California
Bar
Examination

Performance Tests
and
Selected Answers

February 2004

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2004 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced 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 and may not be reprinted.

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FEBRUARY 24, 2004

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE SNOW KING MOUNTAIN RESORT

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

IN RE SNOW KING MOUNTAIN RESORT

Law Offices of Spence and Hawks
San Obispo, Columbia

MEMORANDUM

TO: Applicant
FROM: Margaret Thompson
DATE: February 24, 2004
RE: **Snow King Mountain Resort**

Our client, Snow King Mountain Resort (SKMR), needs assistance in dealing with its insurance carrier. Yesterday, I spoke to SKMR's CEO, Manuel Lopez, and he sent to me by overnight mail the relevant documents. We've done corporate and real estate work for them in the past, but because they've grown tremendously and this will be a new operation, I asked Manuel to describe the current operations and proposed program in some detail.

SKMR is a ski area and vacation second-home resort complex, which wants to add recreational mountain biking to the list of activities available to its summer guests, with bike trails, aerial tram rides, and trail fees. Everything was set until SKMR's insurer informed them that mountain biking would require the highest risk rating, possibly leading to prohibitive premiums.

Columbia has a recreational use statute, Col. Civil Code, Section 846, which protects a landowner who permits recreational use of her or his land. I'm familiar with the statute, and the insurance company is correct that the statute doesn't specifically refer to mountain biking, nor does it apply when someone charges for access. However, the statute also says that "any recreational purpose" is covered, and Manuel says that SKMR hasn't decided whether or for what to charge.

The insurer's letter is attached. It invites a response, if we believe that the recreational use statute applies. We need to research these issues, respond to the insurance company, and advise SKMR how to set up the program.

Would you please:

1. Draft a persuasive argument to the insurance company in letter form arguing that the recreational use statute will apply. Since you will need to explain to the insurance company how the mountain biking program will be operated, you should assume for purposes of drafting the letter that SKMR will set up the program as you recommend. We need to persuade the insurance company's attorneys and rating professionals, and thus you should discuss relevant case law and, as in writing a brief, assume that they will be aware of contrary cases.

2. Draft a memorandum to Manuel Lopez explaining your advice on how SKMR should operate the program to maximize the likelihood that the recreational use statute will apply. We must make recommendations on whether to charge an access fee; whether to carry mountain bikes on the aerial tram; and whether to sell and rent bikes. I will review both your letter and your memorandum with Manuel, so do not repeat discussions or recommendations contained in the letter, in the memorandum.

Also, in drafting the letter and memorandum, do not address issues of conduct which could result in negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

MEMORANDUM FROM THE DESK OF MANUEL LOPEZ

TO: Margaret Thompson, Law Offices of Spence and Hawks
DATE: February 23, 2004
RE: **Snow King Mountain Biking Trails**

Thanks for agreeing to respond to this matter. I've attached the memos from my Operations and Marketing Directors and a letter from the insurance agent, and will outline the information about Snow King's organization and operations you requested.

As we discussed, Snow King Mountain Resort (SKMR) wants to add a mountain biking program in the area of the ski hill. It could be a major part of our effort to add activities to our summer operations and become a year-round resort. The summer-season program will fill out the non-ski off season, which the marketing department now calls our "shoulder season."

Full-year operations are not only helpful to our bottom line, but are essential to retain and develop quality employees, sustain real estate development, and retain nationally-recognized commercial tenants. In the last 5 years, real estate sales are way up, and most of our mall tenants are open year-round. Also, in just 5 years, we've built our year-round staff to 38% of our work-force, enough to allow us to extend health and dental benefits to a majority of our employees, initiate modest retirement benefits, and institute profit-sharing for department heads. A summer-season revenue increase of 12% would justify the employee benefits package and probably permit commuter shuttles from town for our employees. Also, I'd like to start on-site childcare for our employees, which our room-care staff says is their number one concern. These may sound trivial in the corporate world, but in the tourist trade, these benefits would set us apart in attracting career-oriented people.

Building year-round operations began with the name change from Snow King Ski Area to the Mountain Resort. Unlike the winter season, which turns on skiing and snowboarding, seasonal operations require that we provide a wide array of activities. In summer, the Concierge Department is the busiest site at the Village. It's now been moved from inside the Lodge to the Village to provide service not just to Lodge guests but to any visitor.

For starters, we enlarged the resort Lodge pool and health center. We've added shuttle service to and discounts at two nearby golf courses, a tennis club, and several white-water

rafting companies. Three years ago, we began summer operation of the ski area's aerial tram, which carries 50 passengers each trip, to the mountain summit. Visitors are encouraged to ride up for the spectacular view, lunch or dine at the summit restaurant, and even hike down. We converted the cross-country ski area to a summer "dude ranch," offering horseback riding and other ranching activities. This year we're starting our tent-auctions weekend series (antiques, classic cars, art), and convention seminar marketing. For the future, we're considering building an alpine slide, and the Marketing Department is even pushing paragliding tandem rides off the summit.

Mountain biking would be the easiest and cheapest new activity to add. As the memo from Sally Johnson, the Mountain Operations Director, indicates, we only need to add a few trails and signage and print trail maps to implement mountain biking. A trail fee would involve designing fee collection points and hiring personnel to collect fees. If we don't charge for access to the trails, there wouldn't even be much additional personnel cost. The Marketing Department is hot to get on this.

You asked that I outline SKMR's operations. As you know, SKMR now is a resort village complex. SKMR owns and operates some properties (such as the Lodge), owns and rents out a mall of shops and restaurants, and has developed and sells condos and residential lots which surround the Village. There are also some independent businesses within the Village, such as the Best Mountain Lodge and Aman Resort, which purchased their properties from SKMR and now operate independently. As a corporation SKMR consists of:

- Snow King Ski Mountain, which includes as its profit centers: lift ticket sales for access to the tram and 10 chair lifts, the village parking, mountain restaurants, ski and board rentals, and the ski and board schools. The majority of the ski area is on United States Forest Service (USFS) land; SKMR is the lessee and obligated by the lease to defend and indemnify the USFS no matter who gets sued.
- Snow King Lodge, which has 450 rooms, three restaurants and many shops.
- Snow King Development Company, which manages the construction of condominiums, chalets, and time-share properties.
- Snow King Realty and Property Management, which owns and sells the properties and owns and manages rentals. The latter include the condos as well as the 17 shops and restaurants which are in Snow King Village Mall.

You asked that I clearly explain all fees that we're considering charging. The first option is a trail fee. It's still an open question, which I haven't decided, and could go either way depending upon its impact on insurance costs. Charging for access would be a change from our present approach. In winter, of course, access to the ski mountain requires that one buy a lift ticket. However, in summer the mountain is open, hikers regularly use the mountain, both accessing it from the aerial tram to hike downhill or just walking up from the Village. There are resident moose, deer, hawks, and 2 pairs of golden eagles. Wildlife viewing has always been popular. As a matter of fact, after the lifts are closed in April, we have always allowed skiers to hike up and enjoy the spring snow. Basically, when the lifts aren't operating, we neither control nor charge for access.

Similarly, mountain bikers could either access the mountain and trails, as they are currently doing on their own by riding up, or by using the tram to get to the top and riding down.

All visitors pay to ride the aerial tram (which is open all year except for April and May). For most summer visitors, the one-ride $10 charge works well, but for mountain bikers we may need to create a multiple-ride or all-day charge, like a winter ski lift ticket. We may add a bike-tram charge, but my initial review of Sally's and Kyle's memos suggests that we will let the mountain bikers bring their bikes for free. We will eventually add bike sales, rental, and service, but I doubt that we've the time and capital to bring it on-line the first year.

Then there are the charges paid by all our guests and visitors. When we finished the Village and Mall, we imposed a parking fee to park within the Village. Charges are by the hour, day, or multiple-day package, and these are reduced in the summer. There's still free parking outside the Village, which is convenient to the Mall, but much less so for the Mountain and Lodge. Outside parking is heavily used, especially in winter when the Village parking lot fills by 10 am.

As I told you, the mountain biking program is still flexible. The Marketing Department thinks it's a win-win situation even if we don't charge for the trails or rent bikes. The bottom line is the insurance cost. We can design the program any way that will get us affordable insurance.

SNOW KING SKI MOUNTAIN

TO: Manuel Lopez
FROM: Sally Johnson, Mountain Operations Director
DATE: February 17, 2004
RE: *Snow King Mountain Biking Sales and Trail Fees*

This will sum up what I've reported at the staff meetings. We can easily have a mountain biking program for the summer. Most of the mountain's ski trails are too steep for ascent and descent, except perhaps for extreme games fanatics. However, the mountain is crisscrossed by snow-groomer access roads and beginner ski trails that would make excellent natural terrain for mountain biking.

You may recall that the idea for mountain bike trails came from discussions I had last summer with the mountain bikers who are already using the mountain for riding. They've given me good information on the best rides, trail links that could be added, trouble spots (usually encounters with hikers at high speed or blind spots). They also have ideas on where we could build some single-track trails, about 30" wide, which are very popular for mountain biking and would link up existing trails. Most of the trail building could be done by our own work crews, and would help provide them more off-season work. I'd budget an additional $35,000 of capital expenditures the first year for trail building, trail maps, and signage, and about $5,000 a year thereafter for maintenance. That would give us the minimum program: no trail fees, equipment sales or rentals, or tram ticket sales, but also very low cost, and assuming that we don't patrol the trails, almost no additional personnel costs.

A mountain bike trail fee would require a minimum of 4 access kiosks, costing around $144,000 in construction, and $172,000 annually to operate, assuming a 7-day, 12-hour operation from June through September. This includes one bike-patroller to prevent access to nonpaying cyclists and for safety. You may recall that we previously rejected the idea of insisting for waivers/hold-harmless to access to the trails because of the expense of access kiosks necessary to enforce such a requirement.

We can also sell mountain bike tram tickets for those who want to take the tram up and ride downhill. This would not add to the tram sales and operations personnel costs. I'd suggest we sell cyclists the same tram $10 one-time tram ticket we sell any other visitor

and add a $25 all-day tram ticket. Bikes would not be allowed inside the tram. The tram engineers can add exterior "hooks" over the ski carriages to carry the bikes, costing about $17,500.

The SKMR ski rental shops can be converted to summertime bike sales and rentals. This would be the largest inventory and personnel expense. We'd have to commit to start a bike shop operation, and hire a manager who could provide a more precise budget and income projections. My ballpark estimate is in the quarter-million dollar range to start.

I checked with the two other shops in the Village Mall that sell outdoor clothing and rent skis and snowboards, Summitt Designs and Ryan's Extreme Sports, and both said that, for summer, they definitely would add bike accessories (clothes, helmets, tubes, some parts), and with enough lead-time perhaps even bike sales, rentals, and repairs. Both strongly endorsed the bike trails idea, and seem eager to add bike sales and rentals to their business lines. Summitt Designs, noting the developing mountain biking business, had already printed up a trail map and distributed it for free last summer. So even without opening our bike shop, we will have bike services for our customers and help our lessees with the struggling off-season.

The Mountain Operations Department needs 2 months notice to design trails and plan construction, about the same for the bike-tram carriage, and 6 to 9 months for the bike shop.

SNOW KING MOUNTAIN RESORT
"THE PLACE TO COME HOME TO"

MEMORANDUM

TO: Manny Lopez
FROM: Kyle Mills, Marketing Director
DATE: February 18, 2004
RE: **Mountain Biking at Snow King Mountain Resort**

Manny, it's great that SKMR will be offering mountain biking to our guests. Marketing-wise I don't see any down-side.

Up-front, mountain biking fits the target demographics of our year-round development plan. Industry research has confirmed the Marketing Department's assumptions. Mountain bike enthusiasts aren't as young as the snowboard crowd. The majority are in the target 25-34 age group, and 35-44 is the second largest grouping. Average incomes and shopping expenditures are second only to golf and tennis guests (average annual income: $58,500). Education: 16.5 years. For casual riders, bike and accessories expenditures average $500. Self-described "serious" riders spend $1,000 to $2,000.

More importantly, mountain biking long-term growth projections are excellent, exceeding all other seasonal participation sports and are almost as strong as snowboarding.

Image-wise mountain biking is again on-target. It will make great visuals for promotions and appeal to the 20-somethings attracted to the image of extreme sports. This year the producers of the Summer Extreme Games will visit SKMR, and, with mountain biking and perhaps paragliding, we could make a viable pitch to be on their venue schedule. The Extreme Games could be our biggest seasonal attraction!

Mountain bikers' spending patterns could be their biggest up-side impact. As you know, our previous research has determined that the average daily expenditure by a summer Lodge guest is $122, and for a nonguest, $37. Income from increased parking, food service, and merchandise sales alone will exceed Operations' estimates of trail construction costs. Our research indicates that expenditures by mountain bike riders should be 20% above our previous projections. Also, I expect that a much higher

proportion of mountain bikers will come from the local and regional markets and pump up the day-use average, probably above $40. (I'll poll it this summer.)

So, even if we don't sell bikes, tram tickets, or trail passes, from an overall economic standpoint, SKMR would have substantial returns by attracting mountain bikers.

Checking the numbers confirms my previous suggestion that we should offer mountain biking to enhance our guests' unique Snow King Mountain experience, and should not charge for trail access. Unlike ski and board operations, trail access fees are not necessary for profitable operations. We can capitalize on free trails in marketing SKMR as a mountain bike park. Obviously, we'll have to charge for access to the aerial tram, just as we do for all other day-guests, but I'd recommend that we add no additional charge for carrying the bikes on the tram.

Our Lodge guest privileges presently include tram fees and parking fees; thus, Lodge guests could mountain bike without feeling that they're paying for trails, parking, or the tram--a great sales talking-point! Free trails may even help counter the "pay-to-play" rap that Marketing is burdened with because of the annual escalation of lift tickets, which next winter will break the $50/day ceiling.

Below are net income projections based on three levels of our marketing effort. The minimum level would probably be appropriate for the first year operations.

		Projected Revenue
Minimum:	Include mountain biking as part of current marketing. No additional expenditures.	$211,680
Modest:	Print advertising, especially regional and specialty publications.	$332,000
Aggressive:	Establish promotional events, races, packaged tours, national specialty publications.	$467,000

These projections don't include additional benefits which are more speculative, but are

nevertheless tangible. When we brought on board the golf, tennis, and ranch operations, real estate sales jumped; mall partners reported similar increases in sales.

Manny, let me know if you'd like anything more from Marketing.

Let's get going!

National Life and Casualty Insurance Company
One City Center Plaza
Suite 1400
Saint Francis, Columbia 99900
(111) 561-8200
www.nationallifecasualty.com

February 21, 2004

Mr. Manuel Lopez
President and Chief Executive Officer
Snow King Mountain Resort
Snow King Village, Columbia 99014

Reference: Snow King--Policy No. 2877408569867

Dear Manuel:

Thanks for giving us the opportunity to bid on insurance coverage for the new mountain biking operations. Mountain biking at Snow King, with its unique natural beauty and congenial atmosphere, could be a huge success. My partner and I love mountain biking, and are out riding almost every weekend. I'm going to talk to Jen about coming up for Memorial Day.

After our conversation, I sent a memorandum to our Rating Department in Colorado and just received a call from them. It's not good news. Rating thinks that mountain biking requires the highest risk rating. Of course, I can't give you an exact premium quote until we get some usage numbers, but for budgeting purposes I fear that you can assume that it will be in the same ballpark as the skiing operations.

I'd suggest that you consider having your lawyer review Rating's conclusions, and, if they think that Rating is incorrect, that they address a letter to me, which I'll pass along to Rating, stating Snow King's position.

For your lawyer's information, here's what our Rating Department states:

First, they acknowledged that Columbia has a recreational use statute, Columbia Civil Code Section 846, which could significantly reduce the risk of liability, and thus the risk rating. However, mountain biking is not one of the enumerated recreational activities, and they believe that the statute will likely apply only to the specifically named recreational activity. Gerkin v. Saint Clara Valley Water District, Columbia Court of Appeal, 1982.

Second, our Rating Department doesn't think that the statute's immunity applies to commercial operations, citing Danaher v. Partridge Creek Country Club, Supreme Court of Michigan, 1981, and Pratt v. State of Louisiana, Court of Appeal of Louisiana, Third Circuit, 1981.

The other alternative would be to set up the operation so that fee collections are sufficient to cover the cost of insurance. This, after all, is the fact of life that we live with in the ski industry, and unfortunately inflicts expensive lift tickets on the public.

We value our relationship as the insurer for Snow King, and will do all we can to provide coverage as you continue to grow the business. Please let me know how you decide to proceed.

Best wishes.

Sincerely,

Tamara Scott

Tamara Scott
Registered Agent

TUESDAY AFTERNOON
FEBRUARY 24, 2004

California
Bar
Examination

Performance Test A
LIBRARY

IN RE SNOW KING MOUNTAIN RESORT

LIBRARY

§ 846. Permission to Enter for Recreational Purposes

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purposes, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

SCHNEIDER v. MOUNT DESERT ISLAND LAND TRUST
Supreme Court of Columbia, 1997

The State of Columbia is blessed with an abundance of scenic treasures. Its natural landscape contains over 1,100 miles of shoreline, massive mountains, magnificent lakes and sweeping deserts. Such diversity and contrast lend to its appeal as a place where recreational pursuits may flourish, at times on realty owned by others.

In this case we address questions about the scope of Civil Code Section 846, which immunizes landowners from liability for injuries sustained by recreational users of their property. We conclude, under settled principles of statutory construction, that the Legislature defined "recreational purpose" so broadly as to apply to plaintiff's conduct here.

While driving along the coast, plaintiff stopped at Thunder Hole, a spectacular spot within Mount Desert Island Preserve. The Preserve is owned by the Mount Desert Island Land Trust, a private foundation, and is open to the public. Plaintiff parked her car at one of the lots maintained by the Preserve, and she followed the steps down to Sand Beach. She tripped, allegedly because of a defect in the steps, and brought this suit against the Preserve for her resulting injury.

Before entering the Preserve plaintiff had stopped for a cup of coffee and, rather than drink it there (wherever that was) or in the car, she saw a sign ("Sand Beach") and decided to go there to drink it. The Preserve, pleading the statute, sought and obtained summary judgment. Plaintiff appeals. We affirm.

On appeal, plaintiff makes two contentions. First, plaintiff contends that coffee drinking is not within the statutory list, and, second, that she intended none of the named activities. The short answer to the first is that the list does not purport to be complete, but is only illustrative. Any number of clearly recreational activities suggest themselves, from birdwatching to sunbathing, to playing ball on the beach. Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named.

Section 846 establishes limited liability on the part of a landowner for injuries sustained by another from recreational use of the land. The statute provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming

upon the land. Under Section 846, an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration. The landowner's duty to the nonpaying recreational user is, in essence, that owed a trespasser under the common law as it existed prior to Rowland v. Christian, Col. Sup. Ct., 1968; i.e., absent willful or malicious misconduct, the landowner is immune from liability for ordinary negligence.

Thus, the Legislature has established only two elements as a precondition to immunity: (1) the defendant must be the owner of an "estate or any other interest in real property, whether possessory or nonpossessory"; and (2) the plaintiff's injury must result from the "entry or use [of the 'premises'] for any recreational purpose."

Turning first to the "recreational" element of Section 846, we have little difficulty in upholding the trial court's implicit finding that plaintiff entered or used defendant's property for a recreational purpose within the meaning of the statute.

Plaintiff contends that the list of activities set forth in Section 846 is exhaustive. The plain language of the statute does not support such a claim. The statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. To be sure, the principle of *ejusdem generis* provides that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" The examples included in Section 846, however, do not appear to share any unifying trait which would serve to restrict the meaning of the phrase "recreational purpose." They range from risky activities enjoyed by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary pursuits amenable to almost anyone (e.g., rock collecting, sightseeing, picnicking). Some require a large tract of open space (e.g., hunting) while others can be performed in a more limited setting (e.g., recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites). Moreover, the statute draws no distinction between natural and artificial conditions; it specifically mentions "structures," and it obviously encompasses improved streets. Thus,

it is not limited to activities which take place outdoors, and does not exclude recreational activities involving artificial structures.

Accordingly, because the list of examples provided by the Legislature does not effectively limit the meaning of "recreational purpose," we conclude that entering and using defendant's property whether to sightsee, drink coffee, or just relax invoked the immunity provisions of Section 846. Therefore, for our purposes here, walking down the beach steps is no different in kind from scaling a cliff or climbing a tree. Each is clearly recreational in nature.

Second, plaintiff contends that she raised a triable issue as to whether she entered the property for recreation. She claims that it could be found that she was not engaged in any recreational activity at all; that the weather was "cool, drizzly, overcast," and she was going "not to swim, sightsee or have a picnic lunch," and that only to drink coffee under such circumstances could be found not recreational. Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the "totality of the facts and circumstances, including . . . the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose." (Gerkin v. Saint Clara Valley Water Dist., Col. Ct App., 1982)

The consequences of plaintiff's approach would be absurd. The manifest purpose of the Preserve is recreational. Whether plaintiff entered the property to drink coffee or hike is immaterial. In either case, her presence was occasioned by the recreational use of the property, and her injury was the product thereof.

The judgment of trial court, accordingly, is affirmed.

JOHNSON v. UNOCOL CORPORATION,

Columbia Court of Appeal, 1998

Under Civil Code Section 846, landowners who permit others to use their property for recreational purposes are immune from liability for injuries suffered by such recreational use of their land. Defendant owns land which it allows the public to use without charge for recreational purposes. Groups or persons using the land must sign a form which, among other things, obligates the user of the land to hold the company harmless from damages for injuries arising out of the use of the land. We hold that under Section 846 the company enjoys immunity from liability for recreational use of its land, and that the hold harmless clause does not constitute consideration which would except the company from the immunity provisions of Section 846.

In this case, plaintiff's employer, Ubex Corporation (Ubex), executed an agreement with Unocol which, *inter alia*, contains a hold harmless clause. Ubex asked Unocol for permission to use Unocol's popular Orcutt Hill Picnic Grounds for its annual company picnic. Unocol agreed to allow Ubex to use its grounds and reserved a specific date for the picnic. Unocol did not charge Ubex for the use of its grounds. Ubex employees knew they could attend simply by purchasing a ticket from the "Aurora Club" to which all Ubex employees automatically belonged. The Aurora Club provided all the food, drink and games at the picnic. Johnson purchased a ticket and attended the picnic. He suffered injuries on the picnic grounds during a game of horseshoes when he leaned against a railing which collapsed and caused him to fall. Johnson sued Unocol for his injuries.

Plaintiff urges us to engraft onto the provisions of Section 846 an extremely broad view of the phrase "good consideration" found in Civil Code Section 1605. Section 1605 states:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Plaintiff argues that under Section 1605, the hold harmless paragraph constitutes consideration within the meaning of Section 846.

The hold harmless agreement here requires users to indemnify Unocol from costs and expenses it might incur in defense of claims. Plaintiff therefore argues that because attorney fees are costs of suit under Code of Civil Procedure Section 1033.5, which are not available in the absence of statute or contract, the agreement constitutes consideration. Plaintiff suggests that it is possible a trial court might award attorney fees in a lawsuit because of the agreement with its hold harmless clause. Perhaps, but it is not helpful here to speculate what a court might do if Ubex had filed an action against Unocol.

The purpose of Section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. Courts should therefore construe the exceptions for consideration narrowly.

Such a remote, potential "benefit" to Unocol does not constitute consideration to plaintiff. Plaintiff urges that we so broaden the definition of consideration contained in Section 1605 so as to defeat the purpose of Section 846. However, the meaning of a concept for one purpose may be entirely different for another legislative purpose. Section 846 may preclude immunity "where permission to enter . . . was granted for a consideration . . . paid to . . . landowner . . . or where consideration has been received from others . . . ." The mere potential for reimbursement for defense costs incurred if a suit were filed is neither current payment for entry nor a benefit currently received for entry. Although the disjunctive language in Section 846, "where consideration has been received from others," suggests that consideration is not limited solely to direct payment of entrance fees, we hold that at minimum, consideration received must consist of a present, actual benefit bestowed or a detriment suffered.

Although in some cases the amount of consideration may be slight, Thompson v. United States, U.S. Dist. Ct., Col., 1979, it must be more substantial than what occurred here. A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under Section 846 comes into play.

Because the hold harmless clause in the agreement did not constitute consideration, the exception to immunity in Section 846 does not apply here. We therefore affirm the summary judgment granted Unocol.

JONES v. UNITED STATES

United States Court of Appeals, Fifteenth Circuit, 1982

Lisa Jones appeals from a judgment in favor of the United States in this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b). We affirm.

I. Factual Background

Lisa, then 15 years of age, was severely injured in an accident on April 16, 1977, on a slope at Hurricane Ridge in Olympia National Park in the State of Columbia. She was on an outing sponsored by her church, the Bainbridge Bible Chapel, under the supervision of Joseph B. Barlow. Lisa and her friend, Beverly, each rented an inner tube from National Park Concessions, Inc. [NPC], for one dollar to use for snow sliding. They tubed with others in a "Snow Play Area", designated by a directional sign at the Park lodge. Beverly went down the slope first, mounted on her inner tube stomach down, and rolled off the tube at a level area near the bottom of the slope. Lisa, seated on her tube, was unable to stop, crossed the level area at a high rate of speed, and crashed into a tree, fracturing her spine, shoulder and several ribs.

The District Court granted the government's motion for partial summary judgment, holding the government's liability was controlled and limited by the Columbia Recreational Land Use Act, Col. Civil Code, Section 846, which requires proof that the government's conduct was willful and wanton. The trial judge found that the plaintiff had failed to establish willful and wanton conduct on the part of the government as required by the Columbia Recreational Land Use Act and entered judgment for the government.

II. Was the government a "Recreational Landowner"?

The issue on this appeal is whether the liability of the United States is controlled by the Columbia Recreational Land User Statute. Under the Federal Tort Claims Act the government is liable for negligent acts and omissions of its employees, "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Since the accident occurred on government land in Columbia, Columbia tort law is applicable.

This court has held that the principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners. Plaintiff contends that the statute applies only to "a landowner who gives up his right to keep out members of the public." She argues that the requisite element of "consent to public use" is not present, noting that Olympia National Park was "reserved and withdrawn from settlement, occupancy, or disposal and dedicated and set apart as a public park for the benefit and enjoyment of the people." Plaintiff argues that while the purpose of the statute is to "encourage" owners to "allow" someone to use their land, that purpose is not met when, as here, the public has a right and expectation to use the land that pre-exists the passage of the Act and the government has no right to bar entry.

Plaintiff's argument that the government should not be treated as a private party under the Columbia recreational user statute because it is somehow obligated to keep the national parks open to the public is unpersuasive. If liability were imposed upon the government in cases such as this one, the Park Service might well choose to close areas of Parks to public use or limit the scope, place, or manner of activities. For example, would a National Park superintendent allow snowtubing after a contrary ruling? This result is precisely what the Columbia statute was enacted to prevent. Thus, we hold that the government is entitled to the protection of the Columbia Recreational Land Use Statute and is therefore only liable "[f]or willful or malicious failure to guard or warn against a known dangerous condition."

III. Did Lisa Pay a "Fee" for the Use of the Land?

Plaintiff contends that the government received a "fee" for Lisa's use of the Park facilities. She paid the concessionaire, NPC, a dollar to rent an inner tube. NPC pays the government a fixed rental for its facilities (a sales and rental shop) and a percentage of its gross receipts. The District Court concluded that the fee was charged for the use of the inner tube and was not a fee charged for the use of the land. We agree.

The case upon which plaintiff relies, Thompson v. United States, U.S. Dist. Ct., Col., 1979, is distinguishable. There the plaintiff was a participant in a motorcycle race held on federal land in Columbia. The Bureau of Land Management [BLM] had charged the race promoter a $10.00 application service fee and a minimum rental charge of $10.00. The Court concluded that any charge for access was sufficient to preclude application of Columbia

Recreational Land Use Act:

> "If a rental charge is made for the use of the land, it is clear that permission to enter the government land would be 'granted for a consideration', and therefore Columbia Civil Code Section 846 would not apply so as to limit the liability of the landowner."

The Thompson court did not rule that payment for other than access by a land user was sufficient to invoke the exception, as indicated by its statement that:

> "The United States claims that these payments were trivial, inconsequential, and were not rental payments by the plaintiff; that the payments were merely for race permit and that entry to BLM land is free. Although this may turn out to be correct, on review of a motion for summary judgment, we cannot characterize the purpose of the payment."

Here, however, the fee was not charged to members of the public for entry onto the land or for use of the land. Lisa paid the dollar fee to rent the tube. She entered the Park without paying a fee. She could have used the Hurricane Ridge or any other area of the Park without making any payment if she had brought her own tube. No fee was charged which would deny the United States its immunity under the Columbia statute.

More on point, we believe, is the 1975 Columbia Court of Appeal case of Moore v. City of Torrance. There the plaintiff was injured while riding his bike in a city-owned unsupervised "motocross" track. Plaintiff argued that he had paid consideration for the use of the park by virtue of the fact that his parents pay taxes to support the municipal facilities. The Colombia court rejected the argument, stating:

> "We are certain that this is not the type of consideration that the Legislature had in mind when it included consideration as a factor in Section 846. Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended."

Lastly, we agree with the District Court that, "While it was negligence on the United States's part not to put up signs or ropes, its failure to do so does not rise to the status of willful and wanton conduct under the laws of Columbia." AFFIRMED.

GERKIN v. SAINT CLARA VALLEY WATER DISTRICT

Columbia Court of Appeal, First District, 1982

Jo Ann Gerkin through her guardian ad litem appeals from a summary judgment in her action against Saint Clara Valley Water District [“Water District”] and other defendants for personal injuries. Gerkin suffered personal injuries when she fell from a bridge located at Little Llagas Creek in the City of Morgan Creek. According to the complaint, Gerkin was injured because the Water District negligently permitted the bridge to remain in a dangerous condition.

In support of the motion for summary judgment, the Water District presented excerpts from the depositions of Gerkin and her younger sister showing that Gerkin was either walking or walking with her bicycle across the two planks which constituted the bridge when she slipped and fell into a dry creek below. In opposition to the motion, Gerkin submitted the declarations of herself, her mother and her sister averring that (1) on the date in question there was no telephone at the apartment where Gerkin was living, (2) Gerkin's mother gave Gerkin and her sister permission to cross the area in order to use the telephone at a market and to buy a candy bar there, (3) Gerkin's purpose in making the trip was to make a phone call and buy a candy bar, and (4) Gerkin walked across the bridge with her bicycle both to and from the store. The trial court granted the motion for summary judgment on the ground that Gerkin "was engaged in conduct specified by Civil Code Section 846.”

Section 846 provides that, in the absence of willful or malicious failure to guard or warn of a dangerous condition, an owner of “any estate in real property" owes no duty of care to keep the premises safe for entry by trespassers or licensees who engage in certain specified recreational activities. Included among these specified activities are "hiking", but not bicycle-riding. On summary judgment, Gerkin’s claim that she was walking over the bridge when the accident occurred must be accepted.

However, relying on dictionary definitions of "to hike" as "to walk or tramp" and "to go for a long walk," the Water District argues that Gerkin's activity was encompassed within the statute and that summary judgment was therefore proper. It is contended that any test which hinges upon the user's subjective "recreational" intent would read into Section 846 a requirement not stated by the Legislature and lead to "diverse, arbitrary and unjust results."

Section 846 must be construed in light of the legislative purpose behind it. It is a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the lawmakers. The purpose of Section 846 was to encourage landowners to keep their property open to the public for recreational activities by limiting their liability for injuries sustained in the course of those activities. The Water District is therefore incorrect when it contends that to walk across their property necessarily constitutes "hiking" within the meaning of the statute. Both the language and the historical background of Section 846 compel the conclusion that the Legislature did not intend to immunize landowners from liability for all permissive or nonpermissive use of their properties, but only those uses which could justifiably be characterized as "recreational" in nature.

The Water District's contention that "walking" falls within the scope of "hiking" under Section 846 is contrary to principles of statutory construction: First, a construction which implies that words used by the Legislature were superfluous is to be avoided wherever possible. If "hiking" were to be read as including the act of "walking," it would have been unnecessary for the Legislature thereafter to enumerate other types of activities which necessarily involve walking such as camping, rock collecting and hunting. Obviously, "hiking" was intended to denote more than just traveling on foot.

Second, a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislation. This principle is vividly illustrated by that portion of Section 846 which, at the time of the events in question, extended a landowner's immunity to "all types of vehicular riding." Read literally, the statute would preclude anyone traveling in a car from suing the owner for injuries caused by a dangerous condition on his property. It is apparent from the purpose of the enactment, however, that the Legislature was intending to reach only recreational vehicular activity such as motorcycling for pleasure or dune buggying. Likewise, to equate the word "hiking" with mere "walking" or traveling on foot apart from any recreational context would be to ignore the legislative purpose of Section 846 and, in effect, broaden the statute in a manner not contemplated by the lawmakers.

And finally, this court has in past cases applied the rule that statutes in derogation of the common law must be strictly construed. This maxim of construction provides that where there exists a common law doctrine relevant to the issue presented by the parties and the statute which would change the common law, the legislative intent to change the common

law must be clearly expressed. In changing the common law rules applicable to the tort liability of the landowner to the entrant, the legislature has, in Section 846, made a new accommodation of the conflicting rights and interests of landowner and entrant. In Section 846, the legislature has shifted some of the risk from the landowner to the entrant, apparently having decided that the social good of encouraging landowners to open their land to the public for recreational purposes outweighs the social cost of imposing the expense of injuries on the entrant to the land rather than on the landowner who may be in a position to prevent the injury. Section 846 is a statute in derogation of the common law, and should be narrowly interpreted.

We conclude that for an activity to fall within the term "hiking" as it is used in Section 846, it must be proved not merely that the user was "walking" across the property, but that the activity constituted recreational "hiking" within the commonly understood meaning of that word, i.e., to take a long walk for pleasure or exercise.

We agree with the Water District that the test should not be based on the plaintiff's state of mind. We believe, however, that such a determination must be made through a consideration of the totality of facts and circumstances, including the path taken, the length and purpose of the journey, the topography of the property in question, and the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.

There is no showing that Gerkin was "hiking" within the commonly understood recreational sense of the word. On the contrary, Gerkin and her sister crossed the Water District's property because it was the shortest route between their apartment and the supermarket and was a method regularly used by residents in the area. A triable issue of fact was raised as to whether Gerkin was engaged in "hiking" on the subject property such as to permit the Water District to invoke the immunity of landowners set forth in Section 846. It was error to grant summary judgment.

Reversed.

DANAHER v. PARTRIDGE CREEK COUNTRY CLUB,
Supreme Court of Michigan, 1981

Plaintiff Joseph O. Danaher went to the Partridge Creek Country Club to play golf with his son. Upon arrival he decided to walk over to a pond located on the golf course premises. He entered the golf course premises through an open delivery gate and went across a large field to get to the pond. When he arrived at the pond he tossed bread crumbs into the water to feed the fish and in general was viewing the pond to see if it offered any fishing potential. While engaged in this activity he was struck by a golf ball which originated from the fifth tee. The pond was not visible to golfers using the fifth tee. As a result of the accident, Danaher lost his right eye. The jury returned a verdict for Danaher and against the country club for $1,000,000.

Defendant sought an instruction based upon the Michigan Recreational Use Statute ("MRUS") which limits liability to one who is on the lands of another without paying to such other person a valuable consideration for certain purposes (such as, fishing, hunting, trapping, camping, hiking, sightseeing, and motorcycling) unless there is a showing of gross negligence or wilful and wanton misconduct. The trial court declined this request and instead instructed on ordinary negligence, ruling that MRUS was not intended to apply to private lands which are used for outdoor recreational uses, but which also constitute commercial enterprises.

In declining defendant's request, the trial court did not discuss the "valuable consideration" exception to the limitation of liability. The courts of appeals have held that it did apply where the consideration was in the form of an "entrance fee." Whether the "entrance fee" for entering the type of lands upon which the kinds of recreational activities described in the statute are carried out is the equivalent of the charge made to play golf need not be determined.

Our review of previous Michigan cases clearly shows that MRUS has been applied consistently to vacant but privately owned land. It has not been applied to circumstances such as those in the present case, where the land is held out for a recreational use to those who pay a fee. It is clear that the character of the land is important and in the present case, the trial court was correct in applying a standard or burden of proof that treated the plaintiff as a business invitee. Although plaintiff had not purchased the right to

play golf that day, he was a golfer who was viewing the premises prior to a decision to actually play golf.

An invitee is one who is on the owner's premises for a purpose mutually beneficial to both parties. The duty which an occupier of land owes an invitee is to exercise ordinary care and prudence to render the premises reasonably safe. A licensee is one who desires to be on the premises of another because of some personal unshared benefit and is merely tolerated on the premises by the owner.

A person who enters the land of another upon business which concerns the possessor of land and upon his invitation expressed or implied is considered an invitee. In some cases permission to enter upon the land was for a consideration. As to such a person the landowner owes a duty of ordinary care. There is a conflict of opinion on the exact definition of an invitee and the basis of the owner's liability. Two theories have developed, i.e., the "economic benefit" theory which embraces a business visitor and the "invitation theory." The economic benefit test imposes an obligation upon the occupier of land when he receives some actual or potential benefit as a result of the entry. The invitation theory imposes a duty based upon a holding out of the premises as suitable for the purpose for which the visitor entered. The Restatement of Torts 2d, Sections 332 and 343, adopts the economic-benefit theory and finds an invitee relationship and a duty to keep the premises safe if the landowner receives any economic benefit from the presence of the visitor or expects to derive any such benefit. Potential pecuniary profit to the possessor of the land is sufficient.

In other cases, we have adopted the invitational theory and find a basis for the liability to the invitee in a representation implied from the encouragement the landowner gives to others to enter to further one of his purposes. To this court, the terms "business invitee," "business visitor," and "invitee" are synonyms, and we have held that when a person enters upon the premises of another and there is a benefit to the other person by the entry or some mutuality of interest, the visitor is an invitee. We recognize a growing tendency of courts to enlarge the duty of landowners in respect to negligence and to minimize the distinction between licensees and invitees either by enlarging what constitutes an economic benefit or by adopting the broader test of the invitation theory.

The Michigan Recreational Use Statute must be considered as a special reversal or

exception to this tendency based upon a special public policy for a limited classification of users. The statute indicates that the landowner owes the ordinary duty of reasonable care to those entering upon his land for certain recreational purposes only if the permission to enter the land is granted for a valuable consideration. Therefore the statute is in derogation of the common law and requires a strict construction. In construing what is meant by "valuable consideration", it is appropriate to look to the legislative history of the section. When the section was enacted, the term "valuable consideration" could have been narrowly or broadly construed. If narrowly construed, only a monetary fee paid to the landowner would have constituted valuable consideration. If broadly construed, the term would have included non-monetary benefits and indirect economic benefits flowing to the owner from the recreational use of his land.

We think a reasonable interpretation of the term "valuable consideration" as used in the statute in light of its history and by its express language means such consideration which at common law could constitute the person entering upon the land as an invitee. Also, this section is in derogation of the common law and we must strictly construe it, which requires a broad construction of the term "valuable consideration." This consideration may be the conferring of a benefit upon the landowner or a mutuality of interest of the landowner and the entrant.

On the instant facts, we think the benefit the defendant expected to receive from increased sales from golfers and other prospective customers was sufficient "valuable consideration" for the general implied permission to the public to use the facilities.

Affirmed.

PRATT v. STATE OF LOUISIANA,

Court of Appeal of Louisiana, Third Circuit, 1981

This is a wrongful death and survival action growing out of the drowning of Mark S. Pratt and Darrell Ray Burgess at Indian Creek Reservoir and Recreation area. The trial court granted motions for summary judgment based on a state statute purporting to exempt or grant immunity from liability to owners of land used for recreational facilities. The statute does not apply to "an owner of commercial recreational developments or facilities." One of the principal issues is whether the recreational area at which the drowning occurred was a commercial development or facility. The trial court held it was not so, and thus that the defendants were exempt from liability from negligence.

The Indian Creek Reservoir and Recreational Area contains an artificial lake with adjacent recreational areas. The lake and facilities are located on land owned by the State through the Department of Natural Resources, Office of Forestry. That agency operates and maintains the facility under a contract entered into by the two public bodies.

The State contends that it is exempted from liability by the Louisiana Recreational User Statute, which reads in pertinent part:

> "Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby: 1) Extend any assurance that the premises are safe for any purposes; 2) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed; 3) Incur liability for any injury to person or property incurred by such person."

The State contends that the phrase "commercial recreational developments or facilities" should be read to equate a commercial recreational enterprise with an establishment run for profit. The State argues that the Indian Creek area is not run for profit and therefore is not to be considered a commercial recreational enterprise with an establishment run for profit.

In view of these conclusions, what factors render a recreational facility a commercial one?

The trial court worked the matter out on the basis of whether the enterprise contemplates the earning of a profit. In McCain v. Hackberry Recreation District, United States District Court, W.D. Louisiana, 1983, the federal district court, applying the Louisiana statute, reached a similar conclusion: "As to whether or not the pool is a commercial recreational development, this court is convinced that the pool does not meet the standards necessary to be so classified. As the Act indicates, the mere fact that some admission price is charged will not necessarily render a facility a commercial recreational development. The test of a facility's "commercial" nature is based on whether the facility was run primarily for profit. In this case, the District did not run the pool with the intention of generating a profit. In fact, an admission fee of only 25 cents to 50 cents was charged for use of the pool. The court is satisfied that these nominal charges do not indicate a managerial philosophy oriented toward profit maximization."

We too are convinced that in the context of the facts of the case before us, profit as a primary objective of the venture would be essential to render it commercial.

Plaintiffs place heavy reliance on the fact that fees are charged for use of the recreational facilities. Regarding this point some reasonable effect must be given to the use in the statute of the words "with or without charge." The critical words are: "an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes . . . does not thereby . . . (3) Incur liability for any injury to person or property incurred by such person." Clearly the use of the words "with or without charge" must be construed to mean that charging fees for use of recreational facilities does not in itself render the operation and maintenance of such facilities a commercial venture. Logically there would have been no reason to include these words in the statute unless it was for the purpose of providing that charging fees would not render an operation commercial. The provision becomes significant only when a fee is charged.

Thus we conclude that the Indian Creek Reservoir and Recreational Area is not a commercial enterprise. Under the circumstances it was the purpose and policy of the Legislature to provide non-liability of defendants for the acts of negligence alleged in plaintiffs' petition.

Answer 1 to PT - A

1)

1.

To: Tamara Scott
National Life and Casualty Insurance Company

Dear Ms. Scott:

We understand the concern you may have with regard to the high risk of a mountain biking path, given the potential for accidents. Given the research and the survey of relevant case law, we believe that the recreational use statute will apply to SKMR. We will address each of your concerns and explain how the the [sic] biking program will be operated.

Your first concern is that Columbia Civil Code Section 846, the recreational use statute, does not apply to mountain biking. Section 846 provides a landowner an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming upon the land. Under Section 846, an owner owes no duty of care to keep the premises safe for entry or use by others for recreational purpose or to give recreational users warning of hazards unless there is willful or malicious conduct or there was consideration for the use of the land.

The Supreme Court of Columbia has stated with regard to Section 846 that "the list does not purport to be complete, but is only illustrative... Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named." Schneider v. Mount Desert. The Schneider cou[r]t found that the statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. Thus, the statute encompasses all recreational activities. In Schneider, the plaintiff was on the premises to drink a cup of coffee, but the Supreme Court found that the manifest purpose of the preserve is recreational and whether the plaintiff entered to drink coffee or hike is immaterial.

The Schneider statutory construction may be inconsistent with the findings of the Columbia Court of Appeal which in 1982 found that Section 846 should be narrowly interpreted. Gerkin v. Saint Clara. However, the Gerkin court distinguished between walking across the property for some separate purpose from taking a long walk for pleasure or exercise. The latter would be considered recreational. The Gerkin plaintiff prevailed because she was walking across the defendant's land to get to a store and not for leisure or enjoyment. Thus, even when the statute is narrowly constructed, mountain biking would nonetheless be considered a recreational activity since there is little utilitarian purpose in taking a bike up to the mountain to ride it back down. Furthermore, Schneider is a

Columbia supreme court case decided 16 years after Gerkin, thus Schneider's holdings will be binding on any subsequent action.

Furthermore, the exceptions to Section 846, which takes away the owner's immunity, applies where the landowner gains "some immediate and reasonably direct advantage, usually in the form of an entrance fee." Johnson v. Unocol. In Jones v. U.S., the Fifteenth Circuit addressed the consideration issue under Section 846 and found that consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. Even though the plaintiff in Jones paid a fee to rent the equipment, the use of the land was without charge and the defendant was still entitled to the immunity.

Johnson court found that the purpose of Section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. "Courts should therefore construe the exceptions for consideration narrowly." A remote or potential benefit to the defendant does not constitute a benefit. SKMR may receive a remote benefit by having the mountain bike customers use their property since they will be using the nearby facilities owned or leased by SKMR. But this remote benefit will not be construed a "consideration" which requires "present, actual benefit bestowed or a detriment suffered." Even if other businesses gave a percentage of its gross receipts to SKMR, it would still not be a fee charged for the use of the land. See Jones.

You had mentioned Danaher v. Partridge, a Michigan case. Of course, the holding of a Michigan case is not binding in Columbia. Danaher recognized two tests the court may apply. The first is the economic benefit test which imposes an obligation upon the occupier of land when he receives some actual or potential benefit as a result of the entry. The second, the invitation theory[,] imposes a duty based upon a holding out of the premises as suitable for the purpose of which the visitor entered. Danahar applied the second theory finding liability where the plaintiff has paid no consideration so long as there was some benefit to the occupier. This case is inconsistent with the policies of the Columbia statute as explained in the cases cited above. The purpose of the Columbia statute was to encourage land owners to share with the public and the fact that the owner may receive some minute benefit as a result would have a chilling effect on the landowners. The Columbia courts have applied the economic benefit test and the Columbia supreme court specifically discussed actual benefit. "The landowner's duty to the nonpaying recreational user is, in essence that owed a trespasser under the common law as it existed before 1968." See Schneider. Thus the discussion as to invitee/licensee status of Danaher does not apply here.

Therefore, absent any willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity, SKMR would have no liability for injuries.

Your second concern is the possibility that the immunity does not apply to commercial settings. The cases aforementioned were not "commercial" in nature. They involved a land trust, a private foundation, open to the public, a picnic grounds in Johnson, and a national park. The Columbia Civil Code is silent as to its application in commercial

settings and does not exclude owners of commercial businesses within Section 846.

First, it does not appear that there is any exception to commercial businesses. The legislative intent in creating Section 846 was to encourage owners of land to open their property for use and enjoyment of the public. Here, SKMR has no duty or obligation to allow the general public to use its land without fee for their leisure. The legislation "decided that the social good of encouraging landowners to open their land to the public for recreational purposes outweighs the social cost of imposing the expense of injuries on the entrant to the land rather than on the landowner who may be in a position to prevent the injury." Gerkin. The legislation, if it had intended to exclude commercial businesses, would have done so as Louisiana has in a similar statute. No Columbia court has distinguished between a commercial and private owner. The statute has applied to private and public entities without making any distinction.

Second, even if Columbia were to distinguish commercial settings, SKMR may not be considered commercial in its activities with regard to the bike path. Louisiana has such a statute distinguishing commercial land owners. In Pratt v. Louisiana, the Louisiana Court of Appeals held that a commercial business is one that is run primarily for profit and a mere fact that some admission price is charged will not necessarily render a facility a commercial recreational development. "Profit must be a primary objective of the venture." Id.

Finally, I will outline how the mountain biking program will be operated at SKMR. The mountain is crisscrossed by snow-groomer access roads and beginner ski trials that would make excellent natural terrain for mountain biking. It is possible for SKMR to build single-track trials, which are very popular for mountain biking and would link up existing trails. SKMR currently charges no access fee to the trail. They have always allowed skier[s] to hike up the mountain without fee to enjoy the spring snow. Mountain bikers may access the trails by riding up or using the tram to get to the top and ride down. All visitors pay to ride the aerial tram. Visitors ride the tram to the summit where they can enjoy the view, lunch or dine at the summit restaurant and even hike down. SKMR would consider renting the bikes on the premises and the cyclists may also be able to rent them at the other shops in the village mall. The rentals would depend on whether it would expose SKMR to further liability under Section 846. The addition of the bike trails would allow SKMR to operate full-year, which is essential to retention and development of quality employees. The increase in revenue would allow SKMR to have commuter shuttles for their employees and on-site childcare.

Because the recreational use statute applies to SKMR, we believe the liability here would be minimal. Thank you for your attention to this matter[.]

Sincerely,

Applicant
To: Manuel Lopez

SKMR

Dear Mr. Lopez:

There are several ways that you can make the bike trail a huge success without incurring liabilities or paying exorbitant insurance premiums.

Access Fee

As noted by Kyle Mills, the marketing director, the income from increased parking, food service, and merchandise sales alone will exceed Operations' estimates of trail construction costs. Mr. Mills notes that even if you do not sell bikes, tram tickets or trail passes, SKMR would have substantial returns by attracting mountain bikers. The operations director, Sally Johnson, estimated a mere $35,000 of capital expenditures for the trail building and about $5,000 a year thereafter for maintenance. According to Ms. Johnson, a trail fee would require a construction fee of $144,000 for the kiosks and $172,000 per year to operate.

An access fee should not be charged to the mountain bike customers if you wish to receive the benefit of the recreational use statue. As discussed in the letter to Ms. Scott, if SKMR were to receive a "consideration" for the use of land, you would be exempted from the statute. The access fee would be a direct benefit for the use of the bike path and the little financial benefit you would gain would not be worth the high risk rating. Since according to Mr. Mills, trail access fees are not necessary for profitable operations and since charging such fees would greatly increase the cost of insurance, the access fees should not be charged. This is particularly true given the numbers provided by Ms. Johnson. Given the high insurance premium and potential liability coupled with high fees associated with the kiosks, SKMR would benefit greatly by foregoing the access fee.

Aerial Tram

If SKMR were to charge an extra fee for carrying the mountain bikes on the aerial tram, that may itself be considered a fee for the use of the land. Skiers pay for access to the land by buying lift tickets; the fee is not for the benefit of the lift but the fee gives them access to the land. Likewise, the surcharge to the mountain bikers may be considered an extra charge for the use of the land. Then we would face the same problem of receiving "consideration" for the use of the land. It would be considered a present actual benefit and SKMR may face the high insurance premiums.

Since SKMR charges a fee to everyone who wishes to get to the summit for any reason, the basic charge should not be considered a fee for the use of land. You had considered an all day pass for the bikers for $25.00, which may again be considered a fee for the use of the land, unless it can be established that the fee is a consideration for the tram, which has many other uses other than the use of the slopes. Furthermore, since people are free to walk, or hike up for free, it should not be a consideration to charge for

the tram.

However, given that SKMR receives [a] substantial amount of money by the bikers' spending, summer lodge gues[t] at $122 and nonguest at $37.00, it may be advisable not to charge more than any other person riding the tram, so as to avoid any future argument that the additional tram fee is a consideration for the bike trail.

Sale and rentals of bikes

Rental of the bikes would not take SKMR out of recreational use statute. A rental fee for equipment was not considered "consideration" for the use of the land by the Fifteenth Circuit. So long as the people are allowed equal free access to the trails when they bring their own mountain bikes, the rental fee cannot be a "consideration." No case has decided the issue on the sale of equipment, but so long as the sale of the bikes is separate from the use of the property, it cannot be consideration. Again, the important issue is that everyone be allowed equal free access regardless of where they get their bikes.

Thank you for your attention.

Sincerely,

Applicant

Answer 2 to PT - A

PERFORMANCE TEST

I. Letter to Insurance Carrier

Tamara Scott, Registered Agent
National Life and Casualty Ins. Co.

February 24, 2004

Dear Ms. Scott,

Our client, Mr. Manual [sic] Lopez, has requested we review your Rating Department's rating which found that Mountain Biking requires the highest risk rating. After doing extensive research, it is Snow King[']s position that the rating is incorrect.

As you know, Snow King would like to add Mountain Biking to its list of attractions without incurring skyrocketing insurance rates. Based on the set-up of the Mountain Biking attraction, it is our position that Mountain Biking will fall within Columbia's recreational use statute, which will significantly reduce the risk of liability, and according to your Rating Department, reduce the risk rating.

As you know, Columbia Civil Code Section 846 provides in part:

> "An owner... owes no duty of care to keep premises safe for entry or use by others for any recreational purpose... except this section does not limit liability... where consideration has been received."

We understand that it is the Rating [D]epartment's position that 1) Mountain biking does not fall within one of the specifically named activities, and 2) the statue[']s immunity does not apply to commercial operations. Based on our extensive research, we disagree.

I. §846 is not limited to specifically named activities

The Ratings Department has cited Gerkin in support of their theory that only specifically named recreational activities fall within protection of §846.

In Gerkin, the court held that §846 is in derogation of common law and should be narrowly construed. (At common law, a land owner owes its invitees a reasonable duty of care.) Gerkin held that a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislature, and that the legislature did not intend to immunize landowners from liability unless the use is "recreational".

Thus, Gerkin did not hold that only the named activities in §846 are recreational. Indeed,

a court must consider "the totality of the circumstances including the path taken and purpose of the journey[']. The plaintiff's subjective intent is not controlling but relevant. Therefore, Gerkin actually provides that the language is not controlling, only legislative intent and the purpose of the activity. See also Jones.

In fact, the Supreme Court of Columbia specifically held in a subsequent case that the list of named activities in §846 "does not purport to be complete, but is only illustrative." Schneider v. Mount Desert Island. Under the doctrine of ejusdem generis, when a statute contains a list or catalogue of items, the court should examine it in reference to each other. Schneider held that §846's list of activities have no connection since activities range from risky to sede[n]tary pursuits, and some require large tracts of open space, while others don't. Therefore, the Rating Department is incorrect in arguing that the statute only applies to named activities.

The relevant issue is whether Mountain Biking falls within §846 because it is recreational in character, regardless of whether it was named. Because the list encompas[s]es activities that are risky and done in open space, Mountain Biking is similar in nature to those on the list. See Schneider. Further, because the legislature wants landowners to invite people to use their premises, §846 recreational definition should be construed pursuant to legislative intent.

II. §846 does not encompass recreational activity where consideration has been paid

Our client intends to offer the Mountain Biking trails free of charge to the public. They do not intend to charge an admittance fee to use the trail. However, they do require a fee for all persons who use the aerial tram, but will not charge extra to mountain bikers. Those who wish to mountain bike will have to use the tram to access the bike trails. The fee is $10 for one ride and $25 for an all day tram ticket. Also, there is a general parking fee.

We understand it is your Rating Department's position that the statute's immunity does not apply to commercial operations. They rely on Danaher and Pratt in support of their position.

Your department incorrectly relies on Pratt. Pratt is a case from the C of A of Louisiana whose recreational user statue excludes from protection "commercial recreational facilities." Our Columbia statute does not. Therefore, reliance on Pratt is misplaced.

The Ratings Department relies on Danaher, which provides that the term "consideration" is bound where a landowner and the entrant have a mutual benefit, and that a landowner's expected increased sales constitute "consideration." However, Danaher was a case decided by the Michigan Supreme Court. Our Columbia Court has held that §846's consideration requirements should be narrowly construed.

In Johnson, the court held that a hold harmless clause does not constitute sufficient consideration as to take the defendant out of protection of §846. Indeed, consideration must consist of an actual present benefit.

In Moore, the Columbia court held paying taxes is not enough to constitute consideration as to exempt a govt. park from §846.

It is clear[,] based on these cases, that the mere fact that our client may receive some incidental benefits is not enough under Columbia Law.

Most significant, the C of A 15th Circuit held that a landowner was covered by a recreational use statute even though he rented inner-tubes to kids who used the park without paying an entrance fee. Thompson.

As you know, our client does not intend to charge an admittance fee to use the trails. Just as a landowner could rent an inner-tube, our client can charge for incidentals such as tram access and parking without risking exemption from §846. See Thompson.

In closing, because Mountain Biking falls within the statutorily protected activities of §846 and the park does not intend to make a profit from trail access, it is our position that our client is protected by §846. Therefore, our client's rating should be reduced.

As always, our client appreciates your efforts in resolving this matter. We look forward to your timely response.

X Applicant

II. Memo to Client

To: Manuel Lopez

From: Margaret Thompson, Esq.

Re: Advice on operating Mountain Bike program

Mr. Lopez,

Pursuant to your request, we have reviewed relevant case law and[,] based on our findings, suggest you design your mountain bike program according to our recommendations, in order to fall within Columbia's Recreational use statute.

Your mountain biking program sounds exciting and well thought out. I have reviewed your letter as well as letters you forwarded from Ms. Johnson and Kyle Mills on their ideas for the program. Although we can never guarantee that a statute will apply, I believe that we can maximize the likelihood that the statute will apply.

a. Access fee to Trails

You indicated that a trail fee would involve designing fee collection points and hiring personnel to collect such fees. Currently, bikers access the trails for free on their own. Sally Johnson indicates that a trail fee would require a minimum of 4 access kiosks which costs $144K in construction and $172K annually to operate, which includes a safety patrol officer. Kyle Mills indicates that even if no trail fee is charged, your park still stands to economically benefit.

Based on our legal research, it is probably a bad idea to charge a trail fee. Columbia courts have held that landowners are not covered under the statute when admittance fees are charged. Because your company still stands to benefit without charging a fee, you should not charge a trail fee. You will also save on insurance costs. It actually appears it is more profitable to not [sic] charge a fee.

b. Mountain Bikes on Tram

You have suggested imposing an additional fee for those who bring their bikes on the tram to access the trails. Because all people are charged a tram fee, it is safer to not [sic] charge extra to mountain bikers. This may be viewed as an admittance fee to enter the trails rather than a general fee for all persons. In fact, Kyle believes that there is no need for an additional fee and that bikes can be hooked on the a[e]riel tram. Again, your savings on insurance are far more beneficial than a simple slight increase in fee would be to a[e]riel tram bike riders.

c. Sell/Rent Bikes

I understand you would eventually like to sell bikes or rent them. There does not appear to be a problem with doing that. However, the park should still allow people to bring their own bikes. Requiring people to use or rent yours may be viewed as an admittance fee. By allowing people to bring their own, there does not appear to be a conflict with the statute.

In closing, I would like to thank you for your business. I enjoy our long standing relationship and look forward to further assisting you in implementing the program should my assistance be needed.

Very truly yours,

X Applicant

THURSDAY AFTERNOON
FEBRUARY 26, 2004

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

IN RE PROGRESSIVE BUILDERS, INC.

IN RE PROGRESSIVE BUILDERS, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States, and refers to the fictional State of Franklin, another one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the task you are to complete.
5. The **Library** contains the legal authorities needed to complete the task. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

COYLE & COOPER, LLP
6620 DWIGHT PROMENADE
SPRING VALLEY, COLUMBIA 55510

MEMORANDUM

To: Applicant
From: Vivian Coyle
Date: February 26, 2004
Subject: **In re Progressive Builders, Inc.**

We have been retained by John May, the owner of Progressive Builders, Inc. (PBI), a residential property construction company, to give ongoing legal advice.

In the course of my initial interview with Mr. May, a question arose about a form contract that PBI has used for the past several years outside of Columbia, and specifically about its provision for arbitration of disputes. Mr. May has tentatively agreed to build a house in Columbia for the restaurateur Pier Nittardi, and wants to use the arbitration provision here. I have made an appointment to discuss the matter with him tomorrow, and have told him that I will have a letter delivered to him beforehand to help guide our discussion.

Please prepare, for my signature, a pre-counseling letter for delivery to Mr. May, in which you do the following:

1. State your understanding of the goals that Mr. May seeks to achieve by using the arbitration provision.

2. In light of Mr. May's goals, discuss the likely consequences of keeping the arbitration provision as-is.

3. Identify and discuss possible steps that Mr. May might take when preparing to enter into any particular contractual relationship, such as that with Mr. Nittardi, in order to maximize the chances that the arbitration provision would be enforceable in Columbia as-is.

4. Identify and discuss possible changes Mr. May might make to the arbitration provision to most fully achieve his goals and to most likely render it enforceable in Columbia.

In preparing the pre-counseling letter, remember that Mr. May is a layperson. Although you must discuss the law, you should do so as clearly and concisely as possible, with a recognition that you are not writing to an attorney.

TRANSCRIPT OF INTERVIEW OF JOHN MAY AND FRANK MAY

VIVIAN COYLE: With your permission, I'll be tape-recording our conversation today?

JOHN MAY: Yes.

FRANK MAY: Of course.

COYLE: Let's back up and summarize how we got to where we are now. John, you were referred to our firm by Peter Padilla, of Padilla Construction Company, one of our clients.

JOHN MAY: That's right. I wanted to establish an ongoing relationship with a law firm in Columbia that had experience with the residential property construction industry. To avoid any legal problems in the first place, you understand, and then to avoid wasting time and money in educating some lawyer on an emergency basis in the event that some such problem should in fact arise.

COYLE: Prior to turning on the tape recorder, John, you and I executed the standard written retainer agreement provided by the Columbia State Bar.

JOHN MAY: Yes, we did.

COYLE: Why don't you state the gist of what you told me about PBI?

JOHN MAY: Sure. Frank and I started PBI here in Spring Valley in Columbia in the mid-1970's. We incorporated it here; we'd always been its sole shareholders, 50-50; I'd always been the President and he'd always been the Vice-President.

COYLE: And what does PBI do?

JOHN MAY: We're a construction company that does residential property. Earlier on, we did small repairs, a bit more complex than handyman work, but then we started to do remodels and eventually construction of new houses.

FRANK MAY: By the early 1980's, we had concentrated on major remodels and new construction. That's all we've done ever since.

COYLE: Just to clarify, you work only on residential property?

FRANK MAY: That's right. When we first started out, we took any job we could get, doing anything we could do, or thought we could do, whether it was residential or commercial or even industrial. But not since the early '80's.

COYLE: More clarification: You work on single-family residences or duplexes or apartments . . . ?

FRANK MAY: No, just single-family residences. Again, in the early days we did anything and everything. But since the early '80's, only residential, and only single-family.

COYLE: By the '90's, what had happened?

JOHN MAY: Politics were heating up here in Columbia and so were property values. Each of us was married by then and had children. With the cost of housing, the only way we could move up was to move out. And there was the State of Franklin right next door. It was somewhat backward. But you could buy land for a song.

COYLE: And the politics?

JOHN MAY: Right. With the tightening of building requirements and environmental regulations and assorted red tape, it took more time and money to get anything built. And that meant that the business was becoming less profitable.

FRANK MAY: So, we both moved to Franklin with our families and moved the business there too. Our first major jobs were building our own houses.

COYLE: Let me return to the politics. Didn't one of you mention something about what you called the "litigation climate"?

JOHN MAY: I did. The "litigation atmosphere." When we started out in the mid-'70's, there was relatively little suing and being sued. I'm not saying there were no disputes. In construction, there're always disputes, especially when you're remodeling someone's house or building him a new one. But we just worked things out, working with each other, the builder and the owner. As the '90's rolled around, that had begun to change. At job sites you'd hear, "See you in court," more often, I'll bet, than you hear it here at your law firm.

COYLE: Well . . .

FRANK MAY: John's exaggerating somewhat, but not much.

COYLE: But did you two have any bad experiences?

JOHN MAY: We didn't, but our friends in the business did, including Pete Padilla, who recommended you to me. Look, our business is construction and not law. From what I've heard, legal problems don't simply cost you a lot of money for lawyers. What's worse, they can pull you away from work for a huge amount of time, and then distract you when you finally get back to work and make you much less efficient.

COYLE: And so . . .

JOHN MAY: And so, we went to Franklin, where the atmosphere wasn't so sue-crazy, at least not then.

COYLE: You went there in the early '90's?

FRANK MAY: That's right. Since then, we continued our concentration on major remodels and new construction, but moved to the higher end as more and more wealthy people from around the country have looked to Franklin for their second or third homes.

COYLE: What do you mean by "higher end"?

JOHN MAY: Contract prices of between $450,000 and $850,000 and up.

COYLE: Okay. Your work has been in Franklin exclusively?

JOHN MAY: Yes, except for a job or two now and again in Columbia, as a favor for a friend, like the house we built two years ago for Pete Padilla's daughter Sophia, who is Frank's goddaughter.

COYLE: What about your subcontractors, have you drawn them exclusively from Franklin?

JOHN MAY: Just about. We've always subcontracted as little work as possible. It's sometimes been a pain to do a lot ourselves, but it's more of a pain to lose control of quality. Of course, we still had to subcontract, particularly the specialty trades, like plasterers and ornamental metal workers. Also foundation work, which demands heavy equipment and lots of concrete and rebar. But all that's mostly local.

COYLE: But here you are in Columbia.

JOHN MAY: Right. Demand for our kind of high-end residential construction has been heating up in this area in Columbia for quite some time. The rich folks who were flocking to Franklin from around the country for their second or third homes have started flocking here as well. Demand hasn't cooled down much in Franklin — but this business is cyclical. So I decided to move back into the Columbia market.

FRANK MAY: Not me, though. John's moved back with his family. He's already set up an office here in Spring Valley. I sold him my interest in PBI. With the money, I've started my own business in Franklin, Frank May Construction, Inc.; I'm working out of our old office there. Now PBI is all John's.

COYLE: That's about all of the background, isn't it? John, your move back led you to talk to Pete Padilla, and Pete Padilla led you to our firm.

JOHN MAY: Right.

COYLE: And in the course of our conversation, you told me about some of your general concerns.

JOHN MAY: Right again. I'm a builder, not a lawyer, and I need to avoid litigation and its costs if I want to stay profitable. Even Franklin's become more sue-crazy. I just want to make sure I don't make any missteps as I come back here.

COYLE: It was in this connection that you happened to mention your form contract and to give me this copy of it. Right?

JOHN MAY: Yes. We've been lucky over the years. The contract's been part of our luck. You might not believe it, but we've never been sued. The main reason is that we've done very good work, and done it on time and within budget. We've also made sure that we fix our own mistakes on our own initiative. We provide old-fashioned honest value, and that's

our reputation. Our contract is simple and uncluttered, and communicates the message of honest value: It specifies what you pay and what we do. That's just about it.

COYLE: Plus arbitration.

JOHN MAY: Plus arbitration. That's important to me. I've just got to avoid the costs of litigation, both the money costs and the time costs. I've seen how they've eaten up friends of ours, builders whose businesses were more profitable than ours, until one or two big lawsuits hit. What I also worry about are punitive damages. All the time I read about some business that screws up a few thousand dollars' worth, and then has to pay a few million in punitive damages. I couldn't survive that. You can't run a business with an open-ended risk like that. You know I can't get insurance to cover that, don't you?

COYLE: Yes, I do. But let me ask you this question: Why do you specify arbitration by the National Arbitration Organization ("NAO")?

JOHN MAY: Two reasons. One is that the NAO was founded in Columbia around the time we started out in the mid-'70's, and we wanted to support a local business. The other is that it focused on construction disputes.

COYLE: How much does the NAO charge for arbitration?

JOHN MAY: You know, I really don't know. Years ago, the first time I tinkered with the arbitration provision and inserted the NAO clause, I think I had a list of charges. But we never became involved in any arbitration with our clients. Whatever disputes arose, we settled them ourselves, by give and take.

COYLE: Let me back up for a moment. You said you "tinkered" with the arbitration provision. Did you actually draft the arbitration provision or any other part of the contract?

JOHN MAY: I wouldn't use the word "draft." Over the years, I've seen lots of contracts. I just took shreds and patches and tried to sew them together to make a whole contract. And I'd mend those pieces from time to time. Basically, over the years, I took out as many words as I could, and simplified the ones that were left.

COYLE: Did you, or do you, negotiate with clients about the terms of the contract?

JOHN MAY: Well, there are all those blanks — you have to come to some agreement with the client on the work to be done, the cost, the schedule, you know.

COYLE: I know. But in addition to filling in the blanks, do you negotiate with clients about the terms of the contract?

JOHN MAY: Well, I don't know how to answer that. I can't remember anybody wanting to change anything. If they get the work they want, at the price they want, on the schedule they want, well, that's about it.

COYLE: What about the arbitration provision? It requires the client to arbitrate but not you.

JOHN MAY: No, I can't remember anybody wanting to change that either. I'd never thought about whether I'd be required to arbitrate if I had a claim. The arbitration provision doesn't say so, but I'd never thought about it.

COYLE: Before I forget, let me add that it's my understanding that your concerns about the contract have not arisen in the abstract.

JOHN MAY: Sorry. That's right. I'm finalizing an agreement which I hope to wrap up in a week or two, to build a house for Pier Nittardi in Bradfield, which is only a few miles away from Spring Valley, here in Columbia.

COYLE: Nittardi is the chef and owner of *Il Pavone*, a restaurant there, isn't he?

FRANK MAY: Yes. John and I have known him for quite some time. He's remarrying his ex-wife Jean.

JOHN MAY: This project will be bigger than any of the jobs Frank and I did together. It couldn't be more important.

COYLE: And before you reduce it to contract, you want to know what contract to reduce it to?

JOHN MAY: That's right.

COYLE: Fine. Before we conclude, let's sum up what you want to do, and what you want me to do, with respect to the contract.

JOHN MAY: Basically, I want to use the contract in Columbia, just as we used it in Franklin, and of course I want to use it for Pier's house.

COYLE: Without modification?

JOHN MAY: Yes, without modification, if possible. I want the contract to change only as necessary. The important thing is for the contract to be understandable and to get the job done.

COYLE: I understand. But Columbia's law is different from Franklin's. So even if it didn't need any fixing there, it might need some fixing here. That will depend on all sorts of things. For instance, will your subcontractors come from Columbia? What about your suppliers?

JOHN MAY: Who knows? As I said, in Franklin we used mostly Franklin subs. Also mostly Franklin suppliers. It's conceivable I could use some of those Franklin folks in Columbia, but it's 200 miles away, so I don't know how likely it is.

COYLE: Give me some time to research the issues. Can you come by again perhaps on February 27th so that we can discuss the matter?

JOHN MAY: Sure. How about 2 o'clock?

FRANK MAY: There's no need for me to return. I'm the fifth wheel, since PBI is all John's now. I just came today because John asked me, to help him with any background you might need to know. Also, I've got to get back to a job in Franklin.

COYLE: Frank, that's fine with me. Thanks for coming. John, two o'clock is good for me too. By noon on February 27th, I'll have a letter delivered to you to assist in focusing the discussion.

JOHN MAY: That'll be fine. Thanks so much.

COYLE: You're welcome. Good-bye.

FRANK MAY: Good-bye.

JOHN MAY: 'Bye.

PROGRESSIVE BUILDERS, INC., CONTRACT

1. Parties to this Contract:
    A. Contractor:
        Progressive Builders, Inc.
        4333 Skillman Avenue, Woodhaven, Franklin 65377
        (656) 425–7900, (656) 425–7905 (fax)
    B. Property Owner:
        _____

(Name)

_____ (Address)

_____ (Telephone and Fax Numbers)

2. Location of Work:

_____

3. Completion Dates:
    A. Estimated date of commencement: _____
    B. Estimated date of completion: _____

4. Contract Price: $_____

5. Method and Schedule of Payment:

_____ Note: The initial down payment must equal at least one-third of the contract price.

6. Description of the Work:

_____

7. Warranty: Contractor provides the following warranty to Property Owner, to the exclusion of all other warranties, express or implied: Contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable to this location; and constructed in a skillful manner and fit for habitation.

8. Arbitration of Disputes: If a dispute arises concerning the provisions of this contract or its performance, Property Owner agrees: (1) to submit any such dispute to binding and final arbitration under the rules of the National Arbitration Organization (NAO); and (2) to limit any relief that may be awarded by the NAO to compensatory damages. Contractor and Property Owner agree to bear the costs of arbitration equally.

9. Additional Provisions:

A.

_____

B.

_____

C.

_____

10. Contract Acceptance:

Signature of Contractor:

_____

Date: _____

Signature of Property Owner:

_____

Date: _____

THURSDAY AFTERNOON
FEBRUARY 26, 2004

California
Bar
Examination

Performance Test B
LIBRARY

IN RE PROGRESSIVE BUILDERS, INC.

LIBRARY

SELECTED PROVISIONS OF THE FEDERAL ARBITRATION ACT

Section 1. *Definitions*.

*　　*　　*

"Commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

*　　*　　*

Section 2. *Policy in Favor of Arbitration*.

A written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* *

SELECTED PROVISIONS OF THE COLUMBIA CODES

Section 3282 of the Columbia Civil Code. *Compensatory Damages*.

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called compensatory damages.

* * * * * * *

Section 3294 of the Columbia Civil Code. *Punitive Damages*.

In an action sounding in tort, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to compensatory damages, may recover punitive damages for the sake of example and by way of punishing the defendant.

* * * * * * *

Section 1281 of the Columbia Code of Civil Procedure. *Policy in Favor of Arbitration*.

A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

* * * * * * *

Section 7191 of the Columbia Business and Professions Code. *Arbitration and Residential Property Work and Construction*.

(a) If a contract for construction of, or work on, residential property with four or fewer units contains a provision for arbitration of a dispute between the parties, the provision shall be clearly titled "ARBITRATION OF DISPUTES," and shall be set out in capital letters.

(b) Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a), and immediately following that arbitration provision, the following shall appear, and shall be set out in capital letters:

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF

DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY COLUMBIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

(c) Notwithstanding any law to the contrary, a provision for arbitration of a dispute between parties to a contract for construction of, or work on, any residential property with four or fewer units that does not comply with this section is not enforceable against any party other than the party performing the construction or work.

* * * * * * *

Section 7195 of the Columbia Business and Professions Code. ***Residential Property Work and Construction and Treble Damages as Punitive Damages.***

In an action sounding in tort arising from construction of, or work on, residential property with four or fewer units, where it is proven by clear and convincing evidence that the person or entity performing the construction or work has been guilty of oppression, fraud, or malice, the person or entity for which the construction or work is performed, in addition to compensatory damages, may recover an additional amount up to three times the amount of compensatory damages as punitive damages for the sake of example and by way of punishing the person or entity performing the construction or work.

Doctor's Associates, Inc. v. Casarotto

United States Supreme Court (1996)

We granted certiorari in this case to settle an important issue relating to the Federal Arbitration Act.

A dispute arose between parties to a standard franchise contract for the operation of a Subway sandwich shop in Montana.

Paul Casarotto, the franchisee, sued Doctor's Associates, Inc. (DAI), the franchisor, in Montana state court.

The Montana trial court stayed the lawsuit pending arbitration pursuant to an arbitration provision set out in ordinary type on page nine of the franchise contract.

The Montana Supreme Court reversed, holding that the arbitration provision was unenforceable because it did not meet a requirement under section 27-5-114(4) of the Montana Code that "[n]otice that a contract is subject to arbitration" must be "set out in underlined capital letters on the first page of the contract." DAI argued, unpersuasively, that section 27-5-114(4) of the Montana Code was preempted by section 2 of the Federal Arbitration Act pursuant to the Supremacy Clause of Article VI of the United States Constitution, inasmuch as section 2 of the Federal Arbitration Act declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Although DAI's argument failed to persuade the Montana Supreme Court, it succeeds in persuading us. Section 27-5-114(4) of the Montana Code with its special notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with, and is therefore displaced by, section 2 of the Federal Arbitration Act. Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration provisions without contravening section 2 of the Federal Arbitration Act. But courts may not invalidate arbitration provisions under state laws applicable *only* to arbitration provisions — whether such laws cover arbitration provisions in *all* contracts *generally*, or merely touch arbitration provisions in *some* contracts or classes of contracts *specifically*. By enacting section 2 of the Federal Arbitration Act, Congress precluded states from singling out arbitration provisions for suspect status. Section 27-5-114(4) of the Montana Code directly conflicts with section 2 of the Federal Arbitration Act because the state law conditions the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally. In concluding to the contrary, the Montana Supreme Court erred prejudicially.

Reversed and remanded.

Sisters Of The Visitation v. Cochran Plastering Company

Columbia Court of Appeal (1997)

The Sisters of the Visitation ("The Sisters") appeal from a judgment of the Superior Court of Mosswood County enjoining an arbitration proceeding initiated by them in a dispute with Cochran Plastering Company, Inc. ("Cochran"). The Sisters are a Roman Catholic religious order that owns and operates a monastery that is a registered landmark under the Columbia Registered Landmarks Act. The Sisters began a restoration project to repair and restore the monastery's chapel. The Sisters engaged the services of Hall Baumhauer Architects, P.C., a Columbia company, and entered into contracts directly with contractors, from Columbia and several other states, within specific trades included in the scope of work for the project.

The Sisters entered into a contract with Cochran, a Columbia company, for Cochran to repair cracks in the plaster in the ceilings and wall of the chapel, to cast and install plaster moldings, and to pin up all loose moldings with screws and washers. This contract included an arbitration provision, pursuant to which the Sisters filed a demand for arbitration; in the demand for arbitration, the Sisters claimed that Cochran had negligently damaged decorative paintings on the surface of the chapel ceiling and walls and that Cochran had failed to complete its work. The Sisters claimed a total of $525,000 for restoration of paintings they claimed Cochran had damaged and $50,000 for the completion of the repair work.

Cochran filed an action in the Superior Court for an injunction to stop the arbitration proceeding. Cochran claimed as follows: The arbitration provision of its contract with the Sisters is unenforceable under the terms of the Columbia Registered Landmarks Act; Section 2 of the Federal Arbitration Act does not displace the Columbia Registered Landmarks Act through operation of the Supremacy Clause of Article VI of the United States Constitution because Section 2 of the Federal Arbitration Act is inapplicable inasmuch as the contract does not evidence a transaction involving interstate commerce. Accepting Cochran's claim after a bench trial, the Superior Court rendered judgment in its favor. The Sisters appealed. We now affirm.

Section 2 of the Federal Arbitration Act states that "[a] written provision in a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

There is no dispute that, under the Columbia Registered Landmarks Act, the arbitration provision of the contract between the Sisters and Cochran would be unenforceable because the act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Neither is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, the arbitration provision of the contract between the Sisters and Cochran would in fact be enforceable because there is no reason to refuse enforcement, such as unconscionability, based on contract law generally. Nor is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, it would displace the Columbia Registered Landmarks Act, which is a state law that "touch[es] arbitration provisions in *some* . . . classes of contracts *specifically*" (*Doctor's Associates, Inc. v. Casarotto* (U.S. Supreme Ct. 1996), italics in original).

As we shall explain, we believe that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce.

At the outset, we state what is now settled: A contract evidences a transaction involving interstate commerce only if it affects such commerce substantially. The presence or absence of substantial effect on interstate commerce depends on the totality of the circumstances — to which we now turn.

First, the Sisters and Cochran are both Columbia residents, and the contract was to be performed in Columbia. The only affiliation of either of the parties with any out-of-state person or entity is found in the relationship between the Sisters and the Roman Catholic Church. We are simply not prepared to recognize that relationship as involving interstate *commerce*. Hence, we discern no substantial effect on interstate commerce on that basis.

Second, although Cochran brought tools and equipment to the project site, it obtained them within Columbia. In connection with the project, a substantial contract for the rental of scaffolding was placed with an out-of-state party; *that* contract, however, did not involve Cochran but was let directly by the Sisters. No substantial effect on *interstate* commerce can be developed based on Cochran's acquiring in *intrastate* commerce any tools and equipment to be used in the performance of its contract.

Third, Cochran employed only Columbia residents as workers. The contract apparently specified the use of plaster and washers that were required to be obtained from a materials company in Ohio, and it called for insurance, which was obtained from an

insurance company in New York. However, the record shows that little of the amount the Sisters paid Cochran is allocable to the cost of these materials and services. Hence, Cochran's contract does not substantially affect interstate commerce by reason of a dependence upon materials and services moving in interstate commerce.

Fourth, the object of the services provided by Cochran is incapable of subsequent movement across state lines. The Sisters contracted with Cochran to perform plaster work in the monastery chapel in Mosswood County, Columbia. Cochran's work becomes a part of the chapel's structure, and cannot be detached and moved across state lines. The fact that people from out of state might visit the site is too tenuous a connection with interstate commerce. Therefore, we conclude that Cochran's work will not have a substantial effect on interstate commerce on this basis.

Fifth and final, we note that the Sisters entered into a series of contracts for the restoration of the monastery chapel related to their contract with Cochran. But the fact that several of the related contracts might have a substantial effect on interstate commerce does not mean that the contract between the Sisters and Cochran itself has any such effect.

Therefore, we conclude that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce for, under the totality of the circumstances, it does not affect such commerce substantially.

It follows that under the Columbia Registered Landmarks Act — which is *not* displaced by Section 2 of the Federal Arbitration Act — the arbitration provision of the contract between the Sisters and Cochran is unenforceable because the Act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Affirmed.

Stirlen v. Supercuts, Inc.

Columbia Court of Appeal (1997)

The Superior Court of Santa Fe County denied a motion to compel arbitration pursuant to the arbitration provision of an employment contract on the ground that that provision was unenforceable because it was unconscionable. We find its order correct and affirm.

Defendant Supercuts, Inc. ("Supercuts"), a Delaware corporation that conducts a national hair care franchise business, appeals from an order, which is statutorily appealable in advance of judgment, by which the Superior Court denied its motion to compel arbitration of a dispute relating to its termination from employment of plaintiff William N. Stirlen, its Vice-President and Chief Financial Officer.

Stirlen commenced this action with a complaint that alleged causes of action based on various contract and tort theories, and that sought compensatory damages in contract and punitive as well as compensatory damages in tort.

Supercuts moved to compel arbitration under the arbitration provision of its employment contract with Stirlen. The Superior Court denied the motion, as we have said, on the ground that the arbitration provision was unenforceable as unconscionable. Supercuts timely appealed.

We shall assume, as have Stirlen and Supercuts, that the arbitration provision of Stirlen's employment contract with Supercuts is subject to the Federal Arbitration Act inasmuch as the employment contract itself evidences a transaction involving interstate commerce within the meaning of Section 2 of the Act.

But we note that, under the Federal Arbitration Act, the question whether, in the words of Section 2, a particular arbitration provision is "valid, irrevocable, and enforceable," or instead presents "grounds . . . for [its] revocation," is answered not by the act itself, but in the first instance by the law of the forum — which in the present case is Columbia.

The arbitration provision of Stirlen's employment contract with Supercuts — which Supercuts itself drafted in its entirety — states, in pertinent part, as follows: "In the event there is any dispute arising out of Executive's [i.e., Stirlen's] employment with Company [i.e., Supercuts], the termination of that employment, or the employment contract itself, whether such dispute gives rise or may give rise to a cause of action in contract or tort or based on any other theory or statute, Company and Executive agree that exclusive recourse for Executive shall be to submit any such dispute to final and binding arbitration and to obtain, if Executive prevails, compensatory damages only."

Under the law of Columbia, a contract, or a provision of a contract, is unenforceable if it is unconscionable. Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present.

The Superior Court determined that the arbitration provision of Stirlen's employment contract with Supercuts was procedurally unconscionable because the contract itself evidenced lack of freedom of assent because it was a contract of adhesion. We agree.

A contract of adhesion is a contract, usually with standard terms, that is drafted and imposed by a party of superior bargaining strength, and that allows a party of lesser bargaining strength only to take it or leave it.

Supercuts maintains that its employment contract with Stirlen is not a contract of adhesion because it did not have superior bargaining strength. Supercuts emphasizes that Stirlen was not a person desperately seeking employment, but a successful and sophisticated corporate executive. Supercuts sought him out and "hired" him "away" from a highly paid position with a major corporation "by offering him an annual salary of $150,000, and then agreeing to remunerative 'extras' not included in the standard executive employment contract," such as generous stock options, a bonus plan, a supplemental retirement plan, and a $10,000 "signing bonus."

We are not persuaded. Stirlen appears to have had no realistic ability to modify the terms of his employment contract with Supercuts. Undisputed evidence shows that the terms of the contract, which were cast in generic and gender-neutral language, were presented to him after he accepted employment and were described as standard provisions that were not negotiable. The only negotiating between Supercuts and Stirlen regarding the conditions of Stirlen's employment related to the stock options, bonus and retirement plans, and other "extras," but these matters were the subject of a separate letter agreement Stirlen executed more than a month before he signed the employment contract. Moreover, the letter agreement adverted to the "standard employment contract" Stirlen would be required to sign, noting that the terms of the letter agreement did not supplant but were "in addition to the standard provisions of the contract." Supercuts does not dispute Stirlen's assertions that the employment contract was presented to him on a "take-it-or-leave-it basis," and that every other corporate officer was required to sign, and did in fact sign, an identical agreement.

The Superior Court also determined that the arbitration provision of Stirlen's employment contract with Supercuts was substantively unconscionable because the provision itself was harsh and oppressive because it was unduly one-sided. Here too, we agree.

The arbitration provision of Stirlen's employment contract with Supercuts cannot be characterized other than as unduly one-sided. We shall overlook the fact that the provision expressly requires Stirlen to arbitrate any dispute that he may have with Supercuts, but impliedly allows Supercuts either to arbitrate or to litigate any dispute that it may have with Stirlen, as it chooses. Instead, we shall focus on this fact alone: The provision allows Supercuts — in effect, if not in terms — to engage in any and all "oppression" and "fraud" and "malice" against Stirlen, without running the risk of any award of even the most minimal punitive damages under Section 3294 of the Columbia Civil Code. Such a provision is unduly one-sided as a matter of law. It is settled in Columbia that any and all contracts or contractual provisions that exempt a contracting party from responsibility for its own oppressive, fraudulent, or malicious conduct are against the policy of the law.

In arguing to the contrary, Supercuts relies on several decisions of courts of sister states. Its reliance is misplaced. Each of those decisions involves the law of a state other than Columbia. More importantly, each deals with an arbitration provision that contains a mechanism for the award of treble damages, which are a species of punitive damages, inasmuch as by definition they amount to three times the compensatory damages in question, and are apparently given "for the sake of example and by way of punishing the defendant" (Colum. Civ. Code, § 3294). No such mechanism, however, is present here.

Lastly, we note that the Superior Court was not obligated to attempt to salvage any part of the arbitration provision of Stirlen's employment contract with Supercuts that might itself *not* be unconscionable. It has long been established that a court need not aid a party who has drafted an unconscionable contract, or contractual provision, by effectively redrafting what is objectionable into something unobjectionable. Indeed, we believe that a court *should* not provide any such aid even if it were otherwise minded to do so. A party who seeks the unmerited benefit of unconscionability must not be allowed to avoid its deserved burden.

For the reasons stated above, we conclude that the Superior Court correctly denied Supercuts' motion to compel arbitration because the arbitration provision of Supercuts' employment contract with Stirlen was unenforceable as unconscionable.

Affirmed.

Myers v. Scamardo Termite Control

Columbia Court of Appeal (1998)

In this action under the Columbia Consumer Sales Act, the Superior Court of Lucas County issued an order (1) granting a motion by the plaintiff for partial summary judgment declaring that an arbitration provision of a contract was unenforceable on the ground of unconscionability, and (2) denying a motion by the defendant to stay the action pending arbitration pursuant to that provision.

Under the Columbia Consumer Sales Act, an order determining the enforceability of an arbitration provision of a contract against a claim of unconscionability is appealable.

The defendant timely appealed the Superior Court's order.

For the reasons set out below, we shall affirm.

The plaintiff, Judith Myers, an elderly woman with limited resources, and defendant, Scamardo Termite Control (STC), entered into a contract: STC agreed to eradicate termites that had infested Myers' house; and, in exchange, Myers agreed to pay STC $1,300. The contract contained an arbitration provision, which reads as follows: "The Consumer and STC agree that any controversy or claim between them arising out of or relating to this contract shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the rules and procedures of the National Arbitration Organization then in force."

Having become dissatisfied with STC's service when termites reinfested her house, Myers brought this action under the Columbia Consumer Sales Act seeking, among other relief, (1) an award of $41,000 in compensatory damages, an award of $123,000 in treble damages as authorized by the act itself, and an award of $2,000,000 in punitive damages; and (2) a declaration that the arbitration provision of her contract with STC was unenforceable on the ground of unconscionability.

Thereupon, STC moved to stay the action pending arbitration pursuant to the arbitration provision of its contract with Myers, and Myers moved for partial summary judgment declaring that the provision was unenforceable on the ground of unconscionability. As noted, the Superior Court issued an order granting Myers' motion and denying STC's. It did so because it concluded that the arbitration provision was indeed unenforceable as unconscionable.

On appeal, both Myers and STC agree that the soundness of the Superior Court's order depends on the correctness of its conclusion on the unconscionability of the arbitration provision of their contract. To that question, we now turn.

The following facts are undisputed for present purposes: The arbitration provision of Myers' contract with STC requires that arbitration must be "conducted in accordance with the rules and procedures of the National Arbitration Organization [now] in force." A party seeking arbitration with the National Arbitration Organization must pay a filing fee — for example, $2,000 for a claim between $100,000 and $250,000, and $7,000 for a claim between $1,000,000 and $2,500,000. Because Myers is asserting a punitive damages claim in the amount of $2,000,000, she would have to pay a $7,000 filing fee. Even if Myers should choose to forgo her perhaps overly optimistic punitive damages claim, she still has a not unreasonable claim for treble damages under the Columbia Consumer Sales Act itself, in the amount of $123,000 — for which she would have to pay a $2,000 filing fee. A filing fee paid by Myers in the amount of $2,000 would exceed the sum of $1,300 that she paid on her contract with STC by a large percentage. Myers did not know at the time of contracting that she would be required to pay any filing fee whatsoever, less still one that would be so high. Although the National Arbitration Organization had, and still has, a published schedule of filing fees, none was attached to the contract or otherwise disclosed to Myers.

Under the law of Columbia, which Myers and STC agree applies here, a contract, or a provision of a contract, is unenforceable if it is unconscionable. As the court in *Stirlen v. Supercuts, Inc.* (Colum. Ct. App. 1997) recently held: "Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present."

In our judgment, unconscionability taints the arbitration provision of the contract between STC and Myers in both its procedural and substantive aspects.

As for procedural unconscionability, the contract between STC and Myers as a whole is plainly a contract of adhesion — that is to say, an instrument, usually with standard terms, drafted and imposed by a party of superior bargaining strength, allowing a party of lesser bargaining strength only to take it or leave it. Perhaps more significantly, the arbitration provision contains an unfair surprise — the undisclosed requirement that Myers would have to pay what must be characterized as arbitration fees that are exorbitant as to her. Such an unfair surprise could have been avoided by disclosure on the part of STC. But STC made no such disclosure.

As for substantive unconscionability, the arbitration provision of the contract between STC and Myers is harsh and oppressive because it effectively requires Myers to pay arbitration fees that are themselves harsh and oppressive because, as stated, they are

exorbitant as to her. We do not dwell in a fool's paradise, thinking that the National Arbitration Organization should provide arbitration without cost. Nor do we mean to suggest that its arbitration fees are out of line with the value of the services it provides. Rather, we conclude only that requiring a consumer in Myers' situation to pay such fees is harsh and oppressive. Harshness and oppressiveness could have been avoided by STC's agreement fee to pay such fees on Myers' behalf. But STC made no such agreement.

In sum, because the Superior Court was correct in its conclusion that the arbitration provision of the contract between STC and Myers is unconscionable, its order denying STC's motion to stay the action pending arbitration pursuant to that provision, and granting Myers' motion for partial summary judgment declaring that that provision was unenforceable on the ground of unconscionability, was altogether sound.

In this court, however, Myers seeks to obtain more than she received below, asking us to enjoin STC from attempting to enforce the arbitration provision here at issue against any consumer in the future. Her request comes too late. But even had it been timely, we would have rejected it. We would be reluctant to find the arbitration provision unconscionable, always and everywhere, and in the abstract, with respect to any and all consumers, no matter what their resources, with whom STC has contracted or may contract. First, and manifestly, unconscionability is in large part a judgment that arises from the unique facts of each individual case. Second, many, or at least some, consumers might in fact prefer arbitration over litigation — and might also prefer to avoid the premium that STC would presumably build into the contract price if it had to cover the risk of litigation and its costs.

For present purposes, however, all that we need do, and shall do, is to uphold the Superior Court's order denying STC's motion to stay the action pending arbitration and granting Myers' motion for partial summary judgment.

Affirmed.

Answer 1 to PT - B

1)

Letter to Mr. May

To: John May, Progressive Builders, Inc.

From: Vivian Coyle, Coyle & Cooper, LLP

Re: Arbitration Clause

Dear Mr. May:

Enclosed please find my preliminary opinion regarding Progressive Builders, Inc.'s (PBI) goals in using an arbitration clause, the potential consequences of leaving the clause as is, what steps PBI could take to maximize the likelihood that the arbitration clause would be enforceable as is, and potential changes PBI could make to the clause [to] achieve your goals and most likely render the clause enforceable in Columbia.

1. Goals Sought Through The Arbitration Clause

Based upon our meeting the other day it seems to me there are three primary goals PBI wishes the arbitration clause to achieve. First it seems PBI wishes to reduce any likelihood of litigation and prefer that all disputes be resolved through arbitration. Second, to limit any costs that arise might [sic] from any damages, particularly the possibility of punitive damages. Third, to limit any time lost to any disputes to a minimum. If you have any additional goals that I have not addressed please contact me regarding these goals.

2. Consequences of Leaving Arbitration Agreement As Is

The primary risk that PBI may suffer from leaving the arbitration clause as is, is that a court may refuse to enforce the clause and PBI would be forced to litigate in court. A lesser risk is that an arbitrator may refuse to limit damages to compensatory damages and may apply punitive damages.

A. Risk Arbitration Clause Will Be Unenforceable

There are two general basis [sic] on which a court may find the present arbitration clause unenforceable. The first risk is that a clause is in the wrong format. The second risk is that the clause is unconscionable.

Form of the Clause

As an initial matter, Columbia Business and Professions Code Section 7191 requires that all arbitration clauses regarding contracts for construction of residential property of 4 or fewer units be clearly title[d] "ARBITRATION OF DISPUTES" and be set out in capital letters. Furthermore, there is specific language that must be used and must be entirely in capital letters. And immediately following this language there must be a line or space provided for the parties to indicate their assent or non-assent. Where a builder does not follow this format the arbitration agreement is only enforceable against the builder. It is possible that under certain circumstances section 7191 does not apply, in which case the format of your arbitration clause would be acceptable. These circumstances are discussed in more detail below in section 3 of this letter.

Unconscionable

Even if a court accepts the form of the arbitration clause it is possible that it will the clause unconscionable [sic] and therefore refuse to enforce the clause. In Columbia, contracts must be both procedurally unconscionable and substantively unconscionable before a court will find them unenforceable. The current arbitration clause risks being found both procedurally and substantively unconscionable.

Contracts of Adhesion

Columbia courts have found arbitration clauses in contracts of adhesion procedurally unconscionable. A contract of adhesion is a contract, usually containing standard terms that is drafted and imposed on by a party of superior bargaining strength, and allows a party of lessor [sic] bargaining strength only to take it or leave it. [Stirlen v. Supercuts.] It is not clear if your contract is a contract of adhesion. While your current form contract contains some standard terms, on the whole your customers are able to negotiate significant portions of the contract including the location of work, completion dates, contract price, method and schedule of payment[,] the description of work[,] and may include additional provisions.

However, if a court were to find your contract a contract of adhesion, there is a strong likelihood the court would find the arbitration clause substantively unconscionable and therefore unenforceable. In the case of Stirlen v. Supercuts a Columbia court refused to enforce an arbitration clause that limited all relief to punitive damages and only required one party to submit to arbitration. In Columbia, punitive damages may be awarded where a defendant engages in an act of fraud, malice or oppression. Contracts that limit liability for fraud, malice or oppression or [sic] considered against public policy. Thus, an arbitration clause that limits recovery to compensatory damages despite the occurrence of fraud, oppression or malice is against public policy and will not be enforced.

Unfair Surprise

Furthermore, even if your contract is not a contract of adhesion it may be found to be procedurally unconscionable because it contains undisclosed fees for the arbitration. In the case of Myers v. Scamardo Termite Control, the plaintiff, an elderly lady, signed a contract that contained an arbitration clause which required arbitration in compliance with the rules and procedures of the National Arbitration Organization. The National Arbitration Organization requires people filing for arbitration to pay a filing fee based upon the amount of damages sought. In the Myers case, the filing fee was $7000 even though the original contract was only for $1300. Because the fees charged were undisclosed and exorbitant for the elderly lady to pay, the court decided that the fees constituted an unfair surprise that rendered the clause unconscionable. Again it is not clear if your failure to disclose the fees would constitute unfair surprise to your clients. The work you perform is unlikely to result in filing fees above $7000 and your construction contracts are likely to exceed this filing fee by a large amount. Furthermore, your contract offers to split the costs of arbitration, and presumably filing fees[,] equally. However, it is still possible for a court to determine that the arbitration clause is an unfair surprise and therefore unenforceable.

B. Risk An Arbitrator Will Award Punitive Damages

As described above, contracts that remove punitive damages are against public policy. Accordingly, it is possible an arbitrator may refuse to deny punitive damages. However, it may be possible to limit punitive damages to no more than 3 times compensatory damages. In that case you would not need to worry about causing $10K in damages and being sued for millions. This will be discussed in more detail in section 4 below.

3. Maximizing Enforceability of Arbitration Agreement As Is

As mentioned above, under certain circumstances the formal requirements of section 7191 may not be applicable to a construction contract for residential property of 4 unit[s] or less. This section details how those circumstances may apply to PBI.

Interstate Commerce vs. Intrastate Commerce

Section 7191 only applies to contracts that are not part of interstate commerce. Thus, the more you can make your construction contracts an activity of interstate commerce the more likely you will not be subject to the requirements of section 7191.

In the case of Sisters of the Visitation v. Cochran Plastering Company, a [sic] Columbia courts have applied several factors to determine that the construction contract at issue did not substantially involve interstate commerce. The Cochran court looked to the resident of the parties and the place where the contract was to be performed, whether the tools and equipment used were from in-state suppliers, the residency of the workers, and whether what was being built could be moved out-of-state. In the Cochran case both the plaintiff and the plastering company were residents of Columbia and the contract was to plaster a chapel in Columbia. Here, your clients would be residents of Columbia and you be [sic]

constructing homes in Columbia but your company is a resident of Franklin (if you incorporated or make Columbia your primary place of business your company will become a resident of Columbia). In the Cochran case almost all tools and equipment at the project site were obtained in Columbia. Currently almost all your tools are obtained outside of Columbia. The Cochran defendant employed only Columbia workers. While you stated that you were more likely to use Columbia workers you might use current workers from Franklin. Finally, the chapel was unlikely to be moved out of Columbia. Although houses may be moved out of the state, it is very unlikely that one of the larger more expensive homes that PBI builds would be moved out of the state.

Based on these factors PBI can maximize the likelihood of a Columbia court enforcing its arbitration clause by remaining a resident of Franklin (i.e. remaining incorporated in Franklin, keeping its headquarters in Franklin and doing most of its business in Franklin), and importing its tools, equipment and most of its workers from Franklin. However, whether these steps will be enough to assure enforceability is uncertain and these steps will have no effect on whether the clause is considered unconscionable.

4. Possible Changes to Arbitration Clause to Achieve Goals

There are several possible changes that PBI could make to its arbitration clause to achieve its goals. These include changing the form of the clause to comply with Section 7191 and making substantive changes to make certain the clause is not unconscionable.

Compliance With Section 7191

PBI could change the clause to comply with section 7191. To comply with section 7191, the clause should be clearly titled "ARBITRATION OF DISPUTES" and be set out in capital letters. Furthermore, the specific language indicated in the statute must be used and must be entirely in capital letters. And immediately following this language there must be a line or space provided for the parties to indicate their assent or non-assent. These changes would probably be much less expensive than the steps outlined in section 3 of this letter to avoid the imposition of section 7191 but may create more questions from clients when entering the contract.

Substantive Changes

It is unlikely that PBI can do much more to make the contract less of a contract of adhesion since there are currently very few standard clauses. However, PBI can take steps to assure that the contract is not substantively unconscionable.

Make Arbitration Binding on Both Parties

As an initial matter, PBI can make the requirement to enter binding arbitration mandatory on itself as well as the client. Since PBI wishes to enter arbitration as a matter of course then this change should have no real impact on PBI.

Include a Provision for Treble Damages

Although Columbia courts are unclear on this issue, PBI might be able to limit punitive damages to 3 times compensatory damages. If valid this provision would make PBI liable to more than purely compensatory but would insulate PBI against a runaway judgment. As stated Columbia courts have not ruled on the validity of this particular clause but inclusion of the clause is unlikely to leave PBI in any worse provision than currently since Columbia courts have clearly stated that punitive damages cannot be completely contracted away.

Include a Schedule of Fees

PBI may also wish to include a schedule of arbitration fees. However, this is probably less likely to be an issue since, as discussed above, PBI already agrees to pay half the fees and fees are likely to be a small percentage of the initial contract price. Another way to avoid posting fees in the clause would be for PBI to indicate that it will pay all fees. Including the fees in the clause may lead to tension during initial contract negotiations. Therefore you should probably decide whether you wish to include the fees, accept the costs of providing the fees yourself or take the small (but present) risk of giving no information about the fees at all. Alternatively, PBI could use a different arbitrator organization but this may not change anything since other organizations may charge similar fees.

Thank you for coming to see me. I look forward to discussing these issues in the near future.

Sincerely,

Vivian Coyle

Answer 2 to PT - B

PERFORMANCE TEST

[Letterhead of Coyle & Cooper, LLP]

February 27, 2004

Progressive Buildings, Inc.
4333 Skillman Avenue
Woodhaven, Franklin 65377

Attention: John May

Dear Mr. May:

You have requested our advice in connection with a standard form construction contract you wish to use with your clients in the State of Columbia. In connection with our general review of the agreement, you have specifically requested we review the arbitration provision set forth in Section 8 of the contract. Our review of the arbitration provision and applicable Columbia law will focus on: (i) the consequences of keeping the arbitration provision in its current form; (ii) what steps you may wish to take when executing your contracts to maximize the enforceability of the arbitration provision and (iii) some suggested changes you may wish to make to the arbitration provision to achieve your goals and increase the lik[e]lihood your arbitration provision will be deemed enforceable in Columbia.

Our general understanding of your goals is as follows. Your overarching goal is to enter the Columbia construction market for higher end homes with contract values of between approximately $450,00 and $850,000, and up. Prior to commencing any work, you envision entering into a form contract with each property owner. Included in the contract is an arbitration provision. The arbitration provision is included for several reasons. The first is to avoid the direct costs associated with protracted litigation. The second is to avoid certain indirect costs associated with litigation including time you and your employees will need to spend defending or engaging in litigation rather than on the business itself and the loss of efficiency following litigation when you must ramp-up again. Finally, you seek to avoid punitive damages, for which you cannot receive insurance coverage.

You have expressed the desire to use the contract without modification, if possible. Section 7191 of the Columbia Business and Professions Code contains a specific provision relating to the form of arbitration provisions contained in construction contracts for work performed on residential property with four or fewer units. Based on your business plan as described to us and as set forth above, we believe this provision will generally apply to your contracts. Section 7191 specially requires a prominent notice provision to be set forth in the contract in all capital letters. In addition, such provision must be specifically initialed

by the parties. Any provision for arbitration which fails to comply with the requirements of Section 7191 is not enforceable against any party other than the builder. Thus, Section 8 of the contract as currently drafted is only enforceable against you and not the counterparty.

One way to avoid this unintended and rather harsh result is set forth in a recent U.S. Supreme Court case Doctor's Associates, Inc. In that case, the Supreme Court held that a Montana statute with language similar to the Columbia statute was preempted by Section 2 of the Federal Arbitration Act.[1] The broader language of the federal statute precluded the Montana state law conditioning the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally.

In interpreting the Supreme Court case, the Columbia courts have concluded that preemption occurs when a contract evidences a transaction involving interstate commerce. This concept is set forth in the Columbia Court of Appeal case Sisters of the Visitation. Accordingly, in order to not modify Section 8 of the contract containing the arbitration provision, and to fall within the preemption concept set forth in Doctor's Associates, you should take steps to ensure that the contract evidences a transaction involving interstate commerce and that such concept is evident from the contract.

Whether a contract "evidences" a transaction involving interstate commerce is a facts and circumstances test. In Sisters of the Visitation, (1) the parties to the contract were both Columbia residents, (2) the builder's tools and equipment were purchased in Columbia, (3) the builder only employed Columbia residents, (4) the services provided by the builder were to be done on a physical building in Columbia and therefore incapable of movement across state lines, and (5) while several ancillary contracts were with out-of-state party's [sic], because the builder was not a party to these contracts, the contract with the builder itself was deemed to not effect [sic] interstate commerce. The court also noted that while certain items and services purchased by the builder were from out-of-state, because the amount allocable to such items and services was small, it did not have a substantial effect on interstate commerce.

Following the court's reasoning in Sisters of the Visitation, we recommend you take the following steps in order to be more likely to be deemed to engage in interstate commerce (and thereby, by extension, falling within the scope of the federal statute rather than the state statute):

(1) Consider maintaining an office in Franklin by subletting space from Frank May Construction. Progressive Builders ("PBI") is incorporated in Columbia. If it enters into

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[1]Section 2 of the Federal Arbitration Act declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

contracts with Columbia residents, the contracts will probably be deemed to have been entered into by Columbia residents. An out-of-state office, however, will bolster the argument that PBI is a Franklin Resident.

(2) Purchase supplies, tools and equipment from outside Columbia. Although Franklin is more than 200 miles away, a closer state may be available for you to purchase supplies from periodically during a project.

(3) Employ personnel from outside Columbia. Again, if Franklin is too far, perhaps a closer state is available.

Although taking the foregoing steps may help you fall within the scope of the Federal Arbitration Act, the Federal Arbitration Act is not a guarantee of enforc[e]ability. An arbitration provision governed by the Federal Arbitration Act may still be deemed unenforceable on the same grounds that any other contract or provision may be deemed unenforceable.

The Columbia courts have determined that when a contract is unenforceable is a question of Columbia law as opposed to a question answered by the Federal Arbitration Act itself. Under Columbia law, "a contract or a provision of a contract, is unenforceable if it is unconscionable."[2] The Columbia courts have determined the test for unconscionability is twofold, requiring both procedural and substantive aspects. In Stirlen, the court determined the procedural aspect required a "lack of assent" whereas the substantive aspect required the imposition of "harsh or oppressive" terms. The court determined that a contract of adhesion, one with standard terms and drafted by a party with superior bargaining strength, and that allowed a party of lesser bargaining strength to take it or leave it, was procedurally unconscionable. Some of the factors the court considered in reaching this conclusion was [sic] that the contract was in generic and gender neutral language, that the contract was presented as nonnegotiable, and that other matters were executed in a side letter more than a month after the main agreement.

In a separate Columbia case, Myers, the court also found a contract unconscionable. In that case, the court determined that unfair surprise, namely that the plaintiff would have to bear the filing fees to arbitrate with the National Arbitration Organization ("NAO") and that neither the existence or amount of the fee was disclosed in the contract, the court specifically held that disclosure would have avoided this result [sic].

In order to avoid any claim of procedural unconscionability, BPI [sic] might want to take the following steps when entering into a contractual relationship.

(1) You may wish to give the counterparty the contract in advance so that the counterparty has the opportunity to compare your contract with potential competitors in advance of

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[2] Stirlen

execution;
(2) You may wish to specifically orally advise the counterparty that the terms of the contract are subject to negotiation;
(3) You may wish to orally advise the counterparty to seek the advice of counsel prior to execution;
(4) You should consult with the NAO on a periodic (perhaps quarterly) basis and obtain a current list of charges. These charges should be provided in advance to the counterparty;
(5) Finally, you should specifically draw the counterparty's attention to Section 8 of the contract and explain the effects of the arbitration provision.

In the event you are amenable to modifying the arbitration provision, some changes may increase the lik[e]lihood the provision will be held enforceable in Columbia.

(1) The first suggestion would be to conform the arbitration provision to the requirements of Section 7191 of the Columbia Business and Professions Code for the reasons discussed earlier. In connection with this change, we would suggest adding a sentence immediately following the notice provision:

> "To the extent Section 7191 of the Columbia Business and Professions Code is deemed inapplicable to this Section 8, it shall be interpreted pursuant to Section 2 of the Federal Arbitration Act."

This will ensure that either Section 7191 of the Columbia Business and Professions Code or Section 2 of the Federal Arbitration Act will apply for certainty of interpretation.

(2) The Columbia Court in Stirlen indicated it would not redraft an objectionable arbitration provision into something unobjectionable. To help alleviate this issue we would suggest the following language be added to the end of Section 8:

> "To the extent any provision of this Section 8 shall be deemed unenforceable, such provision shall be stricken from this section, and the remaining provisions shall be interpreted as if such objectionable provision had not been included."

(3) The Columbia courts have also articulated a test for substantive unconscionability. As discussed earlier, unconscionability requires both procedural unconscionability and substantive unconscionability. In the event the procedural suggestions set forth above are insufficient for the court, the following changes to the agreement may obviate any substantive unconscionability.

First, Columbia courts have held that arbitration provisions requiring one party to arbitrate but not the other are unduly one-sided. We would recommend making the arbitration provision a mutual obligation.

Secondly, the Columbia courts have held that the elimination of absolutely all

punitive damages to be [sic] unduly one-sided. Punitive damages should be available in the event that the defendant has engaged in oppressive, fraudulent or malicious conduct. Accordingly, we would recommend carving out such conduct from the limit to compensatory damages. Although such change may seem to expose you to punitive damages, we believe it will increase the lik[e]lihood the arbitration provision will be enforced. From what you have advised us of your business practices, it seems highly unlikely your conduct will fall within the scope of the carve-out. We see little practical risk from your standpoint by including this provision.

Finally, in Myers, the court held that requiring plaintiff to actually pay the NAO fees was harsh and oppressive because they were exorbitant to her. We would suggest BPI [sic] agree to pay such fees in the event the counterparty demonstrates an inability to pay. Alternatively, BPI [sic] may just want to contractually agree to pay these fees. As it has never yet proceeded to arbitration, it may conclude the odds it will need to actually pay such amounts is low.

As redrafted, the provision would read as follows:

ARBITRATION OF DISPUTES: If a dispute arises concerning the provisions of this contract or its performances, each party agrees: (1) to submit any such dispute to binding and final arbitration under the rules of the National Arbitration Organization (NAO); and (2) to limit any relief that may be awarded by the NAO to compensatory damages, except in an action sounding in tort, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, in which case, the plaintiff may recover punitive damages up to [three] times the contract price. [Note to Mr. May: Discuss if three times is appropriate.] Contractor agrees to bear the costs of arbitration.

To the extent Section 7191 of the Columbia Business and Professions Code is deemed inapplicable to this Section 8, it shall be interpreted pursuant to Section 2 of the Federal Arbitration Act.

To the extent any provision of this Section 8 shall be deemed unenforceable, such provision shall be stricken from this section, and the remaining provisions shall be interpreted as if such objectionable provision had not been included.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY COLUMBIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR A JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS

VOLUNTARY.

_____CONTRACTOR _____PROPERTY OWNER

We look forward to discussing this letter with you in further detail.

Sincerely,

Vivian Coyle