

EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL YOU ARE TOLD TO BEGIN.

THIS EXAM WILL LAST 3 HOURS. Part I is a CLOSED BOOK EXAM. It will last from 9 a.m. until 10:30 a.m. At 10:30 a.m. I will collect all of the exams. If you finish ahead of time you may read Part II (Question 3) and make notes but you may not begin writing your answer to it.

Part II is a modified OPEN BOOK exam. It will last from 10:30 a.m. until 12:00 p.m. You may use any notes you have made yourself, your textbook, the statutory supplement (West's Commercial Law Statutes) and any outlines that I have distributed to you. YOU MAY NOT use any commercially printed outlines, hornbooks, treatises, articles, etc., except that you may use up to 50 pages photocopied from such materials.

While waiting for the exam to begin, be sure that you have written your EXAM NUMBER on each bluebook, that you have read these instructions, and that you are otherwise ready to begin. For each of the questions, START A NEW BLUEBOOK.

POINTS are assigned based upon the rough number of minutes it should take to complete each section. The division is as follows:

|         |             |            |
|---------|-------------|------------|
| Part I  | Question 1: | 70 points  |
|         | Question 2: | 15 points  |
| Part II | Question 3: | 85 points  |
|         | =====       |            |
|         | TOTAL       | 170 points |

For purposes of this exam, assume that you and your clients are located in the State of Linden, and that Linden has adopted all of the Uniform Acts (including the Uniform Consumer Sales Practices Act and the Uniform Consumer Credit Code) that are contained in your statutory supplement.

PLEASE DOUBLE-SPACE YOUR ANSWERS. Label the bluebooks "Question 1, Book 1"; "Question 1, Book 2"; "Question 2, Book 1"; etc.

GOOD LUCK!

HAVE A GOOD SUMMER!

## PART ONE: CLOSED BOOK

QUESTION 1 (70 points)

Patrick Geary, as administrator of the estate of Mary E. Geary, decided to sell 12 Willard Place, Morristown, Linden. He entered into a listing agreement with Weichert Realtors. The original asking price was in the range of \$160,000 to \$169,000. The price was reduced first to \$139,900 and then \$129,000 as it lingered on the market. An offer was made by Robert B. Webster, Jr. in May 1992. Madge Cahill of Weichert was the real estate associate handling this first proposed sale. A termite inspection for Webster was conducted by Joseph M. Nitzsche of Foresight Engineering on June 4, 1992. Nitzsche found visible evidence of infestation of termites and carpenter ants located in the interior trim in the garage and in the siding of the house. He recommended that a pest control firm be consulted for treatment. Foresight Engineering, through Nitzsche, declined, based on the above information, to provide a warranty for this residence. An inspection was then made by Terminex on June 6, 1995 and quotes were given for a residential pest control service agreement and a termite protection plan. On June 6, 1992, Webster, through his attorney, rescinded his offer to purchase the property, requesting the return of his deposit monies.

In notes dated June 8, 1992, another agent for Weichert, Ruth Waddington, as a result of a phone conversation with a representative of Jackson Exterminating Inc., made the following notes:

Plates [the wooden "plates" on the foundation that hold up the walls] totally eaten away. To treat requires drilling thru the floor. Afraid of hitting water pipes.

Termites may have gone up to 2nd floor.

Meanwhile, Kelly Dempsey, also a Weichert agent, showed the house to Oliver and Gemma Byrne, with whom she was socially acquainted. Dempsey advised Byrnes after they offered \$129,000 that an offer had been made for \$130,000. Byrnes then offered \$131,000. They signed a contract on June 18, 1992. Geary agreed to the offer on June 19, but struck the form clauses that permitted Byrnes to obtain wood-destroying insect, home, well and septic inspections, enumerated as paragraphs 4, 5, 7 and 8 respectively in the sales contract. Geary replaced the stricken clauses with the following hand-printed acknowledgement:

SELLER REPRESENTS THERE ARE CARPENTER ANTS AND TERMITES  
ON THE PROPERTY AND SELLER ASSUMES RESPONSIBILITY TO  
TERMINATE THEM AND PROVIDE BUYERS WITH A ONE YEAR  
WARRENTY [sic] OF THE WORK.

When Waddington returned to Dempsey and Byrnes with the contract signed by Geary, Waddington mentioned a termite and carpenter ant problem. Gemma Byrne recalls that Waddington said the problem was "very minimal" and "fixable." Dempsey and Waddington recall that Waddington did not characterize the amount of damage.

Upon review of the contract, Byrnes' attorney objected to the deletion of the inspection clause and demanded its reinstatement in a June 22 letter. It was then included. The property was thereafter inspected by Bernard Sopko of Ecological Home Inspection on June 23, 1992. Sopko noted visible evidence of termites in both the garage and house. The inspection was expressly limited to visible areas only and was not an evaluation of structural damage. The inspection report described the area of inspection in the following terms:

It was made in only those areas which were readily accessible and was made in areas where infestations were mostly likely to occur. No inspection was made in areas which required dismantling, removal or movement of any object, including but not limited to, moldings, floor coverings, siding, ceilings, insulation, floors, furniture, appliances and/or personal possessions.

The areas needing repair, according to Sopko, were a sill plate in the garage, a sill plate in a closet in the bedroom and the door frame to the furnace area.

During a subsequent July 1, 1992 meeting at which Geary, the Byrnes and Dempsey were present, Geary agreed to escrow \$250 in lieu of making necessary repairs and this agreement was put in writing. Byrnes stated that the figure was suggested as "reasonable" by Geary in response to a question by Dempsey. Gemma Byrne also said that Geary described the damage as "very minimal" and "repairable."

In the first week of June, Jackson Exterminating Inc. inspected the property at Geary's request and in Geary's presence. In the report it issued on July 14, 1992, Jackson Exterminating noted that its inspector had "found evidence of major termite damage." Byrnes said that they did not see his report until after the closing. Byrnes apparently received a copy of the report with the closing documents, along with a certificate stating that the premises had been treated by Jackson Exterminating in July 1992 for termites and carpenter ants in described areas and furnishing a one-year guaranty against re-infestation by subterranean termites in those areas.

Approximately five weeks after the closing, Oliver Byrne, who was a carpenter by occupation, began to make the repairs of the studs behind the bathroom tub. When he sought to repair the back wall in the rear downstairs room of the house, he uncovered holes in the sheetrock and discovered that the wall was eaten away. He then reviewed for the first time the report of Jackson Exterminating and saw that it had reported evidence of "major termite damage." Dempsey was called. After reviewing the same report, she spoke to Madge Cahill, the sales associate on the prior deal on this same property. Madge Cahill told Dempsey the prior deal fell through "because of the termites." According to Dempsey, "[Cahill] said that the house was riddled with termites and that was her exact words, 'riddled with termites.'" Cahill, Dempsey noted, said that Waddington knew of the condition.

Waddington denied seeing the Jackson Exterminating report prior to closing. She also denied knowing the extent of the termite damage. Completed repairs on the house have cost Byrnes more than \$10,000, and additional repairs are needed.

Please analyze the potential for Byrnes to recover based upon the theories of recovery covered in the course. Ignore any statute of limitations issues.

#### QUESTION 2 (15 points)

You are a new attorney in the consumer protection division of the Office of the Linden Attorney General. Your superior has forwarded to you a proposal that all television advertising for so-called "psychic hotlines" have a two-line disclaimer at the bottom of the screen. The top line would state "For entertainment purposes only." The bottom line would state "Counselors Cannot Predict Future." Please prepare a recommendation as to whether or not you would support this proposal.

## PART II: OPEN BOOK

QUESTION 3 (85 points)

In 1990 Jane Rini moved from Myrtle Beach, S.C., to Northampton, Mass., in order to attend graduate school. She hired Nilson Van Lines, Inc., which is the South Carolina agent for United Van Lines, Inc. Eleven of the items packed by the movers but not received by Rini at her new home. They appeared on the inventory list, but were never checked off as having been received.

The missing items were family heirlooms, art work that had not been appraised: one pair of Chippendale mirrors; one Mezzotint of the Virgin Mary; one Ivory crucifix; three silk embroideries on paper—St. Jerome, Jesus, and St. John; and four small paintings—Soldiers Gaming, Boy Smoking, Landscape, and Shoemaker or Boy Sewing.

Photographs were available for everything but the Mezzotint, and experts hired by Rini subsequently appraised the missing paintings at a value of \$10,000 each and the missing embroideries at \$45,000. The total loss based on these appraisals was \$135,000.

Rini filed a claim for her missing art work on Oct. 2, 1990. The United investigator assigned to handle the claim, pretended to conduct a thorough investigation of her claim but in fact did very little. His efforts were primarily devoted to insisting on documentation for the loss despite being repeatedly told that such documentation did not exist. Instead of providing receipts for her family heirlooms, Rini obtained appraisals from photographs. United refused to accept such appraisals because they were not based upon actual examination of the physical objects. (In fact, United's own loss procedures often used photographs to come up with estimates).

United's investigator also failed to interview those involved in the move in a timely fashion and some were not contacted at all. He also failed to investigate whether any of the missing art work had been mistakenly unloaded at a moving van stop before or after Northampton.

United gave three reasons for denying Rini's claim. First, United claimed that all items were received. Second, United claimed that the items could not be valued. Finally, United claimed that there was no evidence the art work had been lost.

United also argued that under ICC regulations, she could not file a claim for her loss without first submitting to United's arbitration program. However, Rini never received a copy of the ICC's OCP-100 booklet entitled "Your Rights and Responsibilities When You Move," which detailed United's arbitration program.

As a result of United's practices, Rini suffered hypertension and high blood pressure; her sleep pattern was interrupted; she lost interest in her academic work. She attended mental health counselling once a week and was eventually diagnosed as suffering from a major depressive episode, requiring medication. As her therapist testified, this suffering stemmed not only from the loss of her family heirlooms, but from the treatment she received from United in the subsequent claims process.

You have been hired by United to respond to a settlement letter from Rini's attorney. The attorney is threatening to file suit in federal district court to recover for the loss of the property as well as for the emotional distress that has been suffered. The letter offers to settle the case for \$100,000 for the lost property and \$50,000 for mental suffering.

Please prepare an analysis for your client, United.