Reboot would be entitled to no remedies.

### **Anticipatory Repudiation**

*An unequivocal refusal to perform contractual obligations.*

However, if the court does not accept Data’s evidence, Reboot can argue that Data anticipatorily repudiated the contract. Data sent a fax to Reboot stating the they would make no further payments under the contract.

This was an unequivocal refusal to perform. Therefore, if the court does not admit evidence concerning the time-is-of-the-essence clause, Data could be found in breach of the contract. This breach would be major, since payment was a material term of Reboot and Data’s agreement.

## **REMEDIES**

### **Liquidated Damages**

*A liquidated damages clause will be enforced if exact damages are difficult to calculate, and if the nature of the clause is not penal.*

If the court finds that Data breached the contract, Reboot will contend that it should recover \$17,600 as 80% of the remaining contract price, as provided in the contract.

The court will probably find that this was a liquidated damages clause, since it is designed to compensate Reboot for Data’s breach. In this case, it is unclear what damages Reboot would suffer as a result of the loss of the contract.

However, the court will probably find that Reboot's clause was simply penal, and was not based on any estimate of Reboot's actual damages. Calling for 80% of the contract price when only 1/12<sup>th</sup> of the contracted services were provided would constitute a penalty, not compensation.

Therefore, Reboot's liquidated damage clause would probably not be enforced.

### **General Expectation Damages**

If Data is found in breach of contract, Reboot could seek recovery for loss of expectancy. However, Reboot would be required to mitigate its damages by seeking another contract. If it does so, it could possibly recover damages for the difference in contract price between their new contract and their contract with Data.

However, as discussed *supra*, Data's parol evidence will probably be admissible. Therefore, Data's refusal to continue to perform would be justified, and they would not be liable for breach of contract.

Data is therefore most likely to prevail.

## **Answer B to Question 2**

### **Reboot v. Data**

#### **What law governs?**

Contracts where the subject matter is services are governed by common law.

Here, since the subject matter is “computer maintenance”, a service, the common law rules apply.

Does the contract need to be in writing?

Contracts which by their terms cannot be performed within one year must be evidenced by a writing to be enforceable under the statute of frauds.

Here, the contract between R and D is set to “expire within one year from the date on which it is made” and would therefore have to be evidenced by a writing.

Here, the standard form R faxed to D would be a valid writing to evidence the intent of the parties to contract since it contains subject matter: Computer maintenance repair by R and a price (\$2,000 per month) and D “signed” the agreement. Therefore there is a writing to evidence this contract which satisfies the Statute of Frauds.

Valid Contract?

In order for there to be a valid contract there must be a valid offer, acceptance, consideration and lack of formation defenses. Each is discussed below.

Preliminary Negotiations–

Here, the facts state that R met with D to discuss a computer service agreement.

This would be valid preliminary negotiations since no specific terms are mentioned.

## Offer

An offer is the manifestation of present contractual intent by the offeror to an identified offeree with certain and definite terms.

Here, R's fax manifests R's intent to be bound by the terms of the offer.

Here, R had communicated the offer by faxing it to D.

Here, there are specific terms including:

Price - \$2,000 per month

Subject Matter—Computer repair maintenance by R

Parties—R and P

Time of Performance—10 hours per month, same day service

Time of Payment—Monthly payment by D to R.

Therefore, R has made a valid offer to D.

## Acceptance

An acceptance is an unequivocal assent by the offeree to the terms of the offer; at common law the acceptance must be the mirror image of the offer to be valid acceptance.

Here, D has made a valid acceptance since she "signed and returned the contract". Under the mailbox rule, D's acceptance was effective upon dispatch.

## Consideration

A legally bargained-for exchange which induces current performance, a legal detriment to the promisee, and a binding obligation on both parties.

Here, there is adequate consideration since D receives a benefit of R's services for a detriment of 2000 USD per month while R receives the benefit of 2000 USD per month

and suffers a detriment of performing repair work. Also, each party sought after and bargained for the other's promise.

Therefore this contract is supported by valid consideration.

Defenses to formation

Here, there would be no defenses to formation; we have a valid contract. Next we will look at the terms of the contract.

Terms of the Contract

Parol Evidence Rule

The parol evidence rule prevents any prior or contemporaneous written or oral agreements from being admitted [to] the contract where it contradicts a fully integrated term found in the contract.

Here, D's admission that R "promise we'll be there in an hour" would appear to be barred since it contradicts an integrated term in the contract which states "it will provide same day service." D will only be able to display this information if the court determines that the term "same day service" is ambiguous and the contemporaneous oral statement would be permitted to help interpret the ambiguous term.

Conclusion: It is likely that the court will allow the evidence of prior oral agreement since the term "same day service" is ambiguous on its face.

Condition

A condition is an event not certain to occur which determines whether a duty arises or is extinguished. A condition can be express, implied, or constructive.

## Condition Precedent

A condition precedent is a future event not certain to occur which creates a duty of performance for one party.

Here, the condition precedent to D's obligation to pay would be R's timely service.

## Excused Condition—Anticipatory Repudiation

A party who unequivocally states to the other party that they will not tender performance owed is said to have anticipatorily repudiated the agreement which allows the nonrepudiating party to:

1. Treat the repudiation as a breach, suspend their own performance, and sue for damages.
2. Ignore the repudiation and encourage performance.
3. Wait for [when] the time of performance is due and then sue for damages.

Here, D's fax "stating that D would make no further payments under the contract" is an anticipatory repudiation which would allow for R to suspend performance without incurring liability for breach and sue for damages immediately, which R does by "filing a lawsuit" when D "refused to pay."

## Duty

R owes D a duty to perform timely same day service and R owes a duty to pay 2000 USD per month for R's maintenance work.

## Discharge of duty

## Frustration of Purpose

Duties under a contract are discharged where there is the occurrence of an event, unforeseeable at the time of formation, which frustrates the purpose of the contract and the purpose of the contract is known to both parties.

Here, D will argue that it required the computers that R serviced to be in working order because D is a data processing company and that R's inability to tender service within an hour of notice frustrates the purpose of their agreement. Conversely R will counter that the terms of the contract call for same day service and that R had complied with this requirement because [in] each case R personnel arrived at D's offices at noon and quickly fixed the problem.

Therefore, unless D is successful in showing that the intent of the parties was service in one hour as discussed above, D would not be able to discharge her duties due to frustration of purpose.

### Breach

A party to a contract's unexcused failure to tender or perform an absolute duty owed to the other party.

Here, D is in breach of its contractual duty to [perform] by failing to pay R its monthly payment of 2000 USD because they have a valid contract which requires such payments on the part of D, and R has tendered performance.

### Conclusion -

D has breached its contract by failing to pay R, and R can now seek damages.

### Liquidated Damage Clause for R?

Liquidated Damages clauses are enforceable if the damages are difficult to predict at the time of formation and are not unreasonably disproportionate and are not a penalty.

Here, it is unlikely the court will enforce the LDC because damages could be reasonably determined since R's hourly rate is \$200 per hour for the first ten hours and \$300 after the first ten hours. Additionally, the term "80 percent of the entire remaining balance under the agreement shall become immediately [payable]" appears to penalize D for the breach and would produce a windfall for R. This is especially so since R only rendered services for one month.

Therefore, it appears as though the court would not likely enforce this clause due to its penalizing D instead of an accurate measure of the harm suffered by R as a result of the breach.

#### Compensatory Damages

A nonbreaching party is entitled to damages that give the party the benefit of the bargain (expectation damages).

Here, R would be entitled to seek the benefit of the bargain, or, if that is found to be speculative, at minimum be reimbursed for the incidental costs incurred as the potential cost of any marketing required to attract another customer.

### Question 3

Alan, age 18, decided that as a graduation prank he would set fire to the athletics equipment shed at the high school. Late on a Saturday night, Alan, who had consumed a few beers, told his friend, Brian, about his plan and asked Brian to drive him to the school. "That's an idiotic idea," Brian told Alan. "What if somebody's in there? Somebody might get hurt." Alan replied that he didn't think it was likely anyone would be there late at night. Brian said, "It's not my business why you want a ride. I'll give you a lift, and what you do while you're there is your problem."

Brian drove Alan to the school and parked a hundred feet from the athletics shed. The shed was made of wood. Alan had brought a single pack of paper matches, but was unable to set the shed aflame. Brian, watching from a distance, beckoned to Alan and offered him his cigarette lighter, saying, "Get this over with so we can get out of here." Alan returned to the shed with the lighter and was able to get the shed to smolder, but not catch fire. After several tries, he gave up. Alan and Brian left the school. Because of his intoxication, Alan did not hear Carl, a local homeless man, snoring inside the shed.

Unbeknownst to Alan or Brian, the shed was still smoldering. Two hours later, high winds caused the remaining sparks to burst into flame; the resulting fire destroyed the athletics shed. Carl was still asleep in the shed and was killed by the fire.

What crimes, if any, have Alan and Brian committed? What defenses can each assert, and will they be successful? Discuss.

### **Answer A to Question 3**

#### **What crimes has Alan committed?**

##### Solicitation

Solicitation occurs when one induces another to commit a crime.

Here, Alan asked Brian to drive him to the school so that he could set fire to the athletics equipment shed at the school. At this point Alan was not asking Brian to commit a crime but merely to drive him to the location so that he himself could commit the crime. Brian would be assisting Alan to make a crime occur, though, so this would be considered a solicitation.

There was a solicitation.

##### Conspiracy

A conspiracy is an agreement between two or more persons to commit an illegal act.

Although Brian did not expressly agree to assist in committing the act his actions suggested that he impliedly agreed. This occurred when Brian gave Alan a lighter to assist in getting the shed to burn faster.

There has been a conspiracy.

##### Attempted Arson

An attempt is a substantial step towards perpetration of a crime.

Here, Alan had the specific intent to set fire to the athletics equipment shed at the high school. He had the apparent ability to do the act because Brian had driven him and parked [a] hundred feet away from the athletics shed. Lastly Alan was past the zone of preparation because he brought with him a single pack of paper matches. Alan was now in the zone of perpetration because he started to try to set the shed aflame. Alan

continued to try and was ultimately able to get the shed to smolder but was unable to get the shed to catch fire.

### Arson

In the common law, arson is the malicious burning of the dwelling house of another.

Modernly, arson is the malicious burning of any structure.

After Alan left the school, high winds caused the remaining sparks on the shed to burst into flame, causing the shed to burst in flames. The fire was the result of Alan lighting flames to the shed. But for Alan attempting to light the shed on fire, there would not have been any sparks that could have later turned into flames. Therefore, Alan has committed the crime arson.

### Homicide

Homicide is the killing of another human being.

Here, Carl, a homeless man, was killed as he was asleep in the shed.

There has been a homicide.

### Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought will be found when there is an intent to kill, an intent to cause serious bodily harm, reckless or wanton conduct, or through the felony murder rule.

There are no facts that suggest that Alan intended to kill Carl. In addition, there are no facts that suggest that Alan had an intent to cause serious bodily harm. There are facts to support reckless or wanton conduct because it was foreseeable that someone could have been in the shed and Alan did not do anything to ensure that the shed was empty. Finally, it is possible that the felony murder rule would apply because Alan was in the process of committing an inherently dangerous felony.

### Actual Cause

But for Alan lighting the shed with matches, and later a cigarette lighter, the shed would not have burned down and killed Carl.

Alan is the actual cause of Carl's murder.

### Proximate Cause

Proximate cause is a natural and foreseeable consequence of one's act where there are no unforeseeable intervening factors.

It is foreseeable that when one lights a shed that a fire will be started. Alan will try to argue that his act of lighting the shed was not the proximate cause of Carl's death because when he left the shed was still in place. Carl will try to argue that the high winds were a superseding event that caused the death of Carl. However, this argument will not work because it was so foreseeable that this could happen that his friend Brian asked him prior to even going to the shed about what would happen if someone was in the shed, to which Alan answered that it was unlikely.

Alan is therefore the proximate cause of Carl's murder.

### First Degree Murder

First degree murder is murder that is premeditated or deliberated. It can also be found with the felony murder rule.

There are no facts to show that Alan thought about killing Carl prior to going to the shed. There are also no facts to show that he planned it out. However, felony murder will be found when one is in the commission of an inherently dangerous felony. Alan was attempting to commit arson, which is an inherently dangerous felony; therefore outside any valid defenses Alan could be charged with first degree murder.

## Second Degree Murder

All murder that is not first degree murder will be considered second degree murder. As discussed above there are enough facts to show this as a first degree murder, so absent any defenses Alan will be charged with first degree murder.

## Defenses

### Infancy

The facts state that Alan was 18 years old. At the age of 18 one is considered an adult and will be treated in the justice system as such. This defense will fail.

### Voluntary Intoxication

Here the facts state that Alan had consumed a few beers prior to attempting to set the shed on fire. Further the facts also state that because of his intoxication that [Alan] was unable to hear Carl snoring in the shed. A defense of voluntary intoxication will serve to negate any mens rea associated with the specific intent to commit a crime and will allow the mitigation of the murder to voluntary or involuntary manslaughter.

### Voluntary Manslaughter

Voluntary manslaughter is an intentional killing with malice that has been mitigated. First degree murder will be mitigated to voluntary manslaughter if adequate provocation can be shown, a timeframe where a reasonable person would not have been able to cool off, and that the person did not cool off.

As discussed supra, there are no facts to indicate that this was an intentional killing.

### Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing with criminal negligence. Alan did not have the intent to kill Carl. His intention was to play a graduation prank. He was criminally negligent because he did not take reasonable care in ensuring that there wasn't anyone in the shed before lighting it. Therefore Carl will be charged with involuntary manslaughter.

### Withdrawal

Alan will attempt to argue that they withdrew from the crime because they gave up. This defense will not work as their actions were responsible for the final act of arson and Carl being killed.

### **What crimes has Brian committed?**

#### Accessory

An accessory is one who incites, aids, abets or encourages another to commit a crime.

Here Brian aided in the crime by agreeing to drive Alan to commit the crime of arson.

Brian is an accessory.

#### Accomplice liability

An accomplice will be liable for all foreseeable crimes that occur as a result of their assistance.

To be discussed infra.

#### Conspiracy

A conspiracy is an agreement between two or more persons to commit an illegal act.

Although Brian did not expressly agree to assist in committing the act his actions suggested that he impliedly agreed. This occurred when he gave Alan a lighter to assist in getting the shed to burn faster.

There has been a conspiracy.

#### Pinkerton's rule

All members of a conspiracy will be held liable for all crimes in furtherance of their goals.

Alan will be held responsible for all crimes that Brian is held responsible for.

### Attempted Arson

Supra

### Arson

Supra

### Voluntary Manslaughter

Supra

### Misprision of a felony

A misprision of a felony occurs when one fails to report a known felon or felony.

Here, Brian failed to report that Alan was committing arson.

Brian can be charged with misprision of a felony.

### Defenses

#### Withdrawal

Brian will attempt to argue that they withdrew from the crime because they gave up. This defense will not work as their actions were responsible for the final act of arson and Carl being killed.

### **Answer B to Question 3**

State v Alan (A):

#### Conspiracy:

A conspiracy is an agreement between two or more people to perform an illegal act or to perform a legal act in an illegal manner with the specific intent that the act be carried out. Under the common law, only the agreement was necessary; however, modernly an overt act in furtherance of the agreement is necessary for there to be a conspiracy.

Here, Alan told Brian about his plan and asked him to drive him to the school so he could set it on fire. When Brian agreed to take Alan to the school, they agreed to perform an illegal act. When the two drove toward the school with matches and a lighter in tow, they were performing an overt act in furtherance of the agreement. Here, the conspiracy will be sufficient for common law and modern purposes. Alan will be charged with conspiracy.

#### Solicitation:

Solicitation is inciting or encouraging another to commit a crime with the specific intent that the crime be carried out. Here, Alan asked Brian to take him to the shed so that he could burn it down. By asking Brian to take him to the school so he could perform the burning, Alan was encouraging Brian to become involved in the crime he was about to commit and asking him to become an accomplice to the crime. He intended for Brian to take him to the shed and therefore intended that Brian be an accomplice. Since complicity is a criminal act, and Brian did in fact take Alan to the school, Alan will be held liable for solicitation.

#### Arson:

Under the common law, Arson is the malicious burning of the dwelling of another. Modernly, the law has been changed to include other buildings, including the defendant's own dwelling if being done so for insurance fraud. In order for there to be an arson, the building must have gone past mere scorching and must have been

severely charred and damaged. Under the common law, Alan will not be held liable for arson since the building he burned down was not a dwelling, but just the school athletic shed. However, under modern law, Alan will be held liable for arson. He had the specific intent to burn down the athletic shed, which was shown when he expressed his desire to do so to Brian. Having the intent to burn down the shed, Alan will have acted maliciously. Since the shed was burned and destroyed, the burning met the requirement of charring and thus Alan will be held liable for arson. Alan might argue that he only let the shed smolder and didn't actually burn it down; however, since he set the chain of events in motion, he will be held liable for the ultimate destruction of the shed.

#### Homicide:

Homicide is the killing of one person by another. The facts show that Carl, a homeless man, was inside the shed when Alan burned it down, and that he died due to the burning of the shed.

#### Murder:

Murder is the killing of another human being with malice aforethought. Malice can be found in four ways: 1) Specific Intent to kill, 2) Reckless disregard for [or] high risk of harm to human life (depraved heart murder), 3) Intent to cause grievous bodily injury, 4) Killing during the commission of a felony.

1) Intent to kill: Here, Alan did not know that Carl was inside the shed. Since he was unaware of Carl's presence, he did not have the specific intent to kill Carl.

2) Reckless Disregard of high risk of harm/injury to human life: Alan burned down a shed and was unaware of Carl's presence inside the shed. Although he was unaware, the burning of a building is an act that is still reckless and has a high disregard for risk to human life. The fire could have spread and even injured other people. Alan could be found to have the requisite malice due to his reckless disregard of risk to human life.

3) Intent to cause grievous bodily injury: Here, Alan did not intend to cause injury to anyone. He was unaware that Carl was inside the shed and he was burning the shed down as a prank, not to harm anyone. He will not be held to have had the intent to cause grievous bodily injury.

4) Felony Murder: Felony murder occurs when a killing happens during the commission of a felony. The felony must be inherently dangerous. The felonies that are generally deemed inherently dangerous are: Burglary, Robbery, Rape, Kidnapping, and Arson. Since Carl's death occurred due to the fact that Alan lit the shed on fire, and since Alan is liable for arson, he will be held liable for felony murder.

Causation: In order to be guilty of murder, it must be proved that Alan's crimes were both the actual and proximate cause of Carl's death.

Actual: But for Alan lighting the shed on fire, Carl would not have been burned to death inside the shed.

Proximate Cause: It is foreseeable that when a building is lit on fire, that severe injury or death can occur to people around or within the building. Here, Carl was inside the shed. Although Alan was unaware of this, his burning of the shed was the proximate cause of Carl's death and Carl's death was a foreseeable result of Alan's conduct.

#### Degrees of Murder:

Some states have degrees of murder, and the defendant would be held liable for either 1<sup>st</sup> or 2<sup>nd</sup> degree murder.

1<sup>st</sup> degree: 1<sup>st</sup> degree murder occurs when the defendant has deliberated and premeditated the killing with the specific intent to kill. Here, Alan did not deliberate or premeditate killing Carl; he was unaware Carl would be in the shed. Since he lacks the specific intent to kill Carl, he will not be held liable for 1<sup>st</sup> degree murder.

2<sup>nd</sup> degree: 2<sup>nd</sup> degree murder encompasses the reckless disregard for human life, intent to cause grievous bodily injury, and felony murder killings. Since Alan was recklessly disregarding a high risk of harm to human life and the killing occurred during the crime of an inherently dangerous felony, in a jurisdiction which applies murder in degrees, Alan would be held liable for 2<sup>nd</sup> degree murder.

#### Involuntary Manslaughter:

If, however, the requisite malice cannot be found, then Alan could be found liable for involuntary manslaughter. Involuntary manslaughter occurs when the defendant performs a negligent murder or he performs an unlawful act murder. Alan could be found guilty of involuntary manslaughter since he was negligent in burning down the shed without checking if there was someone inside. However, the odds are that a jury would find that Alan did have requisite malice and thus he would likely not be able to bring his charges down to involuntary manslaughter.

Alan will most likely be held guilty for felony murder or murder in the 2<sup>nd</sup> degree.

#### Defenses:

Voluntary Intoxication: When a defendant is voluntarily intoxicated, if he can negate the mens rea of a specific intent crime, then he may be able to escape liability for that crime. Here, Alan would probably argue he did not have the requisite intent required for murder. He would argue that he was intoxicated and did not have the intent to kill and thus he should only be held liable for manslaughter. However, since the killing occurred during the commission of a felony, this defense will likely fail and Alan will still be liable for murder. Under a jurisdiction which charges for murder in degrees, if Alan could prove that he did not have the specific intent to kill, he would be able to bring his charge down to 2<sup>nd</sup> degree murder. However, since Alan would not be charged for 1<sup>st</sup> degree murder anyway, this defense is irrelevant.

#### State v Brian (B):

Conspiracy: (defined supra). Here, Brian agreed to take Alan to the school so that he could burn down the athletic shed; thus he has agreed to commit a crime (being an

accomplice or accessory before the fact) and has committed an overt act in furtherance of that agreement (driving them to the school). Brian will be held liable for conspiracy.

Accomplice Liability: Any person who aids, abets, or assists a principal in committing a crime with the specific intent that the crime be carried out will be held liable for accomplice liability. Here, Brian would be a Principal in the second degree. He aided Alan by driving him to the school and assisted him in committing the crime of arson by giving him a lighter to set the shed on fire when Alan's own matches would not work. A principal in the second degree is one who is constructively present at the scene of the crime but does not actually commit the crime himself. Brian might argue he did not have the specific mens rea necessary for being an accomplice; however, when he drove Alan and gave Alan the lighter to burn the shed on fire, he was aiding and assisting in the completion of the crime, and thus will be held liable for accomplice liability.

Pinkerton Rule: The Pinkerton rule makes an accomplice or coconspirator liable for any of the crimes that occur in furtherance of the agreement or crime. Here, B would be held liable for all the crimes that occurred in furtherance of Alan's conspiracy to burn down the shed and any foreseeable crimes that occur while in commission of the crime.

Arson: (defined supra) Brian will be held liable for the crime of arson, since it was in furtherance of the agreement and he contributed to the crime by giving his lighter to Alan to burn down the shed and it did in fact burn down.

Homicide (defined Supra)

Murder (defined supra)

Malice (defined supra)

Since the murder occurred due to the lighting of the shed on fire, and Brian helped light the shed on fire, Brian will be held liable for the murder of Carl during the commission of a felony—Arson.

Causation:

Actual: But for Brian giving his lighter to Alan to burn down the shed, Carl would not have died as a result.

Proximate Cause: It is foreseeable that if you give someone a lighter to burn down a building, that someone within the area or inside the building would be seriously injured or death would occur.

Degrees of Murder:

Since the murder occurred during the lighting of the shed on fire, Brian will be held liable for 2<sup>nd</sup> degree murder.

Brian will be charged with felony murder or 2<sup>nd</sup> degree murder.

Defenses:

Duress: Brian might try to raise the defense of duress claiming that he was threatened by force or harm to assist Alan with his crimes. However, the facts do not state that this occurred and so this defense will not work.

## Question 4

Delicious, Inc. manufactures jelly-filled doughnuts which are sold in grocery stores. Delicious doughnuts are packaged in a paper wrapper, which is recyclable, but which costs more than plastic wrappers. On the front of the wrapper is printed, "Delicious Doughnuts," and on the back is printed nutritional information.

Adrian, Cara, and Ed each purchased Delicious doughnuts at a local grocery store. The doughnut that Adrian purchased had a thumbtack inside. Not knowing this, Adrian threw the doughnut at his roommate, Bob, during a food fight at breakfast. Bob suffered a serious injury to his eye when the thumbtack scratched it.

Cara heated her doughnut in a microwave oven on a high temperature setting for several minutes. When she removed the doughnut from the microwave, it was warm to the touch. When she bit into it, however, the inside of her mouth was badly burned by the jelly filling which, because it was liquid, had been heated to a much higher temperature than the pastry on the outside.

Ed packed his doughnut in a suitcase to take on a business trip to make an important sales presentation for his company. When he opened the suitcase at his destination he found that the doughnut had leaked jelly through the paper wrapper and stained all of the clothes in the suitcase. Ed didn't have time to buy new clothes and so wore the stained clothes to the sales presentation. He didn't make the sale.

Under what theory or theories can Adrian, Bob, Cara, and Ed bring claims against Delicious, what defenses, if any, might Delicious assert, and what damages, if any, are likely to be awarded in a lawsuit brought by:

- (1) Adrian against Delicious? Discuss.
- (2) Bob against Delicious? Discuss.
- (3) Cara against Delicious? Discuss.
- (4) Ed against Delicious? Discuss.

## Answer A to Question 4

### I. Adrian v. Delicious for Product Liability.

There are three theories available that actions can be brought for a defective product: Negligence, Strict Product Liability, and Implied Warranty.

A. Negligence. To recover for her injuries, Adrian will have to prove that Delicious was negligent. Proving negligence requires that she establish she was owed a duty of care by Delicious, and that Delicious breached that duty, and their breach was the actual and proximate cause of her injuries. Delicious may offer passive defenses against the individual elements, or may assert direct defenses using contributory negligence, comparative fault, and/or assumption of the risk, depending on the jurisdiction. However, Adrian did not suffer any injuries from the doughnut she purchased and, therefore, cannot recover under a negligence theory.

B. Strict Product Liability. If a defective product causes injury, liability will be assessed without fault to any manufacturer, distributor, or reseller of that product. To recover, one must establish that they are a proper plaintiff, [there is] a proper defendant, a defective product, causation, and damages. Once again, Adrian has suffered no injury and therefore cannot recover under a negligence theory.

C. Implied Warranties. Under the UCC, an implied warrant of merchantability goes with the purchase of goods (including food), that states that the product is fit for its intended use. Privity used to be a requirement and, if it still were, Adrian would have an issue suing Delicious because she was in privity with the grocery store and not the manufacturer. Modernly the privity requirement has become very lax, allowing for her to sue the manufacturer directly. As she had a thumbtack in her doughnut, it was not fit for its intended use. Therefore, Adrian may be able to recover under this theory, although the recovery may be nominal.

## II. Bob v. Delicious for Product Liability.

There are three theories available that actions can be brought for a defective product: Negligence, Strict Product Liability, and Implied Warranty.

### A. Negligence. (defined supra).

1. Did Delicious owe a duty to Bob? When one acts affirmatively they owe a duty to act as a reasonably prudent person under the circumstances to avoid foreseeable risks of harm to foreseeable plaintiffs. In the landmark case of Palsgraf, Judge Cardozo for the majority opinion wrote that one is a foreseeable plaintiff if they are in the “zone of danger” when they are injured. In that same case, Judge Andrews wrote the dissenting opinion where if you owed a duty to one person then you owed to everyone. Bob was injured by one of Delicious’ doughnuts bought by Adrian. He may not have been in the zone of danger, but under Andrews, he would therefore qualify as a foreseeable plaintiff. Duty can be established in a number of ways. Here, as a manufacturer of doughnuts, Delicious had a duty to act as a reasonable doughnut manufacturer under the circumstances. Therefore, bob was owed a duty of care by Delicious.

2. Did Delicious breach the applicable standard of care? When one acts below the applicable standard of care and creates a foreseeable risk of harm to others, they are in breach. Here, a thumbtack was inside Adrian’s doughnut [when,] unbeknownst to her, [she] threw it at Bob and caused his injury. Under Res Ipsa Loquitur an inference of negligence can be established if: 1) The type of injury is one that would not occur without someone’s negligence; 2) The instrumentality was under defendant’s control; 3) Plaintiff did not contribute to his own injury. Here, while Adrian did throw the doughnut at Bob and caused his injury, he might as well just have bitten into it and perhaps caused worse injury. The facts do not suggest the doughnuts were tampered with during distribution, so we can assume that they were defective when they left Delicious. Finally, the facts do not suggest that Bob did anything to contribute to his injuries. Therefore Delicious has breached a duty of reasonable care to Bob, and created an inference of breach using Res Ipsa Loquitur.

3. Was the breach the Actual (legal) and Proximate cause of Bob's injury?

a. One's acts are the actual cause of plaintiffs injuries if, "but-for" their acts, plaintiff would not have been injured. This test is met because, but-for the negligence of Delicious, Bob would not have been injured.

b. One's acts are the proximate cause of plaintiffs injuries if the manner and type of injury is foreseeable, with no intervening superceding forces acting to break the chain of proximate causation. Here, Bob's manner and type of injury is the foreseeable result of being hit with a doughnut that has a thumbtack in it. Delicious will likely argue that Adrian throwing the doughnut is a superceding cause of Bob's injury. However, if the doughnut was not defective it wouldn't have caused the type of injury that it did here. Therefore, Delicious' negligent acts are the proximate cause of Bob's injury to his person and property.

4. Damages are required in order to recover for negligence.

This threshold is met because Bob has incurred injury to his person.

5. Defenses.

a. In a contributory negligence jurisdiction (minority), any percent a plaintiff is at fault in contributing to their injuries acts as a complete bar to their recovery. The facts do not suggest that Bob has done anything to contribute to his injuries and therefore this would not be an issue.

b. Most jurisdictions have converted to a form [of] comparative fault. With pure comparative fault, a plaintiffs recovery is reduced by whatever percentage she was at fault in causing his [sic] injuries. With modified comparative fault, the same holds true unless his percentage exceeds a threshold of either >50% or >=50% depending on the jurisdiction. As explained above, this will not be an issue either.

c. Assumption of the risk is also a complete bar to a plaintiffs recovery. One assumes a risk of danger when they are aware of and understand a risk, and voluntarily decide to expose themselves to it. There was no risk for Bob to be aware of, and this does not apply.

Therefore, Bob will be able to recover for his damages under a negligence theory.

B. Strict Product Liability. Defined (supra).

1. Proper Plaintiff? Bob did not actually purchase the doughnut but is a friend of Adrian, who did. The proper plaintiff extends beyond the actual purchaser of the product and includes family and friends or anyone who might come into contact with the product. Therefore, Bob is a proper plaintiff.

2. Proper Defendant. Delicious is the manufacturer of the doughnuts and is therefore a proper defendant.

3. Defective Product. A product is defective if it has a manufacturing or design defect, or a warning defect. Here, there appears to be a manufacturing defect because it does not appear that every single doughnut has a thumbtack in it. In case you're not convinced it is defective, there is a consumer expectations test that is used to determine if, when the product is used as it is intended, does it do so in a way that a reasonable consumer would expect? Very likely not. Therefore, we have a defective doughnut with a manufacturing defect.

4. Causation and damages are incorporated by reference from the negligence discussion above.

5. Defenses. Under strict product liability, assumption of the risk and misuse of product are the only two available.

a. Assumption of the risk is incorporated by reference from the Negligence discussion above.

b. Misuse of product. Delicious will likely argue that since the doughnut was thrown instead of eaten, that it was misused. This will be unpersuasive since if it was eaten the damages would have been potentially worse.

C. Implied Warranties. Defined and discussed (supra). Since Bob did not purchase the doughnut he would likely not be able to sue under this theory.

### III. Cara v. Delicious for Product Liability.

There are three theories available that actions can be brought for a defective product: Negligence, Strict Product Liability, and Implied Warranty.

#### A. Negligence. (defined supra).

1. Did Delicious owe a duty to Cara? Defined/Discussed (supra). Therefore, Cara was owed a duty of care by Delicious.

2. Did Delicious breach the applicable standard of care? Defined/discussed (supra). Here, there was nothing on the wrapping of the doughnut to warn Cara what could happen by microwaving it, thereby causing a foreseeable risk of harm to her. Therefore Delicious has breached a duty of reasonable care to Cara.

#### 3. Was the breach the Actual (legal) and Proximate cause of Cara's injury?

a. One's acts are the actual cause of plaintiffs injuries if, "but-for" their acts, plaintiff would not have been injured. This test is met because, but-for the negligence of Delicious, Cara would not have been injured.

b. One's acts are the proximate cause of plaintiffs injuries if the manner and type of injury is foreseeable, with no intervening superseding forces acting to break the chain of proximate causation. Here, Cara's manner and type of injury is the foreseeable result of not being warned about hot filling. Therefore, Delicious' negligent acts are the proximate cause of Cara's injury.

4. Damages are required in order to recover for negligence. This threshold is met because Cara has incurred injury to her person.

#### 5. Defenses.

a. In a contributory negligence jurisdiction (minority), any percent a plaintiff is at fault in contributing to their injuries acts [as] a complete bar to their recovery. The facts do not suggest that Cara has done anything to contribute to [her] injuries and therefore this would not be an issue.

b. Most jurisdictions have converted to a form [of] comparative fault. With pure comparative fault, a plaintiffs recovery is reduced by whatever percentage she was at fault in causing his [sic] injuries. With modified comparative fault, the same holds true unless his percentage exceeds a threshold of either >50% or >=50% depending on the jurisdiction. As explained above, this will not be an issue either.

c. Assumption of the risk is also a complete bar to a plaintiff's recovery. One assumes a risk of danger when they are aware of and understand a risk, and voluntarily decide to expose themselves to it. There was no risk for Cara to be aware of, and this does not apply.

Therefore, Cara will be able to recover for her damages under a negligence theory.

B. Strict Product Liability. Defined (supra).

1. Proper Plaintiff? Cara purchased the doughnut and is therefore a proper plaintiff.

2. Proper Defendant. Supra

3. Defective Product. A product is defective if it has a manufacturing or design defect, or a warning defect. Here, there appears to be a lack of warning regarding hot filling resulting from microwaving the doughnut. The burden of putting such a warning on the wrapper would be miniscule compared to the resulting injury. Therefore, we have a defective doughnut with a missing warning.

4. Causation and damages are incorporated by reference from the negligence discussion above.

5. Defenses. Under strict product liability, assumption of the risk and misuse of product are the only two available.

a. Assumption of the risk is incorporated by reference from the Negligence discussion above.

b. Misuse of product. Not applicable.

C. Implied Warranties. Defined and discussed (supra). The doughnut was actually fit for its intended use so not applicable here.

IV. Ed v. Delicious for Product Liability.

There are three theories available that actions can be brought for a defective product: Negligence, Strict Product Liability, and Implied Warranty.

A. Negligence. (defined supra).

1. Did Delicious owe a duty to Ed? Defined/Discussed (supra). Therefore, Ed was owed a duty of care by Delicious.

2. Did Delicious breach the applicable standard of care? Defined/discussed (supra). Here, the paper wrapping seems to be inadequate and caused damage to Ed's property. Therefore Delicious has breached a duty of reasonable care to Ed.

3. Was the breach the Actual (legal) and Proximate cause of [Ed's] injury?

a. One's acts are the actual cause of plaintiffs injuries if, "but-for" their acts, plaintiff would not have been injured. This test is met because, but-for the negligence of Delicious, Ed's property would not have been injured.

b. One's acts are the proximate cause of plaintiffs injuries if the manner and type of injury is foreseeable, with no intervening superseding forces acting to break the chain of proximate causation. Here, Ed's manner and type of injury is the foreseeable result of not having adequate wrapping. Therefore, Delicious' negligent acts are the proximate cause of Ed's injury.

4. Damages are required in order to recover for negligence.

This threshold is met because Ed has incurred damage to his property.

5. Defenses.

a. In a contributory negligence jurisdiction (minority), any percent a plaintiff is at fault in contributing to their injuries acts [as] a complete bar to their recovery. The facts do not suggest that Ed has done anything to contribute to his injuries and therefore this would not be an issue.

b. Most jurisdictions have converted to a form [of] comparative fault. With pure comparative fault, a plaintiffs recovery is reduced by whatever percentage he was at fault in causing his injuries. With modified comparative fault, the same holds true unless his percentage exceeds a threshold of either >50% or >=50% depending on the jurisdiction. As explained above, this will not be an issue either.

c. Assumption of the risk is also a complete bar to a plaintiffs recovery. One assumes a risk of danger when they are aware of and understand a risk, and voluntarily decide to expose themselves to it. There was no risk for Ed to be aware of, and this does not apply.

Therefore, Ed will be able to recover for his damages under a negligence theory.

B. Strict Product Liability. Defined (supra).

1. Proper Plaintiff? Ed purchased the doughnut and is therefore a proper plaintiff.

2. Proper Defendant. Supra.

3. Defective Product. A product is defective if it has a manufacturing or design defect, or a warning defect. Here, there appears to be a design defect in the wrapping used to seal in the filling. The burden of putting such a wrapping on the doughnuts would be costly compared to the resulting injury. It is unlikely that the product is defective under these conditions.

## **Answer B to Question 4**

### **PRODUCT LIABILITY**

A manufacturer who places a product that is defective either in manufacture, design, or warning into the stream of commerce may be liable for damages that result from the use of that product under three separate theories of product liability—intentional, negligence, and strict liability in tort.

### **ADRIAN v. DELICIOUS (D)**

#### **NEGLIGENCE**

As a manufacturer, D owes a duty of due care to all persons who may foreseeably be injured by use of their defective product. Modernly, due care has been extended to all users (McPherson v. Buick). Here the facts indicate that Adrian purchased one of D's doughnuts from a local grocery store. Therefore, D owes a duty to Adrian.

#### **BREACH**

Adrian will argue that the doughnut that she had purchased had a thumbtack inside it and that she was unaware of its presence. Adrian will argue that D failed to inspect, identify, and correct this defect which resulted in D marketing a doughnut that did not meet the ordinary commercial expectation of the average reasonable consumer. Therefore, D breached its duty of due care to Adrian.

#### **ACTUAL CAUSE**

Adrian did not suffer any type of damage as a result of D's negligence because the facts do not indicate that Adrian bit into her doughnut.

Therefore, D is not liable to Adrian for negligence because Adrian did not suffer any damages.

## **BOB v. DELICIOUS (D)**

### **NEGLIGENCE**

Defined and discussed supra

Bob will argue that even though Bob did not purchase the doughnut (privity not required, supra), he is owed a duty of due care by D not to expose him to foreseeable and unreasonable risks of harm with the doughnut.

Therefore, it is likely that D owes a duty of due care to Bob.

### **BREACH – DEFECTIVE MANUFACTURE**

Bob was injured when a doughnut manufactured by D was thrown at him and the thumbtack that was in it caused a serious injury to his eye. Bob will argue that D breached its duty of due care and that the doughnut was defective in its manufacture because it had a thumbtack in it. Ordinarily, a reasonable consumer would not expect to find a thumbtack in a doughnut and that D acted unreasonably by allowing a thumbtack to be placed in a doughnut.

D will argue that it took all reasonable care in its manufacturing process to insure that no foreign objects would be found in its doughnuts and that there is not evidence as to how the thumbtack got into the doughnut. Therefore, D will assert that it did not act unreasonably and therefore did not breach its duty.

### **RES IPSA LOQUITUR**

Bob will argue that even though there is no direct evidence that the thumbtack was placed in the doughnut by D, he will argue that this type of incident would not occur in the absence of someone's negligence, and since the source of the negligence was within the scope of duty owed by D, and there are not facts to indicate that Bob contributed to his own injury, Bob will argue the doctrine of res ipsa loquitur to establish D's breach of duty.

Therefore, under *res ipsa loquitur*, D breached its duty owed to Bob.

### **ACTUAL CAUSE**

But for the thumbtack being in the doughnut, Bob would not have suffered a severe eye injury. Therefore, D is the actual cause of Bob's injury.

### **PROXIMATE CAUSE**

D will be deemed the proximate cause of Bob's injury if Bob's injury was a foreseeable result of D's negligence and Bob's injury was not brought about by an extraordinary unforeseeable sequence of events.

D will argue that there was an intervening act between their negligence of a thumbtack in the doughnut and Bob's injury. D will argue that it is unforeseeable that Adrian and Bob would engage in a food fight and that Adrian would throw a doughnut at Bob. D will further argue that an injury caused by a thumbtack in a doughnut would be related to a[n] injury inside someone's mouth as a result of biting into the doughnut. D will contend that it is unforeseeable that someone would suffer an eye injury from a thumbtack in a doughnut and therefore D should not be held as the proximate cause of Bob's eye injury.

If the court finds that D is the proximate cause of Bob's injury then D will be liable to Bob under a product liability theory of negligence.

### **DAMAGES – GENERAL**

Bob may seek damages for past, present and future pain and suffering.

### **DAMAGES – SPECIAL**

Bob may seek damages for the cost of his medical care and lost wages as a result of the injury.

### **DEFENSES**

## **CONTRIBUTORY NEGLIGENCE**

Contributory negligence is conduct on the part of the plaintiff which contributes to his injury and which is below the standard of care of a reasonable person to protect himself from injury and is a complete bar to recovery.

D will argue that Bob contributed to his injury because he engaged in a food fight by throwing food objects which could result in injury. If the court holds that Bob contributed to his injury he will be barred from recovery.

## **COMPARATIVE NEGLIGENCE**

Some jurisdictions, including California, determine negligence based solely on blameworthiness and will apportion damages accordingly. If Bob is determined to have contributed to his injury and that contribution is equal to or greater than D's contribution, Bob will be barred from recovery. Under a pure jurisdiction, Bob may still be able to recover regardless of his contribution.

## **ASSUMPTION OF RISK**

D will assert that Bob had knowledge of and an appreciation for danger of being involved in a food fight and voluntarily chose to encounter that danger and should be barred from recovery. Bob will counter that a food fight is merely fun and is not dangerous because none of the foods thrown would normally cause injury.

## **STRICT LIABILITY IN TORT**

Courts have held that manufacturers can be liable under operation of law. Thus if a manufacturer places a defective product into the stream of commerce, despite all care taken, they may be liable to all foreseeable users for damage. (Greenman v. Yuba Power Co.)

Here, Bob will argue that the doughnut had the thumbtack in it when it left D's control and that when used in its normal use would defeat the normal commercial expectation

of the reasonable consumer and would be considered a dangerous product (R2nd 402a).

D will argue that a doughnut is not meant to be thrown at someone else, and even though a thumbtack was in the doughnut, the type of injury that Bob suffered was not the type that would be foreseeable. Therefore, D will contend that they should not be held strictly liable in tort to Bob for his eye injury.

## **CARA v. DELICIOUS (D)**

### **NEGLIGENCE**

Defined and discussed supra

### **BREACH – WARNING**

Cara heated her doughnut in a microwave oven on a high temperature and even though it was only warm to the touch on the outside, the jelly on the inside badly burned her mouth because it was liquid and had been heated to a much higher temperature than the pastry on the outside.

Cara will argue that D breached its duty by not placing an effective warning on the doughnut wrapper which would have advised her that when warming up a doughnut that one must use caution because the jelly inside can get very hot. Cara will argue that D was unreasonable in its conduct for not placing a warning because D's burden of placing the warning was much less than the probability and magnitude of an injury that could result. Cara will contend that the doughnuts are packaged in a paper wrapper with 'Delicious Doughnuts' printed on the wrapper along with nutritional information. Therefore, it would have been reasonable for D to place a warning on the wrapper as well, as their failure to do so represents a breach of their duty.

### **ACTUAL CAUSE**

But for D's failure to warn Cara, Cara would not have been injured. Therefore, D is the actual cause of Cara's injury.

## **PROXIMATE CAUSE**

Defined and discussed supra

D will argue that it's unforeseeable that someone would heat up a doughnut. However, it is likely that the court will find that D is the proximate cause of Cara's injury because many people like to heat up their pastries.

## **DAMAGES AND DEFENSES**

Defined and discussed supra

## **STRICT LIABILITY IN TORT**

Defined and discussed supra

Cara may argue that when the doughnut left D's control it was defective in its warning and that when used in its normal use was defective in the warning and therefore an unreasonably dangerous product when used in its normal manner.

## **ED v. DELICIOUS (D)**

### **NEGLIGENCE**

Defined and discussed supra

### **BREACH – DESIGN**

Ed will argue that when he packed his doughnut in his suitcase to take on a business trip that it had leaked jelly through the paper wrapper and stained all of the clothes in the suitcase. Ed will argue that if D had used a plastic wrapper then even if the jelly leaked out it would not have ruined any of his suits. Ed will argue that D improperly designed its doughnut wrapper because a paper wrapper is likely not to protect against jelly leaking out of the doughnut. Therefore, the wrapper did not meet the ordinary commercial expectation of the average reasonable consumer and that D breached its duty of properly designing the wrapper.

## **ACTUAL CAUSE**

But for the wrapper not being properly designed, Ed's suits would not have been ruined.

## **PROXIMATE CAUSE**

D will argue that it is not foreseeable that someone would pack a doughnut in a suitcase and that the wrapper is not designed for such use. Therefore, D will argue that they are not the proximate cause of damage to Ed's suits.

It is unlikely that a court would hold D liable for damage to Ed's suits.

## **CONTRIBUTORY NEGLIGENCE**

D will maintain that Ed should not have placed a doughnut in his suitcase.

## **IMPLIED WARRANTY OF MERCHANTABILITY**

In every sale there is an assurance from the seller to the consumer that the product is of fair and average quality and fit for its intended purposes as compared to other products in the market.

Ed will argue that the wrapper that D used was not of fair and average quality because it allowed the jelly to leak through.