California
Bar
Examination

Performance Tests
and
Selected Answers

July 2004

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the two performance tests from the July 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.

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TUESDAY AFTERNOON
JULY 27, 2004

California Bar Examination

Performance Test A
INSTRUCTIONS AND FILE

DONOVAN v. BARGAIN MART, INC.

DONOVAN V. BARGAIN MART, 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.
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 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 response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem 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.

Ervin, Knight and Paulson
2469 East Angelo Rd., Suite 900
River City, Columbia 55551

MEMORANDUM

To: Applicant

From: Annabelle Lee

Date: July 27, 2004

RE: **Jake Donovan and Bargain Mart, Inc.**

As you know, I participate on a monthly basis at the River City Bar Association Ask-A-Lawyer night. At the last session two weeks ago, I met with Jake Donovan. He feels that he has been a victim of a scam involving a "check deferment" service provided by Bargain Mart, Inc., a local appliance store.

I need you to do some preliminary work on any potential statutory claims Mr. Donovan may have against Bargain Mart, Inc. Please prepare a memorandum that identifies the potential claims Mr. Donovan might bring against Bargain Mart, Inc.

Separately for each potential claim:

1. Set forth the statutory requirements to establish the claim;
2. Analyze whether the facts that we know establish the statutory requirements; and,
3. Identify what additional facts, if any, we must seek through investigation or discovery, and how the additional facts might help establish the particular statutory requirements.

At this point, do not discuss what remedies, such as damages or injunctive relief, might be available. We will figure out the remedies aspect at a later time.

TRANSCRIPT OF INTERVIEW BY ANNABELLE LEE OF JAKE DONOVAN

Annabelle Lee (Q): Nice to meet you, Mr. Donovan.

Jake Donovan (A): Likewise. Thanks for seeing me.

Q: Before we get started, I just want to make sure that tape-recording this conversation is okay with you.

A: It's fine.

Q: I find note taking to be distracting, so this way I just have to jot down a few notes to myself.

A: That's okay by me.

Q: A few words about myself before I turn things over to you. I am here as part of the River City Pro Bono Ask-a-Lawyer night. I am here to give you whatever advice I can about your situation, and sometimes may be able to do some further work for you, if I get permission from my firm to do so.

A: Sounds great. Thanks.

Q: So, why don't you tell me what brings you to the clinic tonight?

A: I'm embarrassed to admit it, but I think I got taken by a scam.

Q: I hope it wasn't one of those pyramid schemes.

A: No, but I should have known better. It was a rip-off. I should have trusted my instincts.

Q: Why don't you start at the very beginning?

A: I'm on a fixed income. I receive Social Security and a small pension from my years working for the State Department of Agriculture as an inspector. I had to pay a lot one month to take care of some dental bills. It left me short for the month. I get this Penny Saver weekly paper that has ads and lists sales and such. Inside was a flyer for a place called Bargain Mart. Here's a copy of the flyer if you want.

Q: Thanks, I'll take a close look at that after we're finished talking.

A: Anyway, they sell small appliances. The flyer said something about, "Come and see us if you're short on cash." I was in the neighborhood, so I stopped in. It looked like a regular store – toaster ovens, microwaves, blenders, and food processors. I asked the guy behind the counter about the flyer. He said, "You mean about being short on cash?" I said,

"Yeah." And he said that the store offered a deal where you could postdate a check, and they would give you cash that day.

Q: That sounds a little shady. Tell me more.

A: Well, it sounded shady to me, too. So I asked him how it worked. He whipped out a chart which listed amounts down the side, and number of days across the top, you know, 7, 14, 21, 28, etc. He asked me how much I needed. I told him $300. He asked how long I would need it for. I said 14 days – until I got my next checks the first of the month. He looks it up on the chart and says, "All you have to do is write us a check for $375, and show us copies of your pension checks, and fill out a form and sign it."

Q: So did you go ahead?

A: Yeah, I did. I was pretty desperate. I had to go home first to get my checkbook and a statement showing my pension amounts. I went back to Bargain Mart, wrote the check for $375, filled out the form – and they handed me $300 in cash just like that.

Q: Did you get copies of anything that you signed?

A: Yeah, I did. Here's the first agreement that I signed. And I forgot to tell you. They also gave me $75 in gift certificates to use at the store.

Q: So let me make sure I have this straight. You wrote a postdated check for $375, and in exchange they gave you $300 in cash plus $75 in gift certificates?

A: Right.

Q: What did they say about cashing the check?

A: They said that since I needed the money for 14 days, they'd wait that long to cash the check. They couldn't have cashed it anyway since it was postdated, and there wasn't enough in my account to cover it until the first of the next month.

Q: When did this happen, by the way?

A: The first time I went in was about a year ago. I've gone back a couple of times since then.

Q: When's the last time you went to Bargain Mart?

A: Well, it was actually a few days ago. I just wrote them another postdated check for $375. It'll get cashed in about 10 days.

Q: Okay. Let me take a look at the flyer and the agreement. . . . Did you ever hear anyone call this a loan?

A: Nope. In fact they specifically said it wasn't a loan since I was getting back exactly what I was giving them. But it just doesn't seem right, you know what I mean?

Q: I know. Did you ever try to use the gift certificates?

A: No. But the stuff in the store was really expensive – even the used stuff.

Q: You said that the person behind the counter showed you a chart – did he give you a copy?

A: No, he didn't.

Q: What would've happened if your check had bounced?

A: Well, that actually happened once. I had to pay a $25 returned check fee, then had to write another postdated check – this time for $500 -- $400 to cover the amount I owed, and I got $100 in additional gift certificates.

Q: So let me get this straight. For that last transaction, you'd originally written a check for $375 and gotten back $300 cash and $75 in gift certificates?

A: That's right.

Q: And then when they tried to cash the check a couple of weeks later, it bounced. You went back to Bargain Mart and now you owed them $375 plus a $25 returned check fee. So that totals $400. On their handy chart, in order to get $400 to pay off the debt, you had to postdate another check for $500 and got another $100 gift certificate?

A: You've got it. That's exactly what happened.

Q: Let me do a quick calculation here. . . . Putting aside the gift certificates, if this was a straight loan, that's a 650% annual percentage rate!

A: How did you figure that?

Q: Well, $75 is 25% of the $300 that you borrowed. The term was two weeks, which is 1/26 of a 52-week year. And 25% times 26 is 650%. I'd call that pretty high interest. And it's 650% interest for the second transaction, too.

A: I told you I thought something wasn't right.

Q: Well, Mr. Donovan, this sounds very interesting. I'd like to do some further investigation of how Bargain Mart operates. Do you have any idea who else I might talk to?

A: Funny you should ask. I met this kid not too long ago who said he used to work there. His name is Larry Walker. I see him around all the time. Shall I just have him give you a call?

Q: That would be great. Here's my card. Just have him ask for me. And here's a card for you. I'll let you know what we come up with, Mr. Donovan. You should feel free to call me if you think of anything else. I'll get back to you before that last check will get cashed, okay?

A: Thanks a lot. I really appreciate your time.

*** * END OF INTERVIEW * ***

EXCERPTS FROM INTERVIEW BY ANNABELLE LEE OF LARRY WALKER

Annabelle Lee (Q): Mr. Walker, we got your name from Jake Donovan.

Larry Walker (A): Yes, I know. Jake told me that you wanted to talk to me about Bargain Mart.

Q: That's right, and if you could just confirm for me that you are agreeing to this tape recording, that'd be great.

A: It's fine. I agree to the tape recording.

Q: So, Mr. Walker, when did you work at Bargain Mart?

A: I worked there about 3 years ago for about 8 months.

Q: What did you do there?

A: I worked behind the counter.

Q: What did your job consist of?

A: I would help customers who wanted to use either our "cash-plus" service or buy an appliance.

Q: Tell me about the cash-plus service.

A: The idea was that people would get cash from us in exchange for writing a check for a higher amount. I had a chart at the counter that would tell me how much more the check had to be. Oh, and the check was postdated. So let's say the customer needed $500. My chart said $125. So, the customer would write a check for $625 and get cash of $500 that day. In addition, they'd get gift certificates for the $125 premium.

Q: Did people ever use their gift certificates?

A: I never saw it. I mean, why would you? You can get the same stuff across the street at Smitty's for a lot less. The appliances were really overpriced and pretty junky.

Q: Can you give me an example?

A: Well, I can't remember exactly, but say, a toaster oven was for sale for $150, and you could only pay for half of it with gift certificates.

Q: So, to buy the $150 toaster oven you would have to pay with a $75 gift certificate, plus another $75 in cash?

A: Yeah, and even $75 was more than you'd pay for the same thing at other places like Smitty's.

Q: Did you receive any sort of training for the cash-plus service?

A: Yeah, my boss told me never to use the word "loan," because the customers were getting full value in the form of gift certificates.

Q: Did you have the customers fill out any forms?

A: Yeah, there was a standard agreement that everyone signed.

Q: Did you do any credit checks on anyone?

A: Nope. All they had to show us was proof of regular monthly income – a job, pension, Social Security, whatever.

Q: So, you said the appliances were overpriced. Did anyone come in just to buy appliances?

A: I never saw any, but I wasn't the only one who worked there and that was three years ago.

* * *

BARGAIN MART, INC.

AGREEMENT

NATURE OF SERVICES PROVIDED. I understand that Bargain Mart, Inc. (BMI) provides "cash-plus" services only. BMI is not in the loan business. In exchange for BMI's giving me cash of $ 300.00 and gift certificates worth $ 75.00, I will write a postdated check in the amount of $ 375.00 which BMI will not cash until 14 days from the date I sign this agreement.

RETURNED TRANSACTIONS. In the event that any check that I have signed is returned unpaid to BMI: (1) I agree to pay a returned check charge of $25.00; (2) in the event that BMI initiates collection activity on my account, I agree to be responsible for collection fees, court costs and fees, and all reasonable attorney fees; (3) I authorize BMI to initiate debits to my bank account in amounts up to the amount I owe, until the amount I owe is paid in full; and, (4) I understand and agree that I may be subject to criminal prosecution and civil penalties for writing "bad" checks under applicable laws.

GOVERNING LAW. I agree that the laws of the State of Columbia will apply to this and any transactions I enter into with BMI.

I have read the foregoing agreement, understand its terms, and am voluntarily entering into this arrangement.

Date: July 25, 2003

Jake Donovan
Customer

112 2nd St., River City, Col.
Address

BARGAIN MART – YOUR ONE-STOP BARGAIN CENTER

IF YOU'RE IN THE MARKET FOR GOOD DEALS ON SMALL APPLIANCES, COME SEE US AT BARGAIN MART. WE MAY BE ABLE TO HELP.

WE STOCK A LARGE SUPPLY OF SMALL APPLIANCES. CHECK OUT OUR PRICES– THEY CAN'T BE BEAT.

IF YOU'RE SHORT ON CASH OR DON'T HAVE GOOD CREDIT, WE ALSO OFFER CASH-PLUS SERVICES.

IF YOU NEED CASH BEFORE YOUR NEXT PAYDAY, YOU CAN WRITE US A CHECK FOR THE AMOUNT YOU NEED AND WALK AWAY WITH IMMEDIATE CASH. COME SEE US FOR DETAILS.

WE LOOK FORWARD TO WORKING WITH YOU!!!

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SELECTED COLUMBIA CODE PROVISIONS

INTEREST AND USURY STATUTES

Civil Code § 3601. Legal Interest Rate—Agreement for Higher Rate

(a) The legal rate of interest shall be 10 percent per year (or 10% annual percentage rate or APR) where the rate of interest is not established by written contract. Notwithstanding the provisions of other laws to the contrary, the parties may establish by written contract any rate of interest, expressed in annual percentage rate or APR terms as of the date of the evidence of the indebtedness, and charges and any manner of repayment, prepayment, or acceleration.

(b) Where the principal amount involved is $3,000.00 or less, the legal rate of interest shall not exceed 20 percent per year (or 20% annual percentage rate or APR) on any loan, advance, or forbearance to enforce the collection of any sum of money unless the loan, advance, or forbearance to enforce the collection of any sum of money is made pursuant to another law.

Civil Code § 3602. Civil Penalty for Charging Excessive Interest-- Usury

The taking, receiving, reserving, or charging a rate of interest greater than the amount allowed by § 3601, when knowingly done, shall be unlawful. The creditor is prohibited from recovering any interest on loans when an interest rate greater than is allowed by § 3601 is charged. Where a rate of interest greater than is allowed by § 3601 has been paid, the person by whom it has been paid, or his legal representatives, may recover all of the interest thus paid from the creditors taking or receiving the same. In addition, the person or legal representatives may recover an additional amount equal to all of the interest paid as a penalty.

* * *

CHECK-CASHING AND DEFERRED-DEPOSIT SERVICES

Civil Code § 3701. Definitions

As used in this chapter:

(1) "Check" means any check, draft, money order, personal money order, travelers' check, or other demand instrument for the transmission or payment of money.

(2) "Consideration" includes any premium charged for the sale of goods or services in excess of the cash price of the goods or services.

(3) "Deferred deposit transaction" means, for consideration, accepting a check and holding the check for a period of time prior to deposit or presentment in accordance to an agreement with or any representation made to the maker of the check, whether express or implied.

(4) "Deferred deposit service business" means a person who engages in deferred deposit transactions.

(5) "Department" means the Department of Financial Institutions.

(6) "Licensee" means a person duly licensed by the Department to conduct the business of cashing checks or accepting deferred deposit transactions.

(7) "Person" means any individual, partnership, association, joint stock association, trust, corporation, or other entity, but shall not include the United States government or the government of this State.

Civil Code § 3702. Requirement of License

Except as provided in § 3703, no person shall engage in the business of cashing checks or accepting deferred deposit transactions for a fee or other consideration without having first obtained a license.

Civil Code § 3703. Exemptions from Applicability of §§ 3701 to 3712

The provisions of §§ 3701 to 3712 shall not apply to:

(1) Any bank, trust company, savings and loan association, savings bank, credit union, consumer loan company, or industrial loan corporation which is chartered, licensed, or organized under the laws of this State or under federal law and authorized to do business in this State;

(2) Any person who cashes checks without receiving, directly or indirectly, any consideration or fee therefor; and

(3) Any person principally engaged in the retail sale of goods or services who, either as an incident to or independently of a retail sale, may from time to time cash checks for a fee or other consideration.

Civil Code § 3705. Procedures to be Followed by Licensees

* * *

(2) Any fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest. A licensee shall not charge a service fee in excess of fifteen dollars ($15) per one hundred dollars ($100) on the face amount of the deferred deposit check. A licensee shall prorate any fee, based upon the maximum fee of fifteen dollars ($15). This service fee shall be for a period of fourteen (14) days.

* * *

(8) No licensee shall engage in unfair or deceptive acts, practices, or advertising in the conduct of the licensed business.

(9) No licensee who enters into a deferred deposit transaction with an individual shall prosecute or threaten to prosecute an individual for writing a bad check.

(10) Each licensee shall conspicuously display in every deferred deposit business location a sign that gives the following notice: "No person who enters into a postdated check or deferred deposit check transaction with this business establishment will be prosecuted for or convicted of writing bad checks."

Civil Code § 3708. Requirements of Disclosure by Licensees -- Fees and Service Charges -- Acceptance, Payment, and Deposit of Checks

(1) Each licensee who engages in deferred deposit transactions shall give the customer the disclosures required by the Consumer Credit Protection Act (15 U.S.C. § 1601). Proof of this disclosure shall be made available to the department upon request.

(2) Each licensee shall conspicuously display a schedule of all fees, and charges for all services provided by the licensee that are authorized by §§ 3701 to 3712. The notice shall be posted at the office and every branch office of the licensee.

(3) A licensee may charge, collect, and receive check collection charges made by a financial institution for each check returned or dishonored for any reason, provided that the terms and conditions upon which check collection charges will be charged to the customer are set forth in the written disclosure.

(4) Any personal check accepted from a customer must be payable to the licensee.

(5) Before a licensee shall present for payment or deposit a check accepted by the licensee, the check shall be endorsed with the actual name under which the licensee is doing business.

Civil Code § 3720. Enforcement by Department of Financial Institutions and Attorney General

The provisions of §§ 3702 through 3708 shall be enforced exclusively by the Department of Financial Institutions. Actions for any violations of these provisions shall be prosecuted exclusively by the Attorney General or any district attorney or city attorney in the name of the people of the State of Columbia.

* * *

UNFAIR BUSINESS PRACTICES ACT

Business and Professions Code § 17200. Definition

As used in this chapter, “unfair competition” shall mean and include any unlawful,

unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.

* * *

Business and Professions Code § 17203. Remedies and Jurisdiction

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Business and Professions Code § 17204. Actions for Relief; Prosecutors

Actions for any relief pursuant to § 17203 shall be prosecuted by the Attorney General or any district attorney or city attorney in the name of the people of the State of Columbia; or upon the complaint of any person acting for the interests of him or herself, or the general public.

SELECTED FEDERAL CODE PROVISIONS

THE CONSUMER CREDIT PROTECTION ACT

15 U.S.C. § 1601 Congressional Findings and Declaration of Purpose

(a) It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

* * *

15 U.S.C. § 1602 Definitions and Rules of Construction

* * *

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

* * *

15 U.S.C. § 1605 Determination of Finance Charge

(a) "Finance charge" shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. Examples of charges which are included are:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges;

(2) Service or carrying charge;

(3) Loan fee, finder's fee, or similar charge; and

(4) Fee for an investigation or credit report.

Hamilton v. HLT Check Exchange, LLP

Columbia Court of Appeal (1997)

Defendant HLT Check Exchange, LLP ("HLT"), has appealed an order denying its motion to dismiss plaintiffs' claims.

The following are the pertinent facts. On August 22, 1996, the Hamiltons began doing business with HLT, a licensed check cashing company, in Pikeville, Columbia. The Hamiltons engaged in two types of transactions with HLT: (1) "check cashing" transactions, and (2) "deferral" transactions.

The following is how the "check cashing" transactions worked. The Hamiltons would give HLT a document in the form of a check in exchange for cash. HLT agreed to hold the "check" for two weeks before presenting it for payment or before requiring the Hamiltons to "pick up" the check by paying the face amount. HLT's charge for cashing and holding the check for two weeks was 20% of the sum advanced. The Hamiltons incurred the 20% charge for the use of HLT's money and the ability to delay the payment of the check.

In the "deferral" transactions, upon the expiration of two weeks, HLT would allow the Hamiltons to defer presentment of their check in exchange for an additional 10% of the sum originally advanced for each week of deferral. The "deferral" fees were incurred by the Hamiltons in order to have more time to pay off their original "check." The Hamiltons allege that HLT knew or reasonably should have known that at the time of the "check cashing" and "deferral" transactions that they did not have sufficient funds in the bank to cover the checks given to HLT. Based on the above facts, the Hamiltons have made numerous claims against HLT, and HLT moved to dismiss all of them. The trial court denied the motion.

The applicable law on motions to dismiss is as follows: (1) A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief; and, (2) A complaint need only give 'fair notice' of what the plaintiff's claim is and the grounds upon which it rests.

One of the Hamiltons' first claims involves Columbia's Interest and Usury Statutes, Civil Code §§ 3601, et seq. In order to state a claim under Civil Code § 3602, a person must knowingly take, receive, reserve, or charge a rate of interest greater than is allowed in CC § 3601. Based on the above facts, the Hamiltons claim that HLT charged a 520% annual simple interest rate (10% per week times 52 weeks per year), which more than exceeds the rate allowed in Civil Code § 3601.

HLT, relying heavily on the check cashing statutes, argues that it was not charging interest but only service fees for cashing checks. The pertinent check cashing provision, Civil Code § 3705(2), states that "[a]ny fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest."

The Hamiltons, however, argue that their "check cashing" and "deferral" charges were incurred in exchange for extra time to pay back their original check, not fees for cashing a check.

In analyzing this issue, we note that the greed of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible

rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence; and, if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings.

In looking at the substance of the transactions between the Hamiltons and HLT, as opposed to the form, the Court finds that the transactions were nothing more than interest bearing loans. HLT was not cashing the Hamiltons' checks, but rather it was giving them short-term loans that could be deferred for an additional 10% per week.

It also seems clear that Civil Code § 3705(2) was written so there would be no confusion that if a person walked into a check cashing establishment with a government check for $1,000 and the business gave him $900 for the check that the business would not be subject to usury statutes because the $100 payment would be a service fee, not discounted interest. The above $100 charge is considered a service fee because the business is not receiving the $100 for the use of its money, but rather the service of processing and providing instant cash to people who don't have access to bank services.

Moreover, a well-known legal dictionary defines "loan" as "delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest." *Black's Law Dictionary* 844 (5th ed. 1979). It goes on to define "interest" as "the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Id. at 729. Based on the above definitions, it is clear that the charges incurred by the Hamiltons were interest from short-term loans, not service fees.

The Hamiltons also assert claims under the Columbia's Unfair Business Practices Act (UBPA). The UBPA is a broad, remedial act which confers a right of action, in equity, to enjoin unfair, deceptive and/or fraudulent business acts or practices. The goal of the UBPA is intended to address the general societal harm that results when business enterprises act illegally or unethically. In order to state a claim under the UBPA, plaintiff must allege that defendant engaged in unlawful, unfair, or fraudulent business acts or practices; or unfair, deceptive, untrue or misleading advertising. Business and Professions Code section 17200. The factors which the courts consider in determining whether a practice is unfair are: whether the practice violates or offends public policy as it has been established by statutes, the common law, or otherwise; whether it is immoral, unethical, oppressive, or unscrupulous; and whether it causes substantial injury to consumers. Here, the Hamiltons allege that HLT disguised their consumer loan business as a check cashing operation, failed to disclose their interest rates and finance charges, threatened criminal prosecution for writing bad checks when HLT had to have known that the Hamiltons could not have been prosecuted for failing to pay usurious loans, and violated Civil Code provisions pertaining to check-cashing businesses. If proved, these practices constitute actionable unfair business practices under the UBPA.

HLT asserts that a UBPA claim cannot be based upon violations of licensing requirements under Civil Code §§ 3702-3708. HLT argues that the Hamiltons have no standing to seek relief for violations of licensing statutes, that being the exclusive purview of the State. Therefore, the Hamiltons lack standing to raise these statutory violations as a basis for a UBPA claim. This argument lacks merit as it ignores the broad mandate of the UBPA. The courts will look to the underlying conduct engaged in by the business. If that conduct is unlawful, unfair, deceptive, or fraudulent, a UBPA claim can be based upon that conduct notwithstanding the plaintiff's lack of standing to seek direct relief for violations of the law.

In regard to the claims under the federal Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601, et seq., it is clear that the Hamiltons have alleged sufficient facts to state a claim. CCPA is a comprehensive regulatory scheme intended to deter the predatory extension of credit which can disrupt the national economy and increase the personal bankruptcy rate. Its provisions are intended to aid the unsophisticated consumer in determining the total costs of financing. One of its primary mechanisms for accomplishing this is the requirement of "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). The consumer must receive, in writing, the finance charge (a dollar amount) and the annual percentage rate or APR (the cost of credit on a yearly basis). Because CCPA is a remedial act designed to protect consumers, courts construe it liberally in favor of consumers. They focus on the substance, not the form, of credit-extending transactions.

The Hamiltons allege that the defendant failed to disclose the terms of their transactions, such as the 520% annual rate, in the manner required by CCPA. The defendant argues that it did not have to conform to CCPA because the transactions were not covered by the statute. This argument ignores the nature of the deferred-repayment transactions and does not reflect the broad wording of CCPA or its underlying policy.

For example, 15 U.S.C. § 1602 states that:

> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
>
> (f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise,

> consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

Furthermore, 15 U.S.C. § 1605(a) broadly defines "finance charge" as:

> the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. Examples of charges which are included are:
>
> (1) Interest, time price deferential, and any amount payable under a point, discount, or other system of additional charges;
>
> (2) Service or carrying charge;
>
> (3) Loan fee, finder's fee, or similar charge; and
>
> (4) Fee for an investigation or credit report.

The deferred-repayment transactions between the Hamiltons and HLT involved payments by the Hamiltons of substantial sums of money over time for the privilege of obtaining cash from HLT today. Thus, since the Hamiltons were incurring debt and deferring its payments, these transactions would fall under the language in 15 U.S.C. § 1602(e) and (f). Additionally, the alleged fees paid by the Hamiltons to the defendant would be considered finance charges under the broad definition in 15 U.S.C. § 1605(a).

Affirmed.

Pilot Life Insurance Company v. Sledd

Columbia Court of Appeal (1975)

This is an appeal from a judgment finding that certain charges appellant Robert Sledd (Sledd) was required to incur in connection with a loan were not interest payments and therefore not subject to Columbia's usury statute.

Sledd borrowed money from Pilot Life Insurance Company (Pilot). As a condition of the loan, Pilot required Sledd to purchase credit-life insurance. Sledd purchased the insurance from Pilot, but he could have met the requirement by purchasing insurance from any reputable insurer doing business in this State. When Pilot sued Sledd to enforce the loan, Sledd interposed a defense alleging that the loan was unenforceable because it provided for payment of a usurious interest rate. Sledd alleged that by requiring him to purchase credit-life insurance as a condition of receiving the loan, the payment of the insurance premium amounted to a demand for excessive interest in violation of the state's usury laws.

Usury is the excess over the legal interest charged by a lender to a borrower for the use of the lender's money. It is the reserving and taking or contracting to reserve and take, either directly or indirectly, by commission, discount, exchange, advances, or by any contract or contrivance whatever, a greater sum for the use of money than the lawful interest, the legal rate being 10 percent, and it being usury to charge more than 10 percent. Civil Code § 3601.

However, where an excess over the legal interest is paid for other good and valuable considerations beyond the mere use of money, it is not usury. The substance of Sledd's claim was that the usury consisted of Pilot requiring that he procure a credit-life insurance policy, on his life or on the life of some other person, offered by some reputable life insurance company doing business in this State, and assign it as collateral security for the loan. Sledd purchased the policy, which was issued by Pilot, a reputable

life insurance company doing business in this State. Sledd asserts that the premium charged for the insurance by Pilot as a life-insurance company in connection with the interest charged, which was 6 percent per annum, was in excess of the legal rate of interest, and made the contract usurious. The premium charged did not inure to the benefit of Pilot, as such, but was the consideration charged and earned by it as a life insurance company. There was therefore no violation of the principle that anything given in excess of legal interest which inures to the benefit of the lender will be considered usury.

Sledd contends that the premium should be included as interest because the credit-life insurance was of no value to him. The beneficiary of the policy was Pilot, and the amount of the policy covered only the amount of the loan. Thus, Sledd argues that he received nothing of value, and that the policy was, in effect, a payment to protect the interest of the lender. It is to be noted that Sledd was not required to take out the insurance with Pilot, but only with some reputable insurance company doing business in this State; that less than the maximum rate of 10% interest was charged on the loan; and that the premium charged was not alleged to be more than was customarily charged non-borrowers for similar insurance coverage.

Judgment affirmed.

ANSWER 1 TO PERFORMANCE TEST-A

1)

MEMORANDUM

To: Annabelle Lee

From: Applicant

Date: July 27, 2004

RE: Potential Claims Jack [sic] Donovan has against Bargain Mart, Inc.

The following is a list of potential claims Jack [sic] has against Bargain Mart, Inc. as you requested. Additionally, I have included information on how Jack [sic] will be able to establish his claim, or if he can't, what information we need in order for him to do so.

Claim that the gift certificates operated as a[n] interest rate that violate Civil Code Sections 3601 & 3602 of the Interest & Usury Statutes (U&I).

Civil code sections 3601 & 3602 allows [sic] legal interest to be stipulated by parties, however, makes [sic] it unlawful for such interest rate to exceed 20% per year if the principal is $3,000.00 or less.

First, Jack [sic] will have to establish that the Bargain Mart (BM) gift certificates operated as a charge for the immediate use of its up-front money by those who did not have sufficient funds. Jack [sic] can argue that since BM overpriced it[s] products, the gift certificates were intended to effectively operate as a service or interest charge since BM knew that such certificates would not be used on its overpriced products by people who had received certificates, i.e.[,] those on a pension. BM had such knowledge because it mandated proof of a pension payment prior to disbursing funds to customers like Jack [sic]. Additionally, a reasonable person, especially one on a limited fixed income, would not spend frivolously on overpriced products that they could get across the street for much lower [sic]. Further, the fact that Larry Walker, a former employee[,] never actually saw anyone use a gift certificate in the store is a good indication that the certificates were merely covering up what was truly a service or interest charge. We will need to get more information on whether gift certificates are ever used in the store, and whether people buy their products from this store and to what extent to strengthen our claim that these gift certificates operated as a charge on the loan of money. If we can't establish this first fact, we will not have a case under the U&I statute; however, based on the preceding, it [is] likely we can establish this fact even without further information.

Secondly, Jack [sic] must establish that the gift certificates operated as an interest charge

as opposed to a service charge in order to have a claim under U&I statute because a service charge will not fall within the purview of the U&I statute. Courts look to the substance of the transaction as opposed to the form in determining whether a charge is interest or mere service charge (Hamilton). A service charge is a charge on processing a check and providing instant cash as opposed to merely lending money to a customer who did not have sufficient funds so that he could immediately use money he didn't have. (See Hamilton). Interest is defined as the compensation allowed by law or fixed by the parties for use or forbearance of money. Therefore, it appears as though Jack [sic] can establish this point without further information. (However, in the unlikely even[t] this is considered a service charge as opposed to interest, we still have a UBPA claim based on a section 3705 violation discussed below.)

Thirdly, Jack [sic] will have to show that the interest rate was usury, namely that it is greater than what is allowable and the excess was not paid for other good and valuable consideratio[n]s beyond the use of money (Hamilton & Sledd). This can easily be done since the original loan amount was $300 and the gift certificates (assuming they operated as an interest charge) were $75, which is 25% of the principal, thereby exceeding the allowable interest rate. Additionally, the excess of interest was in exchange for gift certificates in a store that overpriced its products than [sic] its competitor across the street. We will have to establish that such gift certificates did not constitute good or valuable consideration since they effectively couldn't and wouldn't be used. Furthermore the fact that the consumer's only option was to give its business to the provider of the money may be additional support for our argument (see Sledd).

Fourthly, Jack [sic] will have to show that BM knowingly accepted an interest rate that was greater than what was allowed. We will have to establish that BM knew it was charging in excess of an allowable amount. It may be helpful to know why BM instituted this deferral system, its purpose, motivation and rationale for such deferral system. If it had conducted research or had itself been involved in anything that would have revealed the maximum allowable interest rate, Jack [sic] will be able to establish this claim. Additionally, if we can establish BM is a [sic] licensed by the Department of Financial Systems, it is likely that it would have known of such ceiling on the allowable interest rates.

<u>Claim that the Bargain Mart, Inc. has violated the Unfair Business Practices Act (UBPA)</u>

The UBPA attempts to prevent harm caused by business acting illegally or unethically by prohibiting unfair competition by using fraudulent, misleading, or unlawful business practices. Unfair business practices are determined by considering a variety of factors, including whether the practice violates public policy as evidenced by such practice being prohibited by statute. Therefore, Jack [sic] must prove that BM is a business and has violated a statute. Jack [sic] can rely on the section 3601 & 3602 violations of the U&I or he can rely on additional U&I sections even though direct actio[n]s based on such sections may only be brought by the state (See Hamilton which explains that a UBPA claim can be based on conduct despite plaintiff's lack of standing to seek direct relief for violation based

on that statute).

Therefore in addition to relying on sections 3601 & 3602 violations for unlawful interest rate charged, Jack [sic] can rely on sections 3705 (2) (9) & (10) to ground his UBPA claim, even though he could not bring such direct actions as a private individual since there [sic] are expressly limited to the state by civil code section 3720.

Jack [sic] will have to establish that BM [is] in the deferred deposit service business and is a licensee, i.e.[,] that BM has been licensed by the Department of Financial Institutions to conduct cash checking or accepting deferred deposit transactions. We have support that BM is in the deferred deposit service business since it did engage in a deferred deposit transaction with Jack by accepting a post-dated check for a higher value than the cash BM gave in exchange and BM probably regularly partakes in such transactions as evidenced by its ad stating "Come and see us if you're short on cash" and its extensive chart regarding the check amount required for the relevant cash advance. We will need the additional fact of whether BM is licensed to partake in such activity. If so, then Jack [sic] can proceed with his reliance on section 3705 to establish his UBPA violation claim.

Assuming that BM is a licensee, we will have to ensure that BM doesn't fall within one of the exemptions to the applicability of section 3705, namely that he is not a person principally engaged in retail sales who incidentally or independently may from time to time cash checks for a fee. Although we know BM is a retailer, we need to discover the extent of its retail business and whether the operation is merely a coverup of what is truly a loan service. Also, we will have to establish that the gift certificates operate as a fee since BM has priced products so high they effectively will not be used and therefore no consideration is received in exchange for the excess of the customer's check beyond the cash given by BM. Further, we will have to establish that the deferral system is the core of BM's business and that the retail store is incidental as opposed to it being the other way around. Assuming we can establish that BM has effectively charged a fee through its gift certificates and that BM's retail business isn't as booming as its check cashing business, we will be able to overcome section 3703(3)'s exemption and[,] consequently, rely on section 3705 for establishing Jack's [sic] claim.

Civil Code section 3705 specifies that a licensee can't charge a service fee exceeding fifteen dollars for every hundred dollars loaned. Therefore, if we can't establish the gift certificates operate as an interest charge under our sections 3601 & 3602 claims, we can alternatively seek to establish they are a service charge, in which case they would be invalid since the maximum allowable service charge amount on three hundred dollars is forty-five dollars, yet BM charged seventy-five. Therefore a UBPA violation can be grounded in the service charge that exceeds the allowable amount.

Additionally, the UBPA claim can be grounded in section 3705(9). Although a licensee can collect a return check c[h]arge pursuant to civil code section 3708(3), it cannot enter into a deferred deposit transaction with the threat of prosecution for writing a bad check

pursuant to civil code section 3705(9). In this case, assuming we establish BM is a licensee, we must establish that this was a deferred deposit transaction & that BM threatened Jack [sic] with prosecution for writing a bad check. A deferred deposit transaction is defined as holding a check for a period prior to deposit in accordance with an agreement made to the maker of the check in exchange for consideration, which includes a premium charged for the sale of service in excess of the goods or service. In this case, we can clearly establish such transaction because BM holds the check for a specified periods [sic] pursuant to the agreement made with Jack[sic], namely 14 days. Additionally, in exchange for this agreement to hold the check, Jack [sic] writes a check for seventy-five dollars over the amount of immediate cash given to BM. Therefore, this can qualify as a deferred deposit transaction. Additionally, the agreement between BM and Jack [sic] expressly stated in paragraph 4 that Jack [sic] agrees that he may be subject to criminal prosecution and civil penalties for writing bad checks, thus violating section 3705(9). Therefore, liability under UBPA can be grounded in this section, assuming the preceding is met.

Furthermore, the UBPA claim may be grounded in section 3705(10) if we can discover additional facts that BM, as a licensee, failed to conspicuously display a sign giving notice to Jack [sic] that customers who enter into a deferred deposit transaction will not be prosecuted or convicted for writing bad checks.

Claim that the Bargain Mart, Inc. has violated the Consumer Credit Protection Act (CCPA)

CCPA requires that a creditor give meaningful disclosure of credit terms to enable the consumer to compare various credit terms and avoid uninformed use of credit. It is read liberally to protect the consumer from predatory extension of credit which can have the tendency to increase personal bankruptcy. The consumer must receive the finance charge in writing.

First we will have to establish that BM falls within the purview of this Act, namely that it is a creditor. This requires us to establish that BM regularly extends consumer credit or loans for which there is a finance charge. If we can establish the gift certificates effectively and were intended to operate as a service charge or interest, we will likely have a claim under this Act. We need the information discussed above regarding the gift certificates, i.e.[,] their purpose and extent of business. Additionally, it is likely we can establish that BM is a creditor since he did advertise for such deferments & had what appears to be an easy and accessible deferral chart payment system, but will need further facts as to how much he actually utilized the deferred payment system. Even if we don't get the information that will be helpful, Jack [sic] still has a claim under this action per Hamilton. Hamilton has stated the incurring of debt and deferring of payments falls within CCPA, and charges on such transactions constitute finance charges falls under the Act.

Second we will have to establish that BM as a creditor did not give meaningful disclosure of the credit terms to enable the consumer to compare various credit terms. We will argue

that because the terms of extending credit, namely char[g]ing an interest or service charge, was hidden since Jack thought he was obtaining a gift certificate that had real value but was unusable. The fact that Jack [sic] was living on a limited income and BM knew such a fact due to its requirement that Jack [sic] supply a copy of his pension payment prior to BM disbursing the funds, establishes that BM knew Jack [sic] would not use such gift certificates on its overpriced products and therefore, payment for such gift certificates would certainly operate as a service charge or interest. Additionally, because BM knew this essentially constituted a loan with a service or interest charge, such terms were not adequately disclosed. Rather Jack [sic] was lead [sic] to believe that he was getting gift certificates, when in actuality he was getting a service charge or interest rate. Therefore, he could not meaningfully appreciate the terms of the loan due to BM's nondisclosures, and consequently, could not make an informed credit decision which the CCPA is aimed at preventing. Thus, Jack [sic] has a claim under CCPA.

ANSWER 2 TO PERFORMANCE TEST-A

1)

MEMORANDUM

To: Annabelle Lee

From: Applicant

Date: July 27, 2004

RE: Jack [sic] Donovan and Bargain Mart, Inc.

Per your request, I have done some preliminary work on Dr. [sic] Donovan's potential statutory claims against Bargain Mart, Inc.

I. Donovan may assert that Bargain Mart has violated Columbia's Interest and Usury Statutes

A. Statutory requirements:

1. The usury statutes apply to interest charges, not service charges.

The Hamilton court explained that Columbia's interest and usury statutes only apply to interest charged for loans (usury) and do not apply to service fees for cashing checks. Thus, we must first determine whether Donovan was charged interest on a short term loan or, alternatively, a service fee for cashing the check. In Hamilton, the court of appeals explained that whether a fee is interest or a service fee is determined by the whole of the evidence. Citing Civil Code section 3705(2), the court explained that service fees are found when a fee is charged at the time the check is cashed for the service of processing the check and providing instant cash for people without access to bank services. Section 3705 explains that "any fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest." In Hamilton, the court found that HLT's deferment of check cashing was not a fee for cashing the Hamilton's [sic] checks, but rather giving them short-term loans subject to the usury statutes.

In Pilot Life Insurance Co., the court of appeals again attempted to define what constitute interest payments subject to the usury statutes. There, Sledd borrowed money from Pilot in exchange for a promise to purchase credit-life insurance. Sledd alleged that requiring him to purchase life insurance as a condition of receiving the loan amounted to a demand for excessive interest in violation of the usury laws. The Pilot court explained that anything given in excess of legal interest which inures to the benefit of the lender will

generally be considered usury. However, Pilot explained, where an excess over the legal interest is paid for other goods and valuable considerations beyond the mere use of money, it is not usury. Moreover, the court explained that a payment is not usury simply because the borrower received nothing of value. For example, in Pilot, the court rejected Sledd's argument that the requirement that he take out credit-life insurance was no benefit to him and thus constitutes usury. Thus, the court found the life-insurance policy was not interest payments subject to the usury laws.

In Pilot Life Ins. Co., the court explained that usury is the "excess over the legal interest charged by a lender to borrower for the use of the lender's money." The elements include "the reserving and taking or contracting to reserve and take, either directly or indirectly, by commission, discount, exchange, advance, or by any contract or contrivance whatever, a greater sum for the use of money than the lawful interest, the legal rate being 10 percent, and it being usury to charge more than 10 percent." Civil Code section 3601.

2. If Bargain Mart charged an interest, the Usury statutes impose statutory limits of 10% on the amount of interest that can be charged.

In Hamilton, the court of appeals explained that to state a claim under Civil Code section 3602, a person must knowingly take, reserve, or charge a rate of interest greater than is allowed in CC section 3601. Section 3601 provides that the legal rate of interest shall be 10 percent per year unless established by contract. Where the principal amount involves under $3,000, the statute states that the legal rate shall not exceed 20 percent per year on any loan, advance, or forbearance to enforce the collection of any sum unless pursuant to another law.

B. Facts as applied

For Donovan to assert a claim that Bargain Mart violated the statutory usury laws, he will have to establish (1) that the fees Donovan paid were not simply service fees, but rather interest or usury and (2) that the usury charged exceeded the 10% annual statutory limit. As to the first element, we know that Donovan gave Bargain Mart a postdated check for $375 in exchange for $300 cash, $75 in gift certificates, and a promise not to cash the check for 14 days. Although Larry Walker told us that Bargain Mart told him never to refer to these transactions as loans, and although Bargain Mart's agreement with Donovan specifically said this was not a loan since Donovan was getting back exactly what he was giving them, we know from Hamilton that we look at the totality of circumstances to determine whether a loan or service fee has occurred.

In exchange for Donovan's $375, we know that Donovan received $75 in gift certificates and that the gift certificates were never used. As Larry Walker, Bargain Mart's former employee, explained[,] the appliances were simply too expensive and of poor quality. Moreover, the gift certificates could only be used for half of the purchase of the appliance, and as Walker explained, the goods weren't even worth the half that would have

to be paid in cash. As the court in Pilot explained, anything that inures to the benefit of the lender is generally considered usury. Here, the gift certificates, if used, clearly benefit the lender. However, although not dispositive, it is clear that Donovan never used the gift certificates and apparent from Walker's statement that the gift certificates were illusory and of no value considering the excessive prices at Bargain Mart. Indeed, a toaster over [sic] sold for $150, $75 of which would have to be paid for in cash, and the toaster was worth less than the $75 in cash. Considering the totality of the circumstances, it looks like the $75 interest charged to Donovan in exchange for gift certificates of seemingly no value constitute usury and are subject to the interest limitations.

Turning to the second element, an interest rate limit of 10%, Donovan told us that the man behind the counter looked at a chart to determine how much Donovan would have to pay to get the cash. Donovan signed an agreement promising to pay $25 for a bounced check, which he was forced to pay when his check bounced. In fact, when Donovan's check bounced, he had to pay the [sic] $500, the $375 he owed, a $25 fee for the check bouncing, and another $100 gift certificate. As you explained to Donovan in your interview, this adds up to a 650% if this was a straight loan without the gift certificates: specifically, $75 is 25% of the $300 he borrowed, the term was two weeks, which is 1/26 of a 52 week year, and 25% times 26 is 650%. Moreover, this was for the second transaction.

C. Facts we need

Based on the facts presently available to us, it appears that Donovan will be able to establish the statutory requirements supporting a claim under Columbia's interest and usury statutes. Thus, any other facts discovered through investigation and disclosure will simply bolster the claim.

II. Donovan may assert that Bargain Mart has violated Columbia's Unfair Business Practices Act (UBPA)

A. Statutory requirements

Columbia's Unfair Business Practices Act is a "broad, remedial act which confers a right of action, in equity, to enjoin unfair, deceptive and/or fraudulent business acts or practices." Hamilton. To state a claim, Hamilton explains that Donovan must allege that defendant Bargain Mart engaged in (1) unlawful, unfair, or fraudulent business acts or practices; or (2) unfair, deceptive, untrue or misleading advertising. See Hamilton.

B. Facts as applied

Unlawful, unfair, or fraudulent business acts and practices

In considering whether a practice is unfair, Hamilton explains that courts will consider: whether (a) the practice violates or offends public policy as it has been

established by statutes, the common law, or otherwise; (b) whether it is immoral, unethical, oppressive, or unscrupulous; and (c) whether it causes substantial injury to consumers. In Hamilton, the court recognized that the following business acts and practices by HLT, if proven, could be found to violate the Unfair Business Practices Act:

(1) disguising consumer loan business as a check cashing operation

(2) failing to disclose interest rates and financial charges

(3) threatening criminal prosecution for writing bad checks when HLT had to have known that the Hamiltons could not have been prosecuted for failing to pay usurious loans; and

(4) violated Civil Code provisions pertaining to check-cashing businesses. As to this latter point, the Hamilton court rejected the argument that the plaintiff lacked standing to challenge violations of Civil Code sections 3702 - 3708 and permitted a challenge to these statutory violations under the UBPA. Civil Code sections 3702 - 3708 provide that it is unlawful for a person to engage in the business of cashing checks or accepting deferred deposit transactions for a fee or other consideration without having first obtained a license. However, these sections do not apply to (2) "any person who cashes checks without receiving, directly or indirectly, any consideration or fee therefor and (3) any person principally engaged in the retail sale of goods or services who, either as an incident to or independently of a retail sale, may from time to time cash checks for a fee or other consideration." Section 3703. If the sections apply, section 3708 provides among other things that the licensee shall (1) disclose conspicuously all fees and charges; (2) post fees and charges at every branch office.

Because of the similarity of the present case to the facts in Hamilton, Donovan can likely assert the same claims of UBPA violations as those asserted against HLT in Hamilton. Thus, I take each claim in turn:

1. First, Donovan may argue that Bargain Mart disguised its check cashing operation as an appliance business. Although Bargain Mart looked like a regular small appliance store with toaster ovens, microwaves, blenders, and food processors for sale, Bargain Mart's advertisement stated that "if you're short on cash or don't have good credit, we also offer cash-plus services. . . you can write us a check for the amount you need and walk away with immediate cash." Larry Walker, an employee of Bargain Mart for about 8 months three years ago, also stated that Bargain Mart offered a "cash-plus"service in addition to its appliances. However, it appears that Bargain Mart was not actually engaged in the sale of appliances, but only the cash-plus service. According to his interview, Walker never saw anyone come in only to buy appliances when he worked there. Rather, it appears, Bargain Mart was simply a cash-checking store disguised as an appliance store. This is likely a deceptive business act. However, we should determine through discovery and investigation whether Bargain Mart actually sold any appliances or simply acted as an appliance store as a disguise to its cash-plus service.

2. Next, Donovan can argue that Bargain Mart failed to disclose interest rates and financial charges. Walker explained the concept as one by which people would get cash in exchange for writing a check for a higher amount. Although salespersons consult a chart to determine the amount a customer must pay to receive immediate cash, Walker explained that customers were not given copies of the chart. Thus, it seems, Bargain Mart did not disclose to Donovan the fees to which he was subject.

3. Third, Donovan can argue that Bargain Mart improperly threatened criminal prosecution for writing bad checks when it knew or had to know that Donovan could not have been prosecuted for failing to pay usurious loans. Bargain Mart's agreement with Donovan stated that Donovan "may be subject to criminal prosecution and civil penalties for writing "bad" checks under applicable laws. However, as the court held in Hamilton, Bargain Mart should have known that Donovan could not be criminally prosecuted for failure to pay usurious laws and thus such threats violated the UBPA.

4. Finally, Donovan can argue that Bargain Mart violated the statutory requirements under Civil Code sections 3702 - 3708 and thus that the violation of the statutes constitutes an unfair practice under the UBPA. However, as explained below, we do not yet have enough facts to determine whether Bargain Mart in fact violated these statutory requirements and whether Bargain Mart is subject to such restrictions as a licensee.

Assuming that Bargain Mart is subject to the requirements of Sections 3702 - 3708, however[,] we know that Bargain Mart violated section 3705 by threatening Donovan with criminal and civil prosecution for writing bad checks. As 3705 states, Bargain Mart was not only precluded from making such threats, but apparently also failed in its affirmation duty to display a notice stating that no person entering into such transaction can be prosecuted or convicted of writing bad checks.

Unfair, deceptive, untrue or misleading advertising

In addition to the above described claims of unfair business acts or practices, Donovan can also argue that Bargain Mart engaged in unfair, deceptive, and untrue or misleading advertising in violation of the UBPA. As to this claim, we know that Donovan found the flyer for Bargain Mart in the Saver weekly paper, a paper which lists sales and ads. Bargain Mart's advertisement stated with regards to the appliances "if you're in the market for good deals on small appliances, come to us . . . we stock a large supply of small appliances. Check out our prices--they can't be beat." However, as Larry Walker explained, Bargain Mart's prices on appliances were nothing [sic] but bargains that couldn't be beat. Rather, Walker explained that the appliances found at Bargain Mart were priced over two times that of competitors and the quality of the goods was poor. Thus, Bargain Mart falsely advertised its good prices arguably in violation of the UBPA.

C. Facts we need

In summary, the facts currently available to establish the statutory requirements of a violation of the UBPA if we determine that sections 3702-3708 apply to Bargain Mart. In considering whether a practice or advertising is unfair in violation of the UBPA, Hamilton explains that courts will consider: whether (a) the practice violates or offends public policy as it has been established by statutes, the common law, or otherwise; (b) whether it is immoral, unethical, oppressive, or unscrupulous; and (c) whether it causes substantial injury to consumers.

Thus, if Bargain Mart's practices are said to violate sections 3702-3708, Bargain Mart will be subject to a claim under UBPA. However, we do not yet have enough facts to determine whether Bargain Mart is subject to the licensing and other requirements of sections 3702 - 3708. Thus, we will want to determine by investigation and discovery whether Bargain Mart has a license to cash checks or accept deferred deposit transactions for a fee as required under section 3702. It would also assist us to determine whether Bargain Mart actually ever sells appliances either incident to or independent of the cash advance sale. If so, it may be exempt from the license requirements under section 3703. Finally, we must determine whether Bargain Mart posts its fees at every branch office in compliance with section 3708 or whether Bargain Mart's failure to post such fees constitutes an additional violation of the UBPA.

III. Donovan may assert that Bargain Mart has violated the federal Consumer Credit Protection Act (CCPA)

A. Statutory requirements

1. To whom does the CCPA apply

The Hamilton court defined the Consumer Credit Protection Act (CCPA) as a "comprehensive regulatory scheme intended to deter the predatory extension of credit which can disrupt the national economy and increase the personal bankruptcy rate." Applying the CCPA to HLT, a licensed check cashing company in Pikeville[,] Columbia, the Hamilton court explained that the CCPA is intended to aid the unsophisticated consumer in determining the total costs of financing. HLT engaged in "check cashing" and "deferral" transactions. Pursuant to 15 U.S.C section 1602, the CCPA applies where a "credit" is granted by a creditor to debtor to defer payment of a debt or to incur debt and defer its payment. "Creditors," or persons who both (1) regularly extends [sic] consumer credit payable in more than four installments or for which the payment of a finance charge is or may be required and (2) is the person to whom the debt is initially payable. Section 1605 defines "finance charge" to include "interest, time price differential, and any amount payable under a point discount, or other system of additional charges."

2. Elements

The Hamilton court explained that the CCPA requires "a meaningful disclosure of

credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." To satisfy this element, the consumer must receive, in writing, the finance charge (a dollar amount) and the annual percentage rate or APR. The court further explained that courts construe the CCPA liberally in favor of consumers, focusing on the substance, not the form, of credit-extending transactions.

B. Facts as applied to the CCPA

Based on Donovan's interview, it is clear that Donovan qualifies as an unsophisticated consumer of the type the CCPA is intended to protect. Donovan receives Social Security and a small pension from his years working for State Department of Agriculture as an inspector. Donovan lives off a fixed income.

Whether the CCPA applies to Bargain Mart depends on whether Bargain Mart's transaction with Donovan constitutes the grant of a "credit" by Bargain Mart to Donovan to defer payment of a debt or to incur debt and defer its payment. Donovan agreed to pay Bargain Mart $375 in exchange for $300 in cash, $75 in gift certificates, and a promise by Bargain Mart not to cash the check for 14 days. Thus, Bargain Mart agreed to defer payment of a debt and thus granted Donovan a credit.

Thus, we must determine whether Bargain Mart is a creditor under the statutory provisions. Creditors include those who permit payment of a finance charge, including any interest, time price differential, or amount payable under any system of additional charges, and who is the person to whom the debt is initially payable. Bargain Mart permitted Donovan to pay a finance charge in the form of a gift certificate, and Donovan was responsible for payment directly to Bargain Mart. Thus, Bargain Mart is a creditor subject to the terms of the CCPA.

As a creditor subject to the CCPA, it is apparent from the facts at our disposal that Bargain Mart failed to fully disclose the credit terms to Donovan so that Donovan could compare the terms with other options in violation of the CCPA. For example, the salesperson consulted a chart to determine how much Donovan had to pay depending on how many days he wanted the loan. However, Donovan was not given a copy of the chart.

Although Donovan did enter into a written agreement with Bargain Mart, the agreement did not state the finance charge (a dollar amount) and the annual percentage rate or APR. Rather, the agreement stated that he would write a postdated check in the amount of $375 which BMI would not cash for 14 days in exchange for $300 in cash and $75 in gift certificates. The agreement stated that in the event a check is returned to BMI unpaid, Donovan would pay a returned check charge of $25.00. The agreement further explained that Donovan would be subject to criminal prosecution and civil penalties for writing "bad checks" under applicable laws.

Because the agreement Bargain Mart entered into with Donovan failed to meaningfully disclose the credit terms in a manner by which Donovan could compare more readily other terms available, the agreement violated the CCPA and Donovan may assert a claim alleging such violation.

C. Facts we need

Based on the facts presently available to us, it appears that Donovan will be able to establish the statutory requirements supporting a claim under the CCPA for failure to meaningfully disclose credit terms. Thus, any other facts discovered through investigation and disclosure will simply bolster the claim.

Conclusion

Based on the foregoing information, it appears that Donovan has a number of claims against Bargain Mart for violations of statutory requirements.

THURSDAY AFTERNOON
JULY 29, 2004

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

JAYNES v. PALM GARDENS GROUP

JAYNES V. PALM GARDENS GROUP

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 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 response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem 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.

Molina, Spitz and Carter
3400 E. Lansing Blvd., Suite 900
Phillipstown, Columbia 88888
(555) 894-0900

MEMORANDUM

To: Applicant

From: Daniel Spitz

Date: July 29, 2004

Re: **Jaynes v. Palm Gardens Group**

Our firm represents Lydia Jaynes, a tenant at Palm Gardens Apartments, in a negligence claim against Palm Gardens Group (Palm). Ms. Jaynes was assaulted and seriously injured by an unknown male assailant in the parking garage at Palm Gardens Apartments. She has filed a lawsuit against Palm for negligent failure to repair a broken security gate in the parking garage.

Palm has filed a Motion for Summary Judgment. Please draft plaintiff's responsive memorandum of points and authorities opposing the granting of that summary judgment motion. In discussing the facts, assume that the documents in the file will be presented to the court in the form of declarations and exhibits. At this point, simply identify the source of any facts to which you refer.

Molina, Spitz and Carter
3400 E. Lansing Blvd., Suite 900
Phillipstown, Columbia 88888
(555) 894-0900

To: Firm Associates

Re: Memoranda in Opposition to Motions for Summary Judgment

A Memorandum of Points and Authorities in Opposition to a Motion for Summary Judgment consists of three sections, as follows:

SECTION I. *Introduction.* Write a concise summary of the nature of the underlying case, the basis for the summary judgment motion and the basis for the opposition.

SECTION II. *Response to Moving Party's Arguments.* The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Given the nature of summary judgment, it is imperative that there be reference not only to the existence of relevant facts, but where those relevant facts can be found in the record. To the extent that factual material has yet to be reduced to a form appropriate for presentation to the court (e.g., a witness statement has not been converted to a declaration), you may simply identify the source of any factual material to which you refer.

The firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, *Improper:* PLAINTIFF HAS ESTABLISHED A TRIABLE ISSUE OF FACT AS TO DAMAGES. *Proper:* NOTES BY A

TREATING PHYSICIAN ARE SUFFICIENT TO ESTABLISH A TRIABLE ISSUE OF FACT AS TO PLAINTIFF'S DAMAGES.

SECTION III. *Conclusion.* This is a brief statement asking the court to find in our client's favor.

Paul Price
HIMMLER & MATZEN
1 West Union Plaza, 15th Floor
Garden City, Columbia
(555) 267-0001

Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF SCHYLER

LYDIA JAYNES,

Plaintiff,

vs.

PALM GARDENS GROUP,

Defendant.
_____/

Case No. 171757

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Palm Gardens Group owns apartment complexes including the Palm Gardens Apartments. Plaintiff Lydia Jaynes alleges she was assaulted and injured by an unknown assailant in the parking garage at Palm Gardens Apartments. She has sued defendant for negligent failure to repair a broken security gate in the parking garage and to provide adequate security measures.

II. PLAINTIFF HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO SHOW THERE IS A TRIABLE ISSUE OF MATERIAL FACT ON THE ELEMENT OF CAUSATION.

In *Putnam v. Winters Group*, the Columbia Supreme Court upheld a lower court's granting of a motion for summary judgment finding that the plaintiff had not established and could not reasonably expect to establish a *prima facie* case of causation. As in *Putnam*, plaintiff in the instant case has brought forth merely evidence of the "speculative possibility" that additional actions on the part of defendant "might have prevented the assault."

III. PLAINTIFF HAS NOT ESTABLISHED, AND CANNOT REASONABLY EXPECT TO ESTABLISH, A *PRIMA FACIE* CASE FOR CAUSATION.

Plaintiff has failed to present any evidence beyond mere speculation to support her claim for causation. Indeed, fundamental reasonable possibilities for causation have not been foreclosed. For example:

Plaintiff has offered no evidence showing the identity of her assailant;

Plaintiff has offered no evidence showing when the security gate was broken;

Plaintiff has offered no evidence that the assailant entered through the gate, much less when the gate was broken;

Plaintiff has offered no evidence that the assailant broke the gate himself;

Plaintiff has offered no evidence that defendant reasonably or effectively could have warned tenants of unspecified dangers from unknown assailants frequenting the garage.

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IV. CONCLUSION

For the above stated reasons, defendant respectfully requests this court grant summary judgment in favor of Palm Gardens Group.

Respectfully submitted,

HIMMLER & MATZEN

Dated: July 14, 2004

Paul Price

By: PAUL PRICE

MOLINA, SPITZ, and CARTER

MEMORANDUM

To: Applicant

From: Daniel Spitz

Below is the draft declaration of our client, Lydia Jaynes, prepared from the transcript of her initial interview. We will add the case caption and title, and have it signed before appending it to our response.

DECLARATION OF LYDIA JAYNES

I, Lydia Jaynes, declare as follows:

1. I rented my apartment at Palm Gardens Apartments in late 2001 because I wanted a secure building with controlled access.

2. I saw a newspaper advertisement for Palm Gardens Apartments which stated that it was a secure building.

3. The apartment building is small, with ten 2-bedroom apartment units over a parking garage with 12 parking spaces.

4. When I visited the apartment building I was shown the various security features of the building.

5. I was also assured by the building's managers that this particular apartment building had several security features, including underground parking secured by an automatic gate which required an access card for entry (the standard sort of iron gate that rises up from the ground to permit a car to enter, then closes after the car has entered).

6. In addition to the security gate, there were three other pedestrian gates or doors

leading from the parking garage. Two gates exited to a patio area of the apartment building. The third was a door leading to the elevator which ran between the garage and the apartment building.

7. These gates and the door require keys to unlock them, and the keys are provided only to current tenants.

8. Since the Fall of 2002, there has been a serious problem with the automatic gate to the parking garage. It would usually stick open, and it was often not repaired.

9. On at least three different occasions in late 2002 and early 2003, I complained to the manager that the security gate was not closing properly. Other tenants complained as well.

10. In approximately January or February 2003, a car ran into the gate and, from that time on, the gate never worked properly, and often left a three-foot space between the ground and the bottom of the gate.

11. I arrived home at about 2 a.m. on June 15, 2003, and used my security access card to enter the apartment building's underground garage. When I arrived, the gate was partially stuck open, with about a 2 to 3 foot gap between the bottom of the gate and the garage floor.

12. I drove down the ramp and pulled into my parking space. As I got out of my car, I was attacked by a man. He grabbed me by the throat, beat me, and sexually assaulted me. He fled out through the partially open security gate.

13. I did not recognize the man who attacked me. The man wore a mask and did not say or do anything that enabled me to identify him.

14. I am quite sure that the attacker was not any of the male tenants living in the apartment building. I know them all and would have been able to recognize any of the tenants if he had been the assailant.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on _____ in Phillipstown, Columbia.

_____
Lydia Jaynes

Ripka International Investigative Report

To: Molina, Spitz, and Carter

From: John Ripka, Ripka International

You have asked me to conduct an investigation as to the assault of Lydia Jaynes at Palm Gardens Apartments. In addition, you asked me to interview the other apartment tenants. I have also examined the incidence of crime at the Palm Gardens Apartments and its immediate surroundings.

First, I got a feel for the neighborhood. I drove around the area surrounding the apartment complex several times, both during the day and in the evening. Generally, the area is residential, about a mile or so from the downtown business district. The residents are diverse ethnically. It struck me as a lower-to-middle class area based on the relatively high percentage of multi-family housing; the type of cars parked on the street; relatively small single-family homes on smaller lots, etc.

I looked into crime demographics through reports done by the Brookminster Police Department. Palm Gardens is located in a moderate crime area. I say this because the district ranked 35th out of 59 districts in Brookminster in terms of overall crime rates. I also reviewed the police report; the repair logs kept by the apartment manager; the logs kept by the security gate service company; and building permit records.

I inspected the premises, specifically the parking lot and its immediate surrounding area. I did this both during the day and at night; also during the week and over a weekend. It seems clear to me that the building was designed to be a security building in that there were wrought iron security gates installed in the garage in or about 1987. The building was designed as a security complex to attract tenants to the building as opposed to some other building that didn't have those security amenities. I examined the security gates – both the

car gate and the pedestrian gates.

I interviewed police Captain Richard Snyder. He informed me that the Palm Gardens is located in a low to moderate crime area of the City of Brookminster. Over the last five years, there have been some, but not many, incidents of crimes of the person (assault, battery, robbery). Incidents of property crimes (burglary, theft, vandalism) are somewhat more frequent. Captain Snyder also said that there have been no reported incidents involving violent behavior by tenants of Palm Gardens or their guests.

According to Captain Snyder, in assault cases typically the assailant will have cased the location in advance, will know where the escape routes are and will wait for the victim to come to him or provide the opportunity for him to attack the victim. The fact that the assailant attacked Ms. Jaynes in the parking structure as she exited her vehicle suggested to Captain Snyder that the assailant knew, either from prior experience or prior time at this location, that he would be undisturbed during that period of time, that there was a very small chance of being observed by anyone, and that he would have an excellent ability to escape, if necessary. He may have selected this location because of the conditions that he found, such as an open gate providing him access, the isolated, remote nature of the structure, the opportunities to hide, and escape routes out of the building. Snyder thinks they all contributed to the selection of this particular building and the attack on Ms. Jaynes.

From the time Ms. Jaynes moved in until the time she was assaulted, there were no other assaults or violent crimes in the garage, but there were three auto break-ins in the garage reported to the police during that period, as well as a number of incidents of vandalism involving smashing of windshields and slashed tires. These incidents occurred when the security gate was broken.

The nature of the parking structure being underground or below the building, and being remote and isolated, provided a potentially hazardous environment for people that would have to drive in underground, essentially, and park there at night, unless the security gates

were properly functioning. The facts of this case seem to indicate that the security gate to the garage was defective on the evening of Ms. Jaynes' assault in that it would not fully close and allowed the assailant to gain access to the parking structure and lie in wait for Ms. Jaynes to pull into her parking space. For the months immediately preceding the assault, there was no one on site on a daily basis in a management capacity to inspect, test, receive tenant complaints or respond to any defects that might have existed in the security gates. I think that had someone been on the premises acting in that capacity, they would have become aware of the defective condition of the gate and had an opportunity to make the repair.

I have reviewed the repair logs maintained by Palm Gardens. The relevant excerpts are attached. These logs record complaints about items needing repair at the Palm Gardens. There are 7 reports of tenant complaints about the security gate not closing properly between November 2002 through May 2003. The log indicates that calls to the repair company were made in six out of seven times within 24 hours of the date and time of the complaint.

The last tenant complaint prior to Ms. Jaynes' assault occurred on May 27, 2003. However, there was a service call made by the repair company on June 5, 2003. The service call report indicates that the gate was stuck open, and that the repair person adjusted the gate and got it in proper working order. The gate should have been maintained on a regular basis by someone trained and skilled in repairing the gates.

I also interviewed all of the other tenants. There are nine other tenant families in the building besides Ms. Jaynes. Three of the tenants are women living alone; two are single women with children; two are married couples, one with a child, who claim to have been home with their families all evening; and the two other tenants are single males. All five of the teenage and adult males living in the complex claim to have been asleep in their apartments at the time of the attack. All of the tenants denied having male guests that evening.

One of the tenants, Kuryakin Burris, said that she came home around 4 p.m. on the afternoon before the assault, and the gate was again stuck open. She tried several times unsuccessfully to get it to close. She did not report it to the apartment manager because, she said, it always seemed to be broken.

The owners of the Palm Garden Apartments own and operate six similarly sized apartment buildings. The other five are within a mile of the Palm Gardens Apartments. This means that they could have employed a guard service, or individual guard, to patrol the buildings. Either the guard service or the individual guard might have prevented or stopped this assault, or at least deterred it from occurring in the first place.

Thank you for the opportunity to conduct this investigation for you.

RIPKA INTERNATIONAL

John Ripka

John Ripka

Narrative Section from Crime Scene Investigation Report Prepared by Brookminster Police Department

I responded to a call from the responding officer Petrillo at 0300 hours on June 15, 2003. Officer Petrillo requested that I conduct a crime scene investigation. I drove to the apartment complex known as Palm Gardens Apartments. I parked on the street and approached the parking garage. The security gate was open; the bottom of the gate was about 2 feet above the floor of the garage. I examined the security gate with my flashlight and did not observe any signs of forced entry to the gate. I examined the two pedestrian gates leading from the garage to the patio area of the complex. Both of these gates were securely closed, and appeared to be in good working order. I also examined the door leading from the garage to the apartment building. This door was also securely shut and appeared to be in good working order.

Supplemental Report dated June 19, 2003

After the incident, I submitted a list of names and dates of birth of the adult and teenage males living at Palm Gardens Apartments to State Records and Investigations. SR&I reported that none had a record of any arrests or convictions.

Elroi Samuels

Elroi Samuels

Maintenance and Repair Log

[redacted to show only reports pertaining to Palm Gardens Apartments]

Date	Repair request and response
November 15, 2002	Lydia Jaynes called to say that security gate would not close all the way
November 16, 2002	Call placed to Securite Company; will send repair person within 12 hours
November 17, 2002	Securite adjusted and repaired gate
December 10, 2002	Martha Taylor called to report security gate didn't close
December 10, 2002	Call placed to Securite Company; will send repair person within 12 hours
December 11, 2002	Securite adjusted and repaired gate
January 5, 2003	Lydia Jaynes called to say that security gate would not close all the way
January 6, 2003	Call placed to Securite Company; will send repair person within 12 hours
January 8, 2003	Securite adjusted and repaired gate
February 10, 2003	Floyd White reports that a car pulling out of the garage ran into the side support for the security gate. Door seems to be out of

	alignment
February 10, 2003	Call placed to Securite Company; will send repair person within 12 hours
February 10, 2003	Securite adjusted and repaired gate; no sign of permanent damage from car striking support
March 16, 2003	Lydia Jaynes called to say that security gate would not close all the way
March 20, 2003	Call placed to Securite Company; will send repair person within 12 hours
March 21, 2003	Securite adjusted and repaired gate
April 22, 2003	Mel Grant reported the security gate was sluggish; it had to be raised and lowered a couple of times before it would close all the way. Maintenance checked it out and reported there was no problem
May 15, 2003	Securite called to check on gate
May 18, 2003	Betty Miner called to say that security gate would not close all the way
May 27, 2003	Call placed to Securite Company; will send repair person within 12 hours

June 5, 2003	Securite adjusted and repaired gate
June 30, 2003	Called Securite to repair security gate. Stops before closing fully; will send repair person within 12 hours
July 2, 2003	Securite adjusted and repaired gate

THURSDAY AFTERNOON
JULY 29, 2004

California
Bar
Examination

Performance Test B
LIBRARY

JAYNES v. PALM GARDENS GROUP

LIBRARY

Putnam v. Winters Group
Columbia Supreme Court (2000)

We granted review in this case to consider important issues concerning the liability of apartment owners and other business enterprises to persons injured on their premises by the criminal acts of others, a liability based solely on the business owners' negligent failure to provide adequate security measures to protect those who enter or reside on their property. The difficulty in resolving these issues is enhanced by the need to balance two important and competing policy concerns: society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises.

We conclude that the trial court properly granted summary judgment to defendants based on plaintiff's failure adequately to demonstrate that defendants' negligence was an actual, legal cause of her injuries.

STANDARD OF REVIEW

Because plaintiff appeals from an order granting defendants' summary judgment, we must independently examine the record to determine whether there are triable issues of material fact and whether defendants are entitled to judgment as a matter of law. To prevail at trial on her action in negligence, plaintiff must prove each of the elements by a preponderance of the evidence – that is, that defendants owed her a legal duty, that they breached the duty, and that the breach was a legal or proximate cause of her injuries. Accordingly, to prevail on their summary judgment motion, the defendants need only establish that the plaintiff does not possess, and cannot reasonably expect to obtain, evidence that would allow a rational trier of fact to find all of the elements of negligence by a preponderance of the evidence.

Therefore, we must determine whether defendants in the present case have shown, through the evidence adduced in this case, including security records and deposition testimony, that plaintiff Putnam has not established, and cannot reasonably expect to establish, a *prima facie* case of causation, a showing that would forecast the inevitability of a nonsuit or

directed verdict in defendants' favor. If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.

In performing its *de novo* review, the trial court must view the evidence in a light favorable to plaintiff as the opposing party, liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.

FACTS

On March 15, 1996, plaintiff Linda Putnam was an employee of Postal Delivery Express. Defendants were owners of the Harwood Apartments, a 28-building, 300-unit apartment complex located on a several-acre site in the City of Coolidge. Plaintiff came to the complex in midafternoon to deliver a package to a resident. As she entered through one of the many gated entrances to the premises, she saw two young men loitering outside a security gate that had been propped open. While walking across the grounds she saw another young man already on the premises.

Plaintiff's attempt to deliver the package proved unsuccessful because the resident was not at home. When plaintiff returned down a walkway with the package in hand, the three men confronted her, and one of them asked, "Where do you think you're going?" When she failed to reply, another one said, "You're not going anywhere." Then the three of them beat her and attempted to rape her, inflicting serious injuries. After assaulting plaintiff, her assailants fled and were never apprehended.

Plaintiff's complaint alleged that defendants, knowing that dangerous persons frequented their premises, nonetheless failed to maintain the premises in a safe condition, failed to provide adequate security, and failed to warn others of the unsafe conditions. Defendants moved for summary judgment on the basis that plaintiff was unable to establish any substantial causal link between defendants' omissions and plaintiff's injury. Plaintiff offered no evidence showing the identity of her assailants, whether they were gang members,

whether they trespassed on defendants' property to assault her, or whether they were tenants of the building who were permitted to pass through the security gates. Similarly, plaintiff submitted no evidence showing that the propped-open security gate was actually broken or otherwise not functioning properly, or whether her assailants entered through the gate or themselves broke it and entered. Finally, plaintiff offered no evidence that defendants reasonably or effectively could have warned members of the public such as plaintiff of unspecified dangers from unknown assailants frequenting the area.

As the trial court found, plaintiff presented evidence that defendants knew of frequent recurring criminal activity on the premises of their 28-building apartment complex. Coolidge was a high-crime area, with considerable juvenile gang activity occurring both on and off defendants' premises. Plaintiff provided police reports and security logs showing that within the year prior to her assault, defendants received 41 reports of trespass, and 45 reports of occasions in which various perimeter fences and gate doors were broken or rendered inoperable. The list of criminal activity on the premises included incidents of gunshots, robberies, and sexual harassment of women, including sexual assaults and rapes.

Defendants' security manager acknowledged that during the year preceding the assault on plaintiff, several nighttime assaults, and actual or attempted rapes, occurred on the premises. Plaintiff produced evidence that a gang called the 706 Hustlers was reportedly "headquartered" in one of defendants' apartment buildings, conducting drug transactions, and hitting and intimidating other people on the premises. In the year prior to the incident involving plaintiff, sheriff's officers came to the Harwood Apartments approximately 50 times. Much of this criminal activity was reported to defendants' manager, either in daily incident reports from their nighttime security officers or in police reports. Some pizza parlors refused to deliver to apartments in the complex, insisting residents come to the sidewalk if they wanted delivery of pizzas ordered by phone. Defendants' apartment manager used security personnel to escort her to her vehicle whenever she left the premises.

On the other hand, defendants' security logs showed that they took some steps to control the situation, hiring security guards to patrol the premises *at night*, and making frequent and regular attempts to repair broken locks or nonfunctioning gates. The record indicates that these guards were on daily duty from approximately 5:00 p.m. to 5:00 a.m. Defendants' manager stated that the guards' starting times ranged from 3:00 p.m. to 5:00 p.m., to make their schedule less predictable, and that defendants occasionally, on a random basis, employed full-time 24-hour security patrols on the premises. Defendants imposed a nighttime curfew on juveniles, and posted notices threatening eviction of tenants involved with drugs or gang activities. Defendants' security logs indicated their manager and security guards regularly checked access gates for forced entry and broken locks, broke up fights, forced aggressive tenants or trespassers to leave the premises, and evicted tenants involved in criminal or gang activity.

Plaintiff observes that police officers advised both defendants' apartment manager and the head of the security firm they employed that they should hire *daytime* as well as nighttime security patrols. Plaintiff filed a lengthy declaration from a security expert, Robert Murphy, who had reviewed the security logs and depositions and had personally visited the Harwood Apartments complex. His qualifications included service as Director of Police and Safety for the Housing Authority of Dos Padres County, as well as advanced education in public safety and several years in law enforcement. At the time he made his declaration, he was a full-time instructor in criminal justice and police science at a community college. Murphy expressed the opinion "that this attack, assault and battery, and attempted rape on the plaintiff would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed. ... It is my opinion that the premises were a haven for gangsters and hoodlums which further encouraged criminal activity as evidenced by the long history of criminal activity in the one year prior to this incident."

The trial court granted summary judgment for defendants, finding plaintiff had failed to show defendants' breach of duty to safeguard her was a proximate cause of her assault. Based

on the parties' submissions, the court found "overwhelming evidence" of prior incidents of trespass and broken or inoperable perimeter fences or gates, and a "long list" of criminal activity on the premises, including a juvenile gang possibly "headquartered" there. But despite establishing the "high foreseeability" that violent crime would occur on the premises, and defendants' resultant duty to provide increased security, the court found that plaintiff failed to establish a "reasonably probable causal connection" between defendants' breach of duty and plaintiff's injuries.

DISCUSSION

As indicated, in this case plaintiff, injured on defendants' premises by the criminal assault of unknown assailants, seeks to recover damages from defendants on the theory that they breached their duty of care toward her. In order to prevail in such a case, the plaintiff must prove that the defendant owed her a legal duty of care, the defendant breached that duty, *and the breach was a proximate or legal cause of her injury.* Although plaintiff devotes a substantial portion of her brief to the issue of defendants' *duty of care,* defendants do not contest, for purposes of their summary judgment motion, that they may have owed and breached a duty of care toward plaintiff. Here, we are solely concerned with the issue of *causation.* Was defendants' possible breach of duty a substantial factor in causing plaintiff's injuries?

The rule in Columbia is that the plaintiff must prove, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures. In the context of this case, the causation analysis is unaffected by the fact that the assailant's conduct was criminal and not merely negligent. Stated in traditional terms, the assailant's attack is not a superseding cause and it does not, in itself, relieve the defendant of liability. If the likelihood that a third person may act in a particular manner is one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused thereby.

In deciding whether the plaintiff has presented evidence of a triable issue of material fact, we consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to the negative and affirmative inferences to be drawn from all of the evidence, including that which has been produced by the defendant. We will not, however, draw inferences from thin air. Where, as here, the plaintiff seeks to establish that there is a triable issue of fact by means of circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her.

Here, by reason of the prior criminal assaults and incidents on the premises, defendants may have owed a duty to provide a reasonable degree of security to persons entering them. For purposes of discussion, we assume defendants breached that duty by failing to: (1) keep all entrance gates locked and functioning, and (2) provide additional daytime security guards to protect persons such as plaintiff. But the evidence fails to show that either breach contributed to plaintiff's injuries in this case. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to grant summary judgment for the defendant.*

Plaintiff admits she cannot prove the identity or background of her assailants. They might have been unauthorized trespassers, but they also could have been tenants of defendants' apartment complex, who were authorized and empowered to enter the locked security gates and remain on the premises. The primary reason for having functioning security gates and guards stationed at every entrance would be to exclude *unauthorized* persons and trespassers from entering. But plaintiff has not shown that her assailants were indeed unauthorized to enter. Given the substantial number of incidents and disturbances involving defendants' own tenants, and defendants' manager's statement that a juvenile gang was

"headquartered" in one of the buildings, the assault on plaintiff could well have been made by tenants having authority to enter and remain on the premises. That being so, and despite the speculative opinion of plaintiff's expert, she cannot show that defendants' failure to provide increased daytime security at each entrance gate or functioning locked gate was a substantial factor in causing her injuries. Put another way, she is unable to prove it was "more probable than not" that additional security precautions would have prevented the attack.

Plaintiff, citing her expert's declaration, opines that her injuries could have been avoided if defendants had hired roving security guards to patrol the entire premises during the day as well as at night. Aside from the inordinate expense of providing such security for a 28-building apartment complex, the argument is entirely speculative, as assaults and other crimes can occur despite the maintenance of the highest level of security. As previously noted, proof of causation cannot be based on an expert's opinion based on inferences, speculation and conjecture. Despite her expert's speculation, plaintiff cannot show that roving guards would have encountered her assailants or prevented the attack. A 300-unit, 28-building apartment complex contains many rooms, halls, entries, garages, and other spaces where a rape could take place despite extensive security patrols.

Finally, where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the “cause” of the victim's injuries is on these facts to make the landowner the insurer of the absolute safety of everyone who enters the premises. Moreover, the ultimate costs of imposing liability for failure to provide sufficient daytime security to prevent assaults would be passed on to the tenants of low-cost housing in the form of increased rents, adding to the financial burden on poor renters.

Thus, in a given case, direct or circumstantial evidence may show the assailant took advantage of the defendant's lapse (such as a failure to keep a security gate in repair) in the

course of committing his attack, and that the omission was a substantial factor in causing the injury. Eyewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry, may show what likely transpired at the scene. In the present case no such evidence was presented, but the circumstances in other cases may well be different. We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented. As we have seen, most of the assaults and similar incidents of crime plaintiff has cited occurred during the night, and the record indicates defendants did provide extensive nighttime security. Moreover, plaintiff's own evidence showed that defendants at least attempted to keep all security gates in working order, performing regular inspections and repairs.

But again, even assuming a triable issue existed regarding the extent or reasonableness of defendants' security efforts, there was no triable issue with regard to causation. No matter how inexcusable a defendant's act or omission might appear, the plaintiff must nonetheless show the act or omission caused, or substantially contributed to, her injury. Otherwise, defendants might be held liable for conduct which actually caused no harm, contrary to the recognized policy against making landowners the *insurer* of the absolute safety of anyone entering their premises.

In short, plaintiff cannot prove that defendants' omissions were a substantial factor in causing her injuries. Plaintiff has had ample opportunity, through pretrial discovery, to marshal evidence showing that defendants' asserted breach of duty actually caused her injuries. However, the evidence merely shows the speculative possibility that additional daytime security guards and/or functioning security gates might have prevented the assault. Plaintiff's evidence is no less speculative because she offered a security expert's testimony.

Because he was equally unaware of the assailants' identities, his opinion regarding causation is simply too tenuous to create a triable issue whether the absence of security guards or functioning gates was a substantial factor in plaintiff's assault.

The judgment of the trial court is affirmed.

ANSWER 1 TO PERFORMANCE TEST-B

Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment

INTRODUCTION

Plaintiff in this case asserts a negligence claim against defendant, Palm Gardens Group, for failure to repair and maintain an access gate their [sic] secured apartment complex. As a result of the malfunctioning access gate Plaintiff was beaten and sexually assaulted in the parking garage of the Palm Gardens Complex.

Defendant has filed a motion for summary judgment on the grounds that plaintiff has not and cannot establish that defendant's negligence was the cause of her injury. Defendants do not contest in this motion for summary judgment that they owed a duty to plaintiff or that defendant breached that duty. Therefore, this opposition is limited to a discussion of the element of causation. As the following analysis will establish, plaintiff can meet her burden of going forward and will establish by a preponderance of the evidence that defendant's failure to maintain, inspect and repair the security gate at the entrance to the remote underground parking garage was both an actual and legal cause of plaintiff's injury. Defendants rely heavily on the Putnam case, which is clearly distinguishable, as will be established in the substance of this motion. For these reasons defendant's motion for summary judgment should be denied.

ARGUMENT

Standard of Review

In moving for summary judgment, the burden is on the defendant to establish that the plaintiff does not possess and cannot reasonably expect to obtain evidence that would allow a rational trier of fact to find all the elements of negligence by a preponderance of the evidence (Putnam). In concluding its analysis, the court should consider all direct and circumstantial evidence and draw all reasonable inferences from the evidence presented (Putnam). The plaintiff need only show the existence of a triable issue, not that the issue will definitely be found in her favor at trial. The plaintiff can meet this low threshold based on evidence currently in her possession or reasonably attainable.

THE EVIDENCE AVAILABLE SUPPORTS A REASONABLE INFERENCE THAT PLAINTIFF'S ASSAILANT WAS A TRESPASSER

In Putnam, which defendants cite their brief [sic], the court found that causation had not been established because the plaintiff could not identify her attacker, and thus was unable to prove that the attacker gained access through lax security rather than being authorized to enter. However, in the present case, plaintiff has sufficient evidence to

demonstrate that her assailant was an unauthorized trespasser who gained access to the complex through the open security gate.

Unlike in Putnam, where the complex was 300 units and 28 buildings, the complex plaintiff inhabits and defendants own is small, only 10 apartments. (According to Declaration of Lydia James[sic]). There are only 5 adult or teenage males in the complex (report of John Ripka.) Lydia Jaynes is certain that the assailant was not one of these five men, as she knows all of them and would have recognized the assailant if it had been one of these five men. (Declaration of Lydia Jaynes). Additionally, all of the other tenants deny having any authorized male guests on the evening in question (Report of John Ripka). The foregoing evidence makes it more likely than not in this case that the assailant was not one of the tenants in the building (unlike in Putnam).

This conclusion is further supported by the fact that none of the men living in the complex have any records of arrests or convictions (Police Report of Elroi Samuels) and police Captain Richard Sydner has stated that there have been no reported incidents involving violent behavior by tenants of Palm Gardens or their guests (report of John Ripka). This is in stark contrast to the fact pattern in Putnam, where police reported that there was a gang headquartered in the apartment building and that a substantial number of crimes were reportedly committed by tenants in the complex.

While the court in Putnam found it was not possible to rule out a tenant or guest as the perpetrator of the assault, that is not the situation in this case. Plaintiff need not demonstrate the identity of her attacker, only provide proof that he was not an authorized to be on the premises [sic]. With the foregoing evidence, the plaintiff can meet this burden.

PLAINTIFF[']S EVIDENCE DEMONSTRATES THAT THE GATE MALFUNCTIONED LONG BEFORE THE ATTACK

Defendant alleges that plaintiff cannot prove when the gate malfunctioned. The purpose of this argument is probably to show that even if the gate were malfunctioning, there was insufficient time for the dependant to have fixed the gate and remedied the problem. This appears somewhat analogous to the argument in Putnam that even 24 hour patrols by defendant might not have prevented the attack, or in this case, if defendant had not been negligent, the assault might still have occurred.

However, the plaintiff has evidence to show that the gate was stuck open as of 4 p.m. on the afternoon of the assault and that repeated efforts by her were unsuccessful in getting the gate to close. (Kuryakin Burris in Ripka report) A logical inference can be drawn that the gate remained open until 2 a.m. when plaintiff was assaulted. When plaintiff noticed the open gate [sic] (Dec Lydia Jaynes) This inference is further supported by the repair log, which indicates that once the gate malfunctioned, it did not close properly until fixed by the Securite Company (maintenance report and repair records). Therefore, the assailant had at least 10 hours of access to the garage. The defendants may argue that

they had no knowledge of the malfunction, and that, had Ms. Burris report [sic] the malfunctioning gate, it would have been repaired in time to prevent the accident. However, the past history of repairs refutes this claim. In the past, with the exception of February 10, 2003 where there was a collision with the gate, the complex has taken at least two days to repair the gate after a report of a malfunction. In fact, at the last reported incident prior to the attack, it took 17 days between a report that the gate had malfunctioned and the fixing of the gate. (Maintenance Report).

This evidence indicate [sic] that the gate was open for an assailant to enter on the night of the accident and that the defendant took no action to prevent such entry, either by keeping the gate in good repair through regular inspection and maintenance or through posting of security guards. This is enough evidence to meet plaintiff's burden of going forward by demonstrating that the assailant could have gotten into the garage through an open gate.

PLAINTIFF[']S TESTIMONY, POLICE REPORTS AND EXPERT EVIDENCE ESTABLISHES THAT THE ASSAILANT DID ENTER THROUGH THE BROKEN GATE

In Putnam, the court found that although there was evidence of broken gates and unlocked access to the apartment complex, there was no evidence that the assailant had actually utilized those forms of access (Putnam). There was no evidence that failure to have locked gates was a "substantial factor" in the attack. Defendant's [sic] attempt to make the same argument in this case, that there is no evidence the defendant entered through the broken gates. However, in contrast to Putnam, here there is a substantial body of evidence showing that the defendant ingressed and egressed from the broken gate. First, in Putnam there were a number or perimeter fences and gate doors that were broken and inoperable. In the defendant's complex there were only four access points - the security gate and three locked doors (Declaration of Lydia Jaynes). Access to the doors required a key, which only tenants possessed (Declaration of Lydia James [sic]). In contrast to the constant reports that the garage door was broken, in the 7 and a half months prior to the accident there was not one report that the other three access doors were broken or unlocked. (Maintenance Log). There is no evidence to support a finding that the assailant entered through one of these doors. In fact, on the night of the incident, a police check subsequent to the incident found all three doors were securely closed and in good working order (Elroi Samuels).

Additionally, there is empirical evidence to support a finding that the assailant gained access through the open security gate. Police reports indicate that during prior incidents when the security gate was open, criminals used it to gain access to the garage and commit break-ins and vandalism (Ripka Report). No such incidents occurred while the gate was functioning, suggesting the there were no other ways for criminals to access the building.

This conclusion that the assailant did enter through the open gate is further

supported [sic] the declaration of the plaintiff that the assailant left through the open gate. It is logical that the assailant would chose [sic] for his escape route the same path he used to enter.

This empirical evidence is further supported by the expert opinion of the police regarding how criminals select the location of their crimes (Ripka Report). Captain Snyder indicated that assailants normally "case" a location in advance to see if he [sic] would have access and would be undisturbed (Ripka Report). This suggests that the assailant probably noticed the open gate on one of the earlier occasions when it was broken and determined that it would be a good location for his criminal activities. He would have used the same entrance to perpetrate the crime itself. (In addition to showing that the assailant got into the garage through the open gate, this also illustrates that the repeated failure to repair the gate in a timely fashion led to the assault[])].

This evidence is sufficient to demonstrate that plaintiff can meet her burden of showing that the assailant gained access to the garage through the open gate particularly in the absence on any other explanation from the defendant on how the assailants gained access to the garage.

PLAINTIFF CAN DEMONSTRATE THAT THE GATE MALFUNCTIONED, AS IT HAS IN THE PAST, RATHER THAN BEING BROKEN BY THE ASSAILANT

In yet another badly drawn analogy to the Putnam case, defendants argue that there is no evidence that the assailant did not break the gate to gain entry.

On the contrary, the plaintiff has substantial evidence in this regard. First, there is a history of mechanical malfunction in the gate, with at least six mechanical malfunctions happening prior to the assault and one after it (maintenance log). This direct evidence gives rise to an inference that the gate malfunctioned on this occasion. This is unlike Putnam, where there were multiple reports of broken access gates and broken locks, but no mechanical failures. Defendant[']s argument is also undermined by the direct evidence of Kuryakin Burris that the gate was up when she arrived home at 4 p.m. (Ripka report.) While it is theoretically possible that the assailant had broken the gate prior to 4 p.m., this is not logically or empirically supportable. First, it is likely someone in the neighborhood (which has a low incidence of crimes) would have noticed and reported a stranger breaking open a gate. Also, it is unlikely that the assailant would have sat in the garage for 10 hours awaiting his victim. If he had, one of the tenants returning home from work would probably have noticed.

Additionally, the police report after the incident shows no sign of forced entry, thus negating any argument that the assailant broke the gate. Once again it is the defendant in this case who is offering the "speculative possibility" that the assailant broke the gate, while the plaintiff has firm evidence to the contrary, more than sufficient to show that the gate was open because of a malfunction when the assailant entered.

DEFENDANTS[‘] ARGUMENT THAT THEY COULD NOT HAVE WARNED OF THE DANGERS IS BOTH INCORRECT AND DESIGNED TO DISTRACT ATTENTION FROM THE STEPS THEY COULD HAVE TAKEN TO PREVENT THE ATTACK

Once again the defendants would have the court misapply language from the decision in Putnam, arguing that they could not have effectively warned the plaintiff to prevent the attack. First, this shows a misunderstanding of what the court said in Putnam[,] which is that the plaintiff did not prove that defendants could have warned “members of the public” about the possibility of criminal activity. The plaintiff in this case, unlike the postal delivery employee in Putnam[,] is a tenant of the building and not a member of the general public. Plaintiff in this case is not asserting a failure to warn the public at large, but failure to comply with their duties as landowners to paying tenants. Second, it is clear that the defendants could have effectively warned tenants of the danger created by the open security gate. There were only ten apartment[s] in the complex and, unlike the “open areas” in Putnam, this complex was not open to the general public. Therefore, defendants could easily have warned tenants. However, this argument is a distraction from the gravaman of plaintiff[‘]s complaint in this action, which is that adequate security measures would have prevented this attack. Unlike Putman, where the defendant had exercised care and diligence to attempt to make the building more secure, the defendants in this case took no actions to protect tenants against criminal activity, despite repeated malfunctioning of the security gate and several reported incidents of criminal activity. Here, unlike Putnam, there remain reasonable and affordable steps the defendant could have and should have taken to prevent this incident. As a security expert can testify, the defendant has several other apartment complexes in the vicinity and could have a roving security guard to monitor the complexes (Ripka report). On the same note, given that there are six complexes, it would be reasonable for the defendant to have a member of management regularly visit to look for problems and make repairs where needed. The defendant failed to take these steps (Ripka). Instead, the defendant relied upon the Securite Company to make repairs. They continued to use the company even after it took 8 days in late May to repair the broken gate (maintenance log). In fact, the evidence demonstrates that from the first reported incident of a malfunctioning gate, it took longer and longer for the defendant and the Securite Company to fix the door. The defendant ignored the fact that Securite rarely failed to fix the door within 24 hours as promised and continued to use the company (maintenance & repair log). The continued malfunctioning also suggests that Securite was not actually “repairing” the door but instead fixing it temporarily. The defendant could have used a different company who could have effectively repaired the gate in the seven months leading up to the assault. In contrast to the defendant in Putnam who took all reasonable steps when it became aware of a problem the defendant continued on the same course of action in spite of continued malfunctions and criminal activity.

THE POLICY ARGUMENTS ADVANCED IN PUTNAM ARE NOT APPLICABLE TO THIS CASE

The court in Putnam also declined to stretch the definition of causation because of

public policy arguments against make [sic] the defendant an "absolute insurer" against criminal activity on the premises. The same policy arguments are not applicable here, first because the defendant has done nothing to prevent criminal activity, so imposing liability here is not "unreasonable." Second, while the complex in Putnam was for the low-income and the court feared the cost burden of additional security measures, plaintiff is not asking for anything "additional" in this case. Instead the plaintiff is merely asking that the defendant maintain the security measures that are advertised as a feature of the building & that were critical to her decision to move to the building. The price of a security gate is built into the rent and plaintiff is merely arguing that the defendant failed to live up to the security that was promised to her and that that [sic] failure caused her injury.

CONCLUSION

In summary, plaintiff can meet the burden of showing that defendant caused her injury. She has sufficient evidence to prove that she was attacked by an unauthorized assailant who gained access to an open security door that was open due to defendant's negligence and that the defendant could and should have taken reasonable measures that would have prevented her injury. The law and good public policy call for a ruling against defendant's summary judgment motion in this case.

ANSWER 2 TO PERFORMANCE TEST-B

1)

Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment Lydia Jaynes v. Palm Gardens Group

I. INTRODUCTION

Plaintiff, Lydia Jaynes, a resident of the Palm Gardens Apartments owned by defendant, Palm Gardens Group, alleges that she was assaulted and seriously injured by an unknown male assailant on June 15, 2003 in the underground parking garage of the Palm Gardens Apartments. Ms. Jaynes has sued defendant for negligent failure to repair a broken security gate in the parking garage and for negligent failure to provide adequate security measures.

Defendant, Palm Gardens Group (Palm) has filed a motion for summary judgment. Defendant's motion for summary judgment asserts that the plaintiff has failed to make a prima facie for causation. Defendant bases its motion for summary judgment on a recent Columbia case[,] Putnam v. Winters Group. In Putnam, the Columbia Supreme Court upheld the trial court's granting of a motion for summary judgment for a defendant apartment management group finding that the plaintiff had not established the causal connection between the her [sic] injuries caused by a group of unknown male assailants inside the apartment complex and the defendant's failure to adequately maintain gates and locks and failure to provide security personnel during the daytime hours. Defendant alleges that Ms. Jaynes has failed to establish a prima facie cause [sic] of causation and addition [sic] has failed to present sufficient evidence that there is a triable issue regarding causation.

Plaintiff's opposition to the motion for summary judgment is based on the factual distinctions between the two cases that will distinguish Ms. Jaynes['] claim of negligence from that of the Putnam plaintiff. The factual circumstances surrounding the two attacks are sufficiently different that Putnam can be distinguished. Furthermore, Ms. Jaynes has collected enough direct and circumstantial evidence that she can prove the actual causal link between her injury and defendant's failure to provide adequate security measures.

II. RESPONSE TO MOVING PARTY'S ARGUMENTS

A. FACTS THAT A PROPERLY OPERATING SECURITY GATE ACROSS THE UNDERGROUND GARAGE ENTRANCE AND THAT LANDOWNER FAILED TO PROVIDE SUCH ARE SUFFICIENT TO ESTABLISH A TRIAL ISSUE OF FACT AS TO THE LEGAL CAUSE OF AN INJURY INFLICTED BY THE CRIMINAL ACT OF A THIRD PERSON

In order to present a triable issue of material fact, the plaintiff must present evidence that is more than a "speculative possibility" that the defendant "might have prevented the assault." In Putnam, the Columbia Supreme Court, while upholding the trial court's granting the defendant's motion for summary judgment, stated in dicta, "[w]hen an injury can be prevented by a lock or fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person." Putnam

The court should find that here plaintiff has presented evidence that her injury could have been prevented by a properly operating gate on the underground garage. Here the Palm Gardens Apartment complex is very small, with ten 2-bedroom apartment units over one parking garage containing twelve parking spaces. Draft Jaynes Declaration. The area within the garage and the apartment complex could be easily sealed off from outside intruders with properly operating gates. This is in sharp contrast to the apartment complex in Putnam, which was a 28-building, 300 unit complex located on several acres. Putnam. The Columbia Supreme Court stated that an open area that large could have been [sic] fully protected and that the owner could not have reasonably prevented an assault. Nonetheless, the stark difference in size of the two units supports plaintiff's argument that Palm could have effectively provided full protection for the Palm Gardens with the security gates it had in place, if only defendant had maintained them in a working order. Putnam.

In fact, the defendant has acknowledge[d] the feasibility of protecting its tenants by advertising the building as a secure building. Draft Jaynes Declaration. When potential tenants visit the building, they are shown the various security features of the building and are assured by management that about those features including the underground parking secured by an automatic gate requiring [sic] access cards. Draft Jaynes Declaration. The outward appearance of the building also indicates that it is meant to provide security because of the iron security gates installed on the garage. Therefore, defendant, Palm, admits by its own conduct that securing the complex is feasible and that defendant is able to reasonably prevent physical assaults of its tenants.

Furthermore, in contrast to Putnam, Ms. Jaynes has presented evidence that the only other reported crime incidents, three car break-ins, occurred while the gate was broken. Ripka International Report.

Here because evidence of defendant's actions prove that it could have secured the

complex effectively with a properly operating security gate on the underground garage, plaintiff has presented evidence sufficient to present a triable issue of fact on whether the Palm's failure to maintain the gate in proper working order substantially contributed to Ms. Jaynes' injury.

B. CIRCUMSTANTIAL EVIDENCE THAT THE TENANTS IN THE APARTMENT COMPLEX WERE NOT THE ASSAILANT IS SUFFICIENT TO SUPPORT A [SIC] THE PRIMA FACIE CASE FOR CAUSATION

Although plaintiff cannot prove the [sic] conclusively the identity or background of her assailant, she can disprove that her assailant was another tenant of the apartment complex, i.e., that the attack came from a person who was rightfully inside the security gates at the complex.

In Putnam, the victim was a mail delivery person who had entered the complex for the purpose of delivering a package. Putnam. When she entered she saw men both outside a propped open gate and one inside. Putnam. Ms. Putnam was attacked, beaten and seriously injured by three men who[m] she could not identify. Putnam. In Putnam, the apartment complex was known to be riddled with gang activity and drug trafficking. Putnam. There were many tenants who were involved in illegal activities. Putnam. Ms. Putnam offered no evidence that excluded her assailants from this group of tenants who were known to be involved in crime. Putnam. Therefore, Ms. Putnam was unable to prove that her assailants were not people who had a right to be within the security gates.

Here, plaintiff has presented circumstantial evidence that proves that her assailant was not a fellow co-tenant. Ms. Jaynes herself is quite certain that the attacker was not any of the male tenants living in the apartment building. Draft Jaynes Declaration. She is quite sure that she would have been able to recognize any of the male tenants. Draft Jaynes Declaration. Furthermore, all five of the teenage and adult males have stated that they were asleep at 2 AM on June 15, 2003, and all the other tenants denied having male guests that evening, and investigator Ripka found that there no report incidents involving violent behavior by tenants. Ripka International Report. Finally, the Brookmeister Police Department verified with the State Records and Investigation department that none of the adult and teenage males living at Palm Gardens had any record of any arrests or convictions. Brookmeister Police Report.

Additionally, the neighborhood surrounding Palm Gardens does have a low to moderate crime rate. Ripka International Report. Therefore, because the crime rate outside the complex is much lower [sic] than the crime rate within the complex, it makes it more likely that the assailant came from outside the complex. Contrast this with Putnam, where the crime both inside and outside the complex were very high, which made it virtually impossible for the plaintiff to prove by circumstantial evidence that her assailants came from outside the complex.

Finally, plaintiff's assailant fled out of the apartment complex through the open gate. Draft Jaynes Declaration. Had he been a resident and known his way around the complex, he might have fled through one of the pedestrian doors.

Because the primary reason for having functioning security gates at every entrance would be to exclude unauthorized persons from entering, plaintiff's showing that the person who attacked her was not a fellow tenant supports her claim for causation. Therefore, plaintiff's circumstantial evidence makes it more probable than not that a working gate would have prevented the attack. Because the court must construe the evidence in the light most favorable to the non-moving party, this circumstantial evidence is enough to rebut a motion for summary judgment. Putnam.

C. STATEMENT BY A TENANT OF THE APARTMENT THAT THE GARAGE GATE WAS BROKEN IS SUFFICIENT TO SUPPORT A PRIMA FACIE CASE FOR CAUSATION

In Putnam, the victim observed a gate that was propped open. Putnam. She presented no evidence that the gate was broken and that in a state of disrepair provided her assailants access to the complex. Putnam.

Plaintiff here has shown through the repair log that the gate being inoperable was an on-going problem. Five tenants called with problems in one year period.

Contrastingly, plaintiff has provided evidence that in January or February 2003, a car ran into the gate and damaged the gate causing it to not work properly. Draft Jaynes Declaration, Repair Log. Most importantly, she herself noticed that the gate was partially stuck open with about a 2 to 3 foot gap between the bottom of the gate and the garage floor when she arrived home at 2 AM on June 15, 2003. Draft Jaynes Declaration. Finally, she has presented direct evidence that tenant Kuryakin Burris came home around 4 PM on June 15, 2003 and found the gate stuck open. Ripka International Report. Ms. Burris has stated that she didn't report the broken gate because "it always seemed to be broken." Ripka International Report.

Most importantly, the Brookmeister Police Department discovered that the security gate was open, the bottom being about 2 feet above the floor of the garage, at 3 AM on June 15, 2003, following the attack on plaintiff. Brookmeister Police Department.

Plaintiff has also shown through the maintenance and repair log that Securite Company was called on June 30, 2003 to repair the security because it stops closing fully. Repair Log. On July 2, 2003, the gate was repaired. Repair Log.

Because plaintiff has presented direct and circumstantial evidence that the gate was not working and because the court must construe this evidence in a light most favorable to plaintiff, she has met her burden to overcome a motion for summary judgment.

D. CIRCUMSTANTIAL EVIDENCE THAT ASSAILANT ENTERED THROUGH THE BROKEN GARAGE GATE IS SUFFICIENT TO SUPPORT A PRIMA FACIE CASE FOR CAUSATION

Because the complex in Putnam was so large and so crime ridden, it was difficult to prove that the assailant could have entered through a broken gate or even which gate in the complex might have been broken. However, in the instant case, the Palm Gardens only has one security gate on the garage and three other pedestrian gates or doors. Draft Jaynes Declaration. Therefore the number of entrances through which an assailant could enter is very limited. Furthermore, only one other door ran between the garage and the apartment complex. Draft Jaynes Declaration.

Following the attack on plaintiff, the police observed that the two pedestrian gates leading from the garage to the patio area were securely closed and in good working order. Brookmeister Police Department. Furthermore, the door leading from the garage to the apartment building was also securely shut and in good working order. Brookmeister Police Department.

Plaintiff has also stated that her assailant fled out of the partially open security gate following the assault. Draft Jaynes Declaration. This makes it more likely that he entered through the gap under the door, because he was looking for a quick means of escape, one he knew existed.

Because plaintiff has presented circumstantial evidence that the garage door was broken on the date of her attack and no other doors in the complex were broken, she has presented enough evidence to overcome a motion for summary judgment on the issue of causation.

E. STATEMENT BY OTHER TENANTS AND RECORDS OF REPAIR ARE SUFFICIENT TO SUPPORT A PRIMA FACIE CASE FOR CAUSATION

There is no evidence that the assailant broke the gate himself, nor does plaintiff need to offer any evidence that he did. Plaintiff has offered enough circumstantial evidence to prove that the gate was broken on the day in question providing her assailant access to the complex.

F. EXPERT OPINIONS ARE SUFFICIENT TO PROVE THAT DEFENDANT COULD HAVE REASONABLY AND EFFECTIVELY WARNED TENANTS OF UNKNOWN ASSAILANTS AND SUPPORT PRIMA FACIE CASE FOR CAUSATION

In Putnam, the Columbia Supreme Court was unimpressed by the expert opinions plaintiff offered that additional security guards monitoring the Harwood apartments in the daytime would have prevented her attacks. Putnam. In fact the court chided that her argument was entirely speculative and that causation could not be based on an expert's opinion that

"more" security would have prevented her assault. However, the situation in Putnam was strikingly different from the instant case.

In Putnam, the complex was a 300-unit, 28 building complex with many rooms, halls, entries, garages, and other hiding spaces. Putnam. Ms. Putnam's expert, Robert Murphy, was well qualified and expressed an opinion that the attack would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed. Additionally, the police advised that the defendant should have hired daytime as well as nighttime security patrols. Putnam. The court said this evidence was merely conjecture and speculation because it did not state how many guards would have been necessary or how much better the repair efforts should have been. Putnam.

However, here, Mr. Ripka has presented evidence that Palm owns six other apartment complexes all within close proximity to the Palm Gardens and that it could have easily employed an individual guard to patrol the building. Ripka International Report. Because the Columbia Supreme Court was concerned about an apartment owner becoming an insurer against all bad acts and being required to hire unlimited personnel to protect against those bad acts, the requirement for one security guard does not seem to offend this concern. Moreover, it proves that Palm could have reasonably warned tenants of unknown dangers and assailants.

III. Conclusion

On a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must resolve any evidentiary doubts or ambiguities in the plaintiff's favor. Putnam. The defendant has moved for summary judgment resting its entire basis for the motion on Putnam, which although similar in procedural and factual stance, can be readily distinguished from the instant case.

Putnam involved that assault and battery of non-resident mail carrier at an apartment complex that was located in a very high crime area and that housed many tenants who themselves were gang members and drug dealers. Putnam. The complex had a long history of criminal activity, and the residents were known to the police. Putnam. In addition, the Harwood complex was vast in size, housing 300 units in 28 buildings, and had many means of ingress and egress. Putnam. Ms. Putnam[,] the victim, was unable to prove that her three assailants were not a resident [sic] of Harwood, which was very problematic because the security measures she insisted should have been in place would not have kept her assailants out of the complex if they were residents. Putnam. Additionally, she could not mount any evidence of which door her assailants might have entered and if they gained access because the door was broken. Putnam.

In contrast, plaintiff has presented both direct and circumstantial evidence to support a prima facie case for negligence and to support that Palm's failure to maintain the garage door in working order was the legal cause of her injuries. Ms. Jaynes has presented

circumstantial evidence that tends to prove that her single assailant was not a tenant of the Palm Gardens. She has also presented a great deal of evidence that the one door that was in poor working order was the garage door, and that it was malfunctioning on the day of her attack, which makes it more likely that her assailant gained access to the garage through that door. Additionally, she has shown that Palm would only be required to hire one guard to patrol the complex, which is not overly burdensome on the landlord.

For the above stated reasons, the plaintiff respectfully requests this court deny defendant's motion for summary judgment in favor of Lydia Jaynes.