QUESTION 1

Spud is a produce wholesaler who regularly does business with Dan's Diner, Inc. (Diner). On September 15, Diner's authorized buyer orally agreed with Spud to buy all the potatoes in "bin 15" at Spud's warehouse, to be delivered at Diner's place of business on October 1, for $1,000. The next day Diner received the following writing signed by Spud: "This confirms our sale to you of all the potatoes in our bin 15 for October 1 delivery." Diner did not reply to this writing.

On October 2, Spud tendered all of the potatoes from bin 15 to Diner at Diner's place of business, but gave no reason for being a day late with the delivery. Diner refused to accept or pay for any of the potatoes.

Between September 15 and October 2, the bottom dropped out of the potato market. On September 15 the market value of the potatoes in bin 15 was $1,000; on October 1, it was only $500. The one day delay in delivery did not harm Diner or its business in any way, and Diner admits that the price-drop was its only reason for refusing to accept the potatoes.

Spud sued Diner for breach of contract.

QUESTION:

Discuss the claims and defenses of the parties in this action.

QUESTION 2

One evening while sitting in a bar, after having had a few drinks, Carrie thought of a way to get some fast cash. She stumbled from the bar to Valerie's house. The house appeared to be empty, so she went to the back door, found it unlocked and went inside where she grabbed some jewelry and cash. Then, in an attempt to cover-up her crime, she poured gasoline around the house, lit a fire, and ran. Unbeknownst to Carrie, Valerie was sleeping inside the house and died in the fire.

QUESTION:

Discuss crimes Carrie may have committed and any defenses to her actions. (Carrie lives in a jurisdiction that follows traditional common law principles.)

QUESTION 3

Denver Manufacturing Co. (Denver) is subject to the Occupational Safety and Health Act of 1970 (OSHA). The Act authorizes the Secretary of Labor (Secretary) to promulgate national regulations with which covered employers must comply.

The Secretary promulgated a general regulation requiring that the "point of operation on machines which exposes an employee to injury shall be guarded. The guarding device shall be designed and constructed to prevent the operator from having any body parts in the danger zone during the machine's operating cycle."

The Secretary promulgated a second regulation exempting some press break machines from the guarding requirement, but the regulation does not clearly specify what press break machines are exempted nor is it clear if the exemption applies to press break machines having a potentially dangerous point of operation.

Denver is a covered employer under the act, and uses press break machines in its manufacturing process. Denver does not have a guard at the point of operation on any of its press break machines. Denver's press break machines are potentially dangerous at the point of operation.

Based on an inspection of Denver's plant during late 1999, the Secretary issued a citation charging Denver with failure to provide point of operation guards on its press break machines. The Secretary proposed a penalty of $5,000. Denver plans to contest the citation and proposed penalty. The citation is being heard by an Administrative Law Judge (ALJ) at the Occupational Safety & Health Review Commission (OSHRC).

QUESTION:

Discuss the arguments that Denver may raise in its defense of the alleged violations of the regulations.

QUESTION 4

Alice formed ABC Corporation by properly filing articles of incorporation with the appropriate state agency on January 1, 1995. The articles authorized the corporation to issue 100 shares of common stock at a par value of $100 per share, and provided that the corporation would have three directors on its board, Alice, Bob, and Carol, who would each serve a term of one year. At the first meeting of the board of directors on January 1, 1996, the board approved the issuance of 75 shares to Alice and 25 shares to Bob. Alice and Bob paid the corporation $7,500 and $2,500 cash, respectively, for their stock.

Over the next four years, ABC became very successful in the party supply business. Alice and Bob made huge salaries and borrowed money freely from the corporation at below-market interest rates without shareholder or director approval. Carol felt left out of their success and asked Alice and Bob for shares of ABC stock. Alice called a board meeting on January 1, 1999, and at that meeting the board approved the issuance of 25 shares to Carol for $2,500 cash. This meeting was the only meeting of the board since the initial January 1, 1996 meeting. Carol paid $2,500 cash to the corporation and received a share certificate for 25 shares.

On March 1, 1999, Alice sold all of the assets of ABC to Big Corp for $1 million, which was $500,000 more than the true market value of ABC's assets. Alice did not receive shareholder or director approval for the sale. Alice had the corporation's accountant pay dividends of $750,000 to Alice and $250,000 to Bob. As a result of the sale, the corporation has no cash or assets of any kind remaining.

QUESTION:

Discuss all possible claims which Carol may have against ABC, Alice, or Bob, and which Bob may have against Alice. Do not discuss any possible shareholder derivative suits. Assume that ABC is not a close corporation.

QUESTION 5

On March 5, Vendor, who owned a piece of real estate called Nutacre, telephoned Byers saying: "Nutacre is for sale. I'll let you have it for $100,000 in cash. Although I've talked to other prospective buyers, I assure you that I won't sell it to anyone else before April 1. I'll hold the offer open exclusively for you until that time. Closing will be on April 15."

On March 6, Byers, who was familiar with Nutacre, went to see Vendor. He told Vendor, "I need to look at some other property before I can decide. It will be the last week in March before I can get back to you. Here is $50 to keep your offer open until April 1."

Vendor replied, during the same conversation, "Thank you for the $50. I will definitely keep the offer open until April 1."

On March 21, Vendor sold Nutacre to Smith.

On March 22, Byers first learned of the sale to Smith when he read about it in the local paper.

On March 23, Byers hand delivered to Vendor a letter that read, "You gave me your word you would keep the offer open until April 1. I hereby accept your offer to sell Nutacre to me for $100,000 in cash. I will give you the cash on April 15. [Signed] Byers."

On March 25, Vendor responded in a letter to Byers that he had already sold the land to Smith.

On April 15, Byers tendered $100,000 in cash to Vendor, but Vendor refused to accept it.

QUESTION:

Discuss whether Byers has an enforceable contract with Vendor for the sale of Nutacre. Be sure to discuss whether Vendor's promises to keep his offer open are enforceable.

QUESTION 6

In 1995, Bob executed a valid will at the office of his attorney. The will read:

WILL OF BOB

I, Bob, declare this to be my will.
I give my coin collection to my son, Fred.
I give my stamp collection to my daughter, Sue.
I give the remainder of my estate to my girlfriend, Allison.
Signed on January 1, 1995
/s/Bob

After signing the will, Bob was given a photocopy of the will, which he took with him and kept at home.

In 1997, Bob decided to change his will. He tore up and destroyed the photocopy of the will that his attorney had given to him. He then hand-wrote a document that stated:

At the time of my death, I give my coin collection to my friend, Gary. The rest I will decide at some future date.

/s/ Bob
January 31, 1997

Later in 1998, Bob began to experience severe financial difficulties and decided to sell his coin collection and use the cash to pay his debts. Even after he sold his entire coin collection, however, Bob's financial situation continued to worsen. Desperate and facing certain bankruptcy, he committed suicide on January 1, 2000. Bob was survived by his children, Fred and Sue.

QUESTION:

Discuss the rights of inheritance of Fred, Sue, Gary and Allison and explain how Bob's estate will be distributed. Assume the Uniform Probate Code is in effect in this jurisdiction.

QUESTION 7

Paula Plaintiff and Dan Defendant have been friends for years and often exchanged correspondence. Unfortunately, last year they collided with each other in an auto accident. Paula sued Dan in federal district court, claiming that he ran a red light.

Paula wishes to testify at trial that approximately one week before the accident she received a letter from Dan, in which he wrote: "Boy! Did I have a near-miss on the way home. I wish I didn't drive so carelessly all the time." The letter was not signed by Dan, but Paula claims she can recognize Dan's handwriting because of their frequent correspondence. Paula, however, no longer has the letter. She simply threw it away after she read it, just as she did with all Dan's other letters.

QUESTION:

Discuss all issues reasonably raised by these facts as they relate to Paula's desire to testify about Dan's letter at trial.

QUESTION 8

Sam was an expert skier who had skied all over the world. One day, he and his friend Sandra, who was also an expert skier, decided to ski at the Happy Trails Ski Resort. They purchased lift tickets on which was printed, in relevant part: "Please read. Skiing is a dangerous sport with inherent risks. In purchasing and using this ticket, purchaser or user agrees to accept the risks inherent in skiing, and agrees not to sue Happy Trails Resort, or its employees, if injured while using the ski facilities...."

After warming up on some of the easier slopes, Sam and Sandra took a chair lift to Black Diamond Hill. On the right side of Black Diamond, the ski run ended at the edge of the trees and was clearly marked with large "No Skiing" signs. The left side of the slope had been groomed nearly all the way to the left edge. A mound of snow one foot higher than the groomed area formed a berm that ran along the left edge of the run. Beyond the groomed area and the berm on the left side of the run, the area was ungroomed and dropped off severely. There were no signs, markers, or obstructions to warn skiers of the danger.

Happy Trails' failure to place signs on the left side of the run violated a local ordinance requiring ski areas to maintain a sign system, including signs indicating the level of difficulty of the area's slopes and trails, notices that warn of danger areas, closed trails, and ski area boundaries.

Sam began to ski down the left side of Black Diamond, followed by Sandra. About halfway down the run, he caught an edge, lost his balance, skied over the left berm, and slid into the unmarked area. Sandra found Sam at the bottom of an eight foot drop, sprawled out and screaming for help. She immediately called for the ski patrol. When the ski patrol arrived, they administered first aid and then took Sam down the slope to a waiting ambulance. Sam was transported to the local hospital where he was treated for a severely fractured right leg.

QUESTION:

Discuss potential civil causes of action that Sam may have against Happy Trails and any possible defenses that Happy Trails might assert. Do not discuss damages.

QUESTION 9

Clopton sold certain goods to Talman & Co. through Vernel who was Talman's chief clerk. Clopton had transacted business with Talman for 10 years. Typically Clopton would contact Talman and ask for the chief clerk. Vernel always answered the call.

Recently, Vernel called Clopton and told him Talman was about to expand company operations and needed more goods for its inventory. He said he expected that Clopton would regularly receive larger orders from Talman, and in fact, Vernel placed a large order, larger than was usually transacted over recent years. Little was said regarding the method of delivery and payment. The goods were shipped, delivered, inspected, and accepted by Talman's receiving department and placed into their inventory.

Twenty-nine days later, the CEO of Talman was contacted by her accounting department to verify payment of the recent Clopton delivery. Normally the account would have been routinely paid, but this order was extraordinarily large and the comptroller believed confirmation was in order.

When she found out that Vernel was responsible for the large order, Talman's CEO was infuriated, and immediately fired him. She then had the comptroller cancel the last order placed by Vernel and refused to pay Clopton. Clopton responded by asking for full payment for goods.

QUESTION:

Discuss the potential liability of the parties. Do not discuss issues, if any, raised by the U.C.C.

DISCUSSION FOR QUESTION 1

Potatoes are things movable at the time of their identification to the contract, and, therefore, are "goods." U.C.C. §2-105(1). Since the contract between Spud and Diner is a transaction in goods, it is governed by the Uniform Commercial Code. U.C.C. §2-102.

Since Spud is a dealer in potatoes, and Diner buys potatoes and uses them in its business, and, therefore, holds itself out as having knowledge of potatoes, both parties are "merchants" with respect to potatoes, and the Uniform Commercial Code provisions governing merchants are applicable to this contract. U.C.C. §2-104(1).

Since this contract is a contract for the sale of goods for a price of $500 or more, it must be in writing and signed by the party against whom enforcement is sought. U.C.C. §2-201(1). Although there is a writing, it is not signed by Diner, the party against whom enforcement is sought. There is, however, an exception to the signature-requirement. The exception provides that in dealings between merchants, if a writing confirming the contract is sent by one merchant and received by the other, then the statute of frauds is satisfied unless the merchant receiving the confirmation gives the other written notice of objection to its contents within ten days of its receipt. U.C.C. §2-201(2). Here, there was a written confirmation signed by Spud. Since both parties are merchants, and since Diner did not object to the contents of the writing within ten days after having received it, then the writing satisfies the statute of frauds against Diner even though Diner failed to sign it.

The writing in this case does indicate that a contract of sale has been made and contains a quantity term. It, therefore, satisfies the requirements of the statute of frauds even though it does not contain all of the contract terms. U.C.C. §2-201(1). The phrase "...all the potatoes in our bin 15..." is a sufficient statement of the quantity term to satisfy the statute. Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 5th Cir., 1975. Diner's statute of frauds defense, therefore, will fail.

Because this is not an installment contract, the provisions of U.C.C. §2-601 rather than §2-612 are applicable with respect to the buyer's rights on improper delivery. Where the seller's tender of the goods in any respect fails to conform to the contract, the buyer can reject the whole. U.C.C. §2-601(a). Since Spud was a day late in tendering the goods, the tender failed to conform to the contract and under the perfect tender rule (U.C.C. §2-601) Diner was entitled to reject all of the potatoes.

There has, however, been much criticism of the rule in those cases where the buyer tries to use the rule solely to escape a bad contract. Some courts have applied the good faith requirement (U.C.C. §1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.") These courts have said that a buyer is acting in bad faith, with respect to the enforcement of the

contract under the provisions of 2-601, if the reason for rejecting the goods is solely to escape from a bad contract. Printing Center of Texas v. Supermind Pub. Co., Inc., 669 SW2d 779 (Tex.App. 1984). Diner admits that the one-day delay did not harm it in any way and that the price-drop is its only reason for rejecting the potatoes. "...(T)he courts' manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon 'substantial' non-conformity." White & Summers, Uniform Commercial Code, (4th Ed. 1995), §8-3b. p. 301. It is clear that the one-day delay in delivery was not a substantial non-conformity. It is unlikely, therefore, that Diner can use the late delivery to justify its refusing the tender of the potatoes and its defense of late tender of delivery will fail.

Spud, therefore, should succeed in his breach-of-contract action against Diner.

DISCUSSION FOR QUESTION 2

Burglary

As an initial matter, Carrie is guilty of the crime of burglary. At common law, burglary is defined as the breaking and entering into the dwelling house of another in the nighttime with the intent to commit a felony therein. *Oken v. State*, 327 Md. 628, 612 A.2d 258 (1992). Unlawful entry into a building in which an individual is not authorized or invited to enter constitutes an unlawful entry. *State v. Howe*, 116 Wash. 2d 466, 805 P.2d 806 (1991). Moreover, even where that entry is through an unlocked door, that act is sufficient to constitute a breaking for purposes of sustaining a burglary conviction. *Id.* A "dwelling house" is defined as a building, which is regularly used as a place to sleep. A building does not become a "dwelling" by reason of the fact that someone may sleep there on rare occasion. *Poff v. State*, 4 Md. App. 186, 241 A.2d 898 (1968).

Larceny

The intent to commit the larceny is evident from the fact pattern and, therefore, all of the necessary elements to establish the crime of burglary are present. The crime of larceny is the taking and carrying away of the personal property of another with the intent to unlawfully and permanently deprive the owner of its use. *Swift v. American Universal Insurance Company*, 349 Mass. 637, 212 N.E.2d 448 (1965). The facts as given clearly establish that Carrie has committed the crime of larceny.

Arson

In order to establish the crime of arson, the Defendant must be shown to have maliciously and willfully burned the dwelling house of another. *State v. Oxendine*, 305 NC 126, 286 S.E.2d 546 (1982). Arson is a crime of general intent and is therefore not subject to the defense of diminished capacity. *Veverka v. Cash*, 318 N.W.2d 447 (1982). As is true with the above crimes, the facts clearly establish that Carrie is guilty of this crime as well.

Felony Murder

Felony murder arises where an individual causes the death of another while committing or attempting to commit robbery, rape, arson or burglary. *See generally, Conrad v. State*, 75 Ohio St. 52. Moreover, where the felony relied upon involves a burglary, it is not necessary to prove the existence of items which could have been stolen, since it is only necessary to prove an attempt to commit the underlying felony. *State v. Davis*, 56 Ohio St. 2d 51. Again, the above discussion makes clear that Carrie is guilty of the underlying felony of arson since Valerie was killed as a result of the commission of that felony. Therefore, a claim of felony murder will lie against Carrie.

Potential Defense

The only potential defense that Carrie may raise with regard to the above acts is that she was voluntarily intoxicated and thus unable to intend to commit any of the above-mentioned crimes. Generally, voluntarily intoxication is not a defense to any crime. *State v. Davis*, 81 Ohio App. 3d 706, 612 N.E.2d 343 (1992). An exception to the general rule is that voluntary intoxication may be a defense when specific intent is a necessary element of the charged offense in that the intoxication was significant enough to preclude the formation of such intent. Id. Voluntary intoxication therefore may be a defense to the specific intent crimes of burglary and larceny. Nevertheless, there would have to be proof that Carrie was so intoxicated as to not be able to form the requisite intent.

DISCUSSION FOR QUESTION 3

I. Substantive Challenge to the Secretary's Interpretation

Denver might bring a substantive challenge to the Secretary's interpretation of the regulation. In other words, Denver might question whether the Secretary's interpretation is a permissible interpretation, or perhaps the best one, and urge OSHRC to reject the Secretary's interpretation in favor of its own interpretation. The difficulty with a substantive challenge is that OSHRC is likely to be deferential to the Secretary's position. In numerous decisions, the U.S. Supreme Court has articulated a strong presumption of deference to administrative expertise. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Since this case involves an interpretation of an administrative regulation, rather than a statute, the case for deference is stronger. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In *Thomas Jefferson University v. Shalala*, 114 S. Ct. 2381 (1994), the Supreme Court stated the applicable law as follows:

> We must give substantial deference to an agency's interpretation of its own regulations. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150-151 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "'controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

The Secretary's interpretation is not "plainly erroneous or inconsistent with the regulation" and is therefore entitled to deference. Moreover, in *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171 (1991), the Court held that OSHRC should defer to the Secretary's interpretations. Based on the deference principle, Denver's substantive challenge is unlikely to succeed. The Secretary's interpretation is likely to be accepted as "the" interpretation of the regulation.

II. Due Process "Vagueness"

Denver might also raise a vagueness challenge. The facts show that the regulation suffered from ambiguity because of the conflicting regulation exempting certain press breaks. In *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the Court held "that laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-98 (1982).

Under vagueness analysis, judicial review is usually limited. Most regulations implicate only economic activity, and courts tolerate more indefiniteness in economic regulations than in regulations affecting fundamental rights. There are several justifications for this decreased level of scrutiny: many regulatory schemes implicate limited subject areas, and those subject to regulation can be expected to take affirmative steps to resolve ambiguity or uncertainty; those subject to a regulation can resolve uncertainty by seeking interpretive guidance from the responsible agency; economic interests are generally entitled to less protection than fundamental rights; and the penalties attached to violations of economic regulations are deemed to be qualitatively less severe. Moreover, courts tend to evaluate economic regulations under an "as applied" standard. Thus, even though a statute or regulation may be vague on its face, it can withstand a vagueness challenge if it is not vague as applied to the defendant. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489; *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

In this case, Denver has a good chance of success because the regulations are unclear when read together, and the Secretary is seeking civil penalties. Courts are more likely to invalidate regulations when such penalties are involved. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Winters v. New York*, 333 U.S. 507 (1948).

In this case, Denver has a good chance of success because the Secretary seeks to impose penalties. In *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), the case on which this problem was based, the court accepted a vagueness challenge on very similar facts.

III. Retroactivity

Denver might also challenge the Secretary's interpretation on retroactivity grounds. As already demonstrated, the regulation suffered from vagueness causing Denver to be uncertain about the meaning and application of the regulation. As a result, Denver can argue that it was deprived of an opportunity to conform its conduct to the law, and that the interpretation should not be applied retroactively -- *i.e.*, to conduct that took place before the Secretary announced its interpretation of the regulation and gave regulated entities the opportunity to conform their conduct to the law.

Despite popular opinion to the contrary, retroactivity is not per se illegal. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*). In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court also rejected a retroactivity challenge, but indicated that courts could and should prohibit retroactivity in some instances:

> The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative, for the Board has not yet finally determined whether these buyers are 'managerial.'

Although Denver did not rely on prior board pronouncements, this case does involve fines. Given the strength of the vagueness claim, the retroactivity challenge is likely to be useful to Denver, and should help it prevent the application of civil or criminal penalties.

DISCUSSION FOR QUESTION 4

Carol versus ABC, Alice, and Bob

Carol may claim that she is a shareholder of ABC and should consequently share in the sale of assets to Big Corp. Although Carol paid for 25 shares of stock, there is a question as to whether the share issuance is valid. If the issuance of stock is not authorized by the articles of incorporation, then the transfer of shares is void, regardless of shareholder or director ratification. Model Business Corporation Act, 3rd Ed., §6.03. ABC's articles authorized the issuance of only 100 shares, which ABC had already issued (75 to Alice and 25 to Bob). Therefore, Carol's 25 shares likely are void and ineffective to confer shareholder status on Carol.

Even though Carol is not a shareholder, she may be able to recover her $2,500 investment from ABC as a creditor. Fletcher Cyc. Corp., Vol. 12B, §5755. This poses a problem for Carol, however, as the corporation is insolvent because it sold all its assets and the shareholders, Alice and Bob, took $1 million as dividends.

Carol may have to try to recover her $2,500 from Alice and Bob personally by "piercing the corporate veil." A creditor of the corporation may persuade a court to disregard the corporate entity (pierce the corporate veil) and hold the shareholders personally liable if 1) the shareholders have not respected the separateness of the corporate entity, and 2) injustice would otherwise result. Henn, Law of Corporations, 2nd Ed., §146 and Fletcher Cyc. Corp., §41.30 (p.619). A corporation's separateness is not respected where the shareholders fail to observe formalities such as holding annual shareholder and director meetings and the shareholders commingle corporate funds with their own. Fletcher Cyc. Corp., §41.30 (p. 626). ABC failed to observe numerous formalities: 1) the shareholders and directors did not hold the annual shareholder and director meetings required by law; 2) the corporation acted for over three years without duly elected directors because the terms of the original three directors expired one year after formation of the corporation under the articles; and 3) the shareholders freely borrowed money from the corporation without the approval of the disinterested directors and shareholders as required by law.

Additionally, in order to pierce the corporate veil, it must be shown that without such "piercing," an injustice would be done. *Id.* at §41.30 (p.619). Most courts define "injustice" as undercapitalization of the corporation. *Id.* at §41.30 (p.625). A corporation is undercapitalized where it was organized without sufficient capital to meet reasonably anticipated business risks, as measured at the time the corporation began conducting business. *Id.* at§ 41.30 (p. 625). Alice and Bob capitalized the corporation with a total of $10,000. This may, or may not, be seen as enough capital, depending on the inherent risk of liability from the sale or use of party supplies. The fact that the corporation is now insolvent is irrelevant.

Bob versus Alice

Bob may claim that Alice's sale of ABC's assets to Big Corp violated Alice's fiduciary duties to the other shareholders. A majority shareholder breaches his or her fiduciary duty if he or she engages in an act that is unfair to the minority shareholders. *Id.* at § 5810. In order to pursue such a claim, Bob would have to show 1) that the sale of assets was not properly approved by the shareholders, and 2) that the sale was unfair to him as a minority shareholder. *Id.* at §§ 5811, 5837.

The sale of all of a corporation's assets must be approved by a majority of the corporation's voting shares. *Id.* at § 2949.20.10 and Henn, Law of Corporations, §195. Shareholders must act in meetings, and the shareholders must either receive proper notice of the meeting or all shareholders must waive notice. Fletcher Cyc. Corp., §§392, 405. Because there was no notice of any shareholder's meeting, and the shareholders did not waive notice, there was no shareholder approval of the sale. This is so even though Alice owns 75% of the shares; she must still adhere to the notice or waiver formalities required by law because this is not a close corporation. *Id.* at § 410. Therefore, the sale of ABC's assets to Big Corp was unlawful.

While the sale was clearly unlawful, there is no apparent unfairness to Bob, because Alice obtained an excellent price by selling the assets for 200% of their market value. However, if Bob were to unfairly lose something of value as a result of the transaction, such as a share of the future profits of ABC, or a long term salary from ABC, then Alice would be liable to Bob for those damages. *Id.* at § 5837.

Bob may also claim that Alice breached her fiduciary duty by taking loans at below-market interest. Self-dealing transactions between the corporation and a shareholder or director must be approved by a majority of the disinterested shareholders or directors. *Id.* at § 955. Because Alice did not obtain shareholder or director approval for the loans, she will be liable to Bob for the unfair profit she received on the transaction, e.g., 25% of the difference between the interest she actually paid and the fair market rate of interest. The fact that Bob also took the same unapproved loans from the corporation is not relevant to Alice's liability, but it may provide Alice with an argument that the court should set off her liability against Bob's liability for improper shareholder borrowing. *Id.* at § 955.

DISCUSSION FOR QUESTION 5

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. *Restatement (Second) Contracts* Section 24. Vendor's March 5 phone call was an offer. He identified the relevant specifics of the sale (what he intended to sell, for how much, and by when) and indicated a willingness to do so.

An offer is not terminated by revocation until the offeror has communicated the fact of revocation to the offeree. *Id.* at Section 42. It is possible, however, for the offer to be terminated by an indirect revocation which occurs when the offeror "takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect." *Id.* at Section 43. Vendor's sale of the property to Smith on March 21 would be an inconsistent action sufficient to revoke his offer to Byers, if Byers had known about it then. But, since Byers did not know about the sale to Smith until March 22, the sale, in and of itself, did not operate as an indirect revocation. Nevertheless, the offer was terminated by indirect revocation on March 22 when Byers read about the sale to Smith in the newspaper. Berryman v. Kmoch, 221 Kan. 304, 559 P.2d 790 (1977).

The offer could not be revoked, however, if Vendor's assurance that it would be held open until April 1 created an option contract, or in other words, an enforceable contract of its own to keep open Byers' option to accept Vendors' March 5 offer. To be enforceable, the Restatement requires that an option contract be "in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time." *Restatement (Second) of Contracts* §87.

In this case, Byers' discussion with Vendor on March 6 was an offer to enter into an option contract; the $50 was sufficient consideration; and Vendor's promise was an acceptance, sufficient to form an option contract.

However, a contract for the sale of land must be in writing in order to be enforced. This is true for a contract for the sale of land, as well as for an option contract regarding the sale of land. Garbarino v. Union Savings & Loan Association, 107 Colo. 140, 109 P.2d 638 (1941).

All states except Louisiana have adopted the land-sale provision of the English statute of frauds by statute or judicial decision. *Restatement (Second) of Contracts,* Statutory Note to Chapter 5. The English statute provides, "...no action shall be brought...upon any contract or sale of lands...unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith..." *An Act for the Prevention of Frauds and Perjuries,* 29 Charles II, Ch. 3 (1677). Colorado's version of the statute of frauds is slightly different.

> The Colorado statute differs from the majority of state statutes of fraud, which generally require a memorandum signed "by the party to be charged." *See, e.g.*, Ariz.Rev.Stat. Ann. § 44-101 (West 1994); Cal. Civ.Code § 1624 (West 1985); Conn. Gen.Stat. § 52-550 (1995); see also 72 Am.Jur.2d Statute of Frauds § 364 (1974). Colorado's statute, however, requires that contracts for an interest in land be evidenced by a memorandum signed by the party by whom the sale is to be made, in other words, the vendor.

Boyer v. Karakehian, 915 P.2d 1295, 1298 (Colo. 1996). However, this difference is not significant in the context of this question, since under either version of the statute of frauds, the writing must be signed by Vendor (who is both the party to be charged and the vendor).

Here, there is no writing which satisfies the statute of frauds. Obviously, Vendor's phone call of March 5 was oral. While the parties' March 6 conversation was otherwise sufficient to constitute an option contract (since it included an offer, acceptance, and consideration), it also was oral. Byers' March 23 writing would satisfy the requirement that there be a memorandum in writing because it contains all the essential terms of the contract. *Restatement (Second) of Contracts* §13. The fact that the writing was made after the contract was entered into is not important. *Id.* at §133. Despite this, the memorandum does not satisfy the statute of frauds as it was not signed by Vendor. The agreement to sell Nutacre is unenforceable because there is no memorandum signed by the party to be charged. Without Vendor's signature, Byers' March 23 writing is not sufficient to satisfy the statute of frauds.

DISCUSSION FOR QUESTION 6

1. Did Bob revoke his will of January 1, 1995?

UPC Section 2-507(a)(2) explains:

> A will is revoked...(2) by performing a revocatory act on the will, if the testator performed the act with intent and for the purpose of revoking the will.... For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it.

Bob intended to revoke his will, but he tore up and destroyed the copy of the will that his attorney had given to him, rather than the original document. Thus, Bob's attempted revocation of his will of January 1, 1995 was ineffective.

2. Was the writing executed by Bob on January 1, 1996 valid?

UPC Section 2-502 (b) provides:

> A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting. The document of January 1, 1996 was written entirely in Bob's handwriting and was signed by him. As such, the document constituted a valid holographic codicil to the will.

3. What is Fred's right to the coin collection?

Bob's will included a specific bequest of his coin collection to his son, Fred, and later through the January 1, 1996 will, gave the coin collection to his friend, Gary. However, in 1998, Bob sold his coin collection and used the cash to pay his debts. When specifically devised property is sold or given away by the testator before death, the gift is considered to have been adeemed, or canceled. UPC Section 2-606 (6). The gift of the coin collection to Gary therefore, was adeemed so that Gary will receive nothing.

4. How will Bob's will and holographic codicil be given effect and interpreted?

When a testator has more than one will, all of the wills will be read together and given effect unless one or more of the subsequent wills revoke a prior will or are inconsistent. UPC Section 2-507(d) instructs:

The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

In his will, Bob gave all of his estate to his children and his girlfriend. In his holographic codicil written in 1997, Bob gave his coin collection to Gary. Although Bob may have intended to revoke his will by destroying its photocopy, the revocation was invalid and the will remained in effect. After making the specific devises, Bob added, "The rest I will decide at some future date." Thus, the codicil can be read to supplement the will because the codicil does not make a complete disposition of the Bob's estate and is not so inconsistent with the former as to revoke it.

5. How will Bob's testamentary estate be distributed?

Reading each of the testamentary documents in accordance with the dispositive provisions found in Bob's will and in the holographic codicil, Sue will receive the stamp collection. The residue of Bob's estate belongs to his girlfriend, Allison.

DISCUSSION FOR QUESTION 7

Authenticity

Any exhibit must be authenticated before it is admissible. F.R.E. 901 (a) provides that the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims. F.R.E. 901 (b)(2) further provides that a non-expert may give an opinion about the genuineness of handwriting, if based on familiarity with the handwriting that was not acquired for purposes of the litigation. Paula's testimony that she can recognize Dan's handwriting is sufficient to authenticate the letter.

Hearsay

Dan's letter is offered to prove the truth of the matter asserted (that he is a careless driver) and fits the general definition of hearsay in F.R.E. 801(c). As such, it would be excluded under F.R.E. 802 except as provided elsewhere in the Federal Rules of Evidence. F.R.E. 801 (d)(2)(A) expressly provides that a statement is not hearsay if it is offered against a party and it is the party's own statement. Since Paula is offering the statement against Dan and it is his own statement, and the letter is admissible as an admission by a party opponent.

Best Evidence Rule

Since Paula is trying to prove the contents of a writing, F.R.E. 1002, the Best Evidence Rule, would normally require that she produce the original of the writing. However, under F.R.E. 1004(1) the original is not required if all originals have been lost or destroyed, unless done in bad faith. Since Paula threw the original letter away just like she did with all Dan's other letters, she did not destroy it in bad faith, and can thus testify to the contents of the letter without producing the original.

Character/Habit

Dan would argue that the purpose of the introducing the letter is to prove that his character is that of a careless driver and that therefore he was careless at the time of the accident. F.R.E. 404(a) prohibits the introduction of evidence of a person's character to prove an act in conformity therewith on a particular occasion. Thus, even though the letter can be properly authenticated, contains an admission by a party opponent, and the original of the letter does not have to be produced, the letter is ultimately may be inadmissible because it contains improper character evidence.

Paula's response to the argument of Dan is that the letter is offered to show Dan's habit of driving carelessly, and therefore is admissible under F.R.E. 406. The admissibility of the document therefore depends on whether the court finds that it is offered to show Dan's conduct under 406 or his character under 404.

DISCUSSION FOR QUESTION 8

The issue in this case is whether or not Sam will be able to successfully bring a lawsuit for negligence against Happy Trails Resort for his skiing accident, considering the fact that he purchased and used a ski ticket which had a purported release of liability clause noting that the user/purchaser of the ticket accepted the risks inherent in the sport. Thus, in order to fully answer this question, an examinee must explain both the general law of negligence and also must explain the tort theory of assumption of the risk. She should also consider an argument that the ski area was negligent per se.

Negligence

The elements of a cause of action for negligence are:

a) a duty or obligation recognized by the law, requiring a person to conform to a certain standard of conduct for the protection of others against unreasonable risks;

b) a failure on the person's part to conform to the standard required (i.e., a breach of duty);

c) a reasonably close causal connection between the conduct complained of and the resulting injury, known as proximate or legal cause; and,

d) actual loss or damage to the interest of another.

W. Page Keeton, *Prosser and Keeton on the Law of Torts*, Section 30 (5th ed. 1984); *Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998). Negligence is defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." *Restatement (Second) of Torts* Section 282. Negligent conduct may consist of either an act or an omission to act when there is a duty to do so. Id.

Here, the duty or obligation of Happy Trails would consist of either modifying the steep left dropoff on Black Diamond Hill, blocking it by a fence or some other barrier, or, at the very least, notifying the patrons of the ski resort that the left dropoff on the slope existed, and that it was a "no ski" danger area. The duty of Happy Trails was breached through this failure to either block or to warn (an omission) which resulted in the plaintiff's lack of protection against unreasonable risk of harm. Causation should be fairly easy for Sam to prove; "but for" the unmarked steep dropoff, he would not have broken his leg in this skiing accident. The final element of negligence, that of actual loss, injury, or damage, should be easy for Sam to demonstrate: he has a severely broken leg.

Negligence per se

Sam also could assert a claim that Happy Trails was negligent based upon its violation of the statutory provision related to skier safety, that it is liable for negligence per se. Jurisdictions often enact statutes requiring ski areas to take certain actions in order to protect skiers, including such things as: maintaining a sign system indicating the level of difficulty of the area's slopes and trails, giving warnings of danger areas, closed trails, and ski area boundaries, and marking man-made structures that are not readily visible to skiers. See, e.g., the Colorado Ski Safety and Liability Act, Sec. 33-44-101 to 33-44-114, CRS (1999).

The proof of fault required to demonstrate negligence per se is that the defendant violated the standard of care set forth in a statute or ordinance. Lui v. Barnhart, 987 P.2d 942, 945 (Colo.App. 1999). A statute or ordinance defines the standard of care for a claim of negligence per se if the plaintiff is a member of the class which the statute or ordinance was intended to protect and if the injuries suffered were the type the statute or ordinance was enacted to prevent. Id. at 946. Any violation of a statute's provisions applicable to the plaintiff constitutes negligence on the part of the Defendant. Bayer v. Crested Butte Mountain Resort, Inc., 960 P.2d 70, 74 (Colo. 1998).

Here, the local jurisdiction had in effect a statute regulating the actions of ski areas in protecting their patrons and requiring that the ski area post signs warning of dangerous areas. Sam can argue that Happy Trails was negligent per se for violating the requirements of that statute and not posting a sign warning of the steep drop off on the left side of Black Diamond Hill.

Assumption of the Risk

Happy Trails may raise Sam's assumption of the risks of skiing as a defense to the possible cause of action for negligence. The legal concept of assumption of the risk generally requires: 1) that the plaintiff must know that a risk is present, and 2) he must understand the nature of the risk. Further, the plaintiff's choice to incur the risk must be voluntary. Keeton, supra, sect. 68; Carter v. Lovelace, 844 P.2d 1288, 1289 (Colo. App. 1992). In general, the plaintiff, in assuming the risk, has given his express consent or implied consent in advance, thus relieving the defendant of an obligation to him. Keeton, Id. However, under ordinary circumstances, the plaintiff, even in meeting the above criteria, will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Id.

In this case, Sam has purchased and used a ski ticket which notes that in purchasing and using the ticket, he agreed to accept the risks that are inherent in the sport of skiing. He also gave a purported release to Happy Trails, in agreeing not to sue them for getting injured while skiing. However, examinees should note that Sam was accepting (or assuming) only those risks known to him to exist in the sport of skiing. As an expert skier, he obviously knew those risks. But, as Prosser and Keeton note, Sam will not be assumed to have accepted the risk of the conditions that were unknown to him — namely, the improperly barricaded and unmarked dropoff on the ski slope which caused his injury. Even though he caught an edge in skiing and this caused the start of his problems, his ultimate injury was caused by the dropoff at the edge of the slope. Because of this, he cannot be said to have assumed the risk in this circumstance.

In addition, Sam could raise the argument in response that the language on the back of the lift ticket would operate to relieve Happy Trails of its duties imposed by any statute. It therefore would not effect Sam's negligence per se claim. Statutory provisions may not be modified by private agreement if doing so would violate the public policy expressed in the statute. Phillips v. Monarch Recreation Corp., 668 P.2d 982, 987 (Colo. App. 1983; In Re Marriage of Johnson, 42 Colo. App. 198, 591 P.2d 1043 (1979). Since the statute here placed a duty upon Happy Trails to post signs in order to keep Sam safe, a trial court could exclude evidence of a purported agreement intended to alter those duties. Phillips, id.

DISCUSSION FOR QUESTION 9

Agency is the legal relationship formed when two parties agree that one shall act contractually for the other; it is a consensual relationship that requires some manifestation by the principal authorizing the agent to act for him and acquiescence by the agent. *Appleby v. Kewanee Oil Co.*, 279 F.2d 334 (1960). The relationship is essentially fiduciary by nature where the agent agrees to act for the benefit of the principal in authorized transactions. *Hobson v. Easton*, 399 F.2d 781 (1968).

The agent possesses the power to effect legal changes in relations between the principal and third parties. The agent may alter the principal's obligations as though the principal acted for himself. *Alvares v. Felker Mfg. Co.*, 230 Cal.App.2d 987 (1964). Regardless of the parties' intentions, an agent has certain powers depending upon which events bring them into being: (1) express or impliedly authorized powers, (2) apparently authorized powers, and (3) inherent powers for the relationship. *King v. Earley*, 145 So.2d 831 (1962). Once the principal has indicated that the agent has the power to act affecting the principal's obligations, the power is called the agent's authority. *Windsor Steel Prods., Ltd. v. Whizzer Indus. Inc.*, 157 F. Supp. 184 (1957).

Apparent authority is the power which results in an agent from a principal manifesting some consent to a third party--as in the present case. The prime requirement is that the principal originate the manifestation of authority vis-a-vis anyone else. *Grummitt v. Sturgeon Bay Winter Sports Club*, 197 F.Supp 455 (1961). An agent's power is the ability to create, change, or destroy legal relations. His authority is sometimes identical with, sometimes smaller than, but never larger than his power. An agent's actual or real authority is derived from a "manifestation" from the principal to accomplish whatever his principal has expressly or impliedly assigned him to do. An agent's apparent authority flows from a "manifestation" from the principal to the third party. While an agent may never have received actual authority to bind the principal, the latter will be liable to third parties who reasonably believe the "apparent" agent has the authority based on the principal's manifestation to third parties. Ratification is the affirmance by the principal to treat the agent's prior unauthorized act as if it was authorized from the inception. The ordinary conduct that creates ratification is acceptance by the principal of the benefits of the agent's transaction. Ratification ought to be distinguished from actual or apparent authority by acquiescence. *Restatement (Second) of Agency* Section 43.

One species of the agency relationship is called master-servant. The former employs the latter and directs his physical conduct. The right to control physical performance is the most important criterion and sets it apart from other agency relationships. *Restatement (Second) of Agency* Section 2 . One may possibly be both an agent and a servant. For example, many general agents are servants, such as plant managers. Special agents are those authorized to do only one or few specific acts according to particular instructions. *Farm Bureau Mut. Ins. Co. v. Coffin*, 186 N.E.2d

180 (1962). Servants who perform tortious acts outside the scope of their authorized employment are often deemed to be "on a frolic of their own" or a detour which will relieve the master from any tort liability under the doctrine of a respondeat superior. Harris v. Oro-Dam Constructors, 269 Cal.App.2d 911 (1969).

Since the agent in the present case exercised power beyond his actual authority, his principal will be bound because of the apparent authority of the agent. However, the agent is liable to the principal for those acts binding the principal and any resulting damages. *Restatement (Second) of Agency* Section 383.

21202

Essay 1 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. A contract was formed because elements of a contract are present, offer, acceptance and consideration. 1. _____

2. The sale of potatoes is a sale of goods, and, therefore, is governed by the Uniform Commercial Code. 2. _____

3. Both Spud and Diner are merchants within the meaning of the Uniform Commercial Code. 3. _____

4. The contract is for more than $500 and thus within the statute of frauds of Article 2 of the Uniform Commercial Code. 4. _____

5. Since Diner did not raise any objections to it, Spud's signed written confirmation of the contract will satisfy the statute of frauds as against Diner if it is sufficient to satisfy the statute as against Spud. 5. _____

6. The term "all potatoes in bin 15" is a sufficient, specific quantity term and indicates that a contract has been made, to satisfy the statute of frauds. 6. _____

7. If the writing is otherwise sufficient, but lacking a price, the Court will apply a contract price. 7. _____

8. The contract is governed by §2-601, the perfect tender rule. 8. _____

9. Because the delivery of the goods was one day late, it did not conform to the contract. 9. _____

10. Under the provisions of §2-601, Diner was entitled to reject the whole delivery. 10. _____

11. Diner was required to act in good faith in the enforcement of the contract. 11. _____

12. Spud may recover damages from Diner measured by the difference between market price and contract price ($500). 12. _____

21321

Essay 2 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1.	Recognize the crime of burglary	1. _____
2.	Identify the elements of burglary (breaking and entering into the dwelling house of another at night with the intent to commit a felony).	2. _____
3.	Even though door was unlocked, Carrie's entry constituted "breaking."	3. _____
4.	Recognize the crime of larceny.	4. _____
5.	Identify elements of larceny (the taking and carrying away of the personal property of another with the intent to unlawfully and permanently deprive the owner of its use).	5. _____
6.	Recognize the crime of arson.	6. _____
7.	Identify the elements of arson (the malicious burning of the dwelling house of another).	7. _____
8.	Recognize the crime of felony murder.	8. _____
9.	Identify elements of felony murder (causing of the death of an individual in the course of a felony).	9. _____
10.	Recognize the potential defense of voluntary intoxication.	10. _____
11.	Recognize that voluntary intoxication applies only to specific intent crimes.	11. _____

21382

Essay 3 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Recognition that there can be a challenge on grounds that procedural requirements for promulgating rules were not followed. 1. _____

2. Recognition of potential of ultra vires challenge. 2. _____

3. Denver could make a substantive challenge to the Secretary's interpretation of the regulations. 3. _____

4. Recognition of "deference" principles. 4. _____

5. Deference is appropriate here because the Secretary is interpreting his own regulation. 5. _____

6. Denver could challenge the regulation itself on vagueness grounds. 6. _____

7. Regulation is vague because it is ambiguous. 7. _____

8. Recognition that vagueness challenges are problematic for regulated entities like Denver which have an affirmative obligation to ascertain regulatory requirements. 8. _____

9. Courts are more likely to invalidate regulations when civil penalties are sought. 9. _____

10. Denver could challenge the Secretary's interpretation because it did not have an opportunity to make its conduct conform to the law (retroactivity doctrine). 10. _____

21453

Essay 4 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

Carol's Claims

1. She may claim that as a shareholder, she is entitled to share in the assets of the sale. 1._____

2. However, there is an issue of whether Carol is a bona fide shareholder. Her shares were not authorized by articles and are likely void. 2. _____

3. Carol may be able to recover her $2,500 investment, as she and ABC have creditor-debtor relationship. 3._____

4. Alice and Bob may be personally liable to Carol (under the theory of piercing the corporate veil). 4. _____

5. In order to pierce the corporate veil, Carol must show that:

   5a. There was no respect for the separateness of the corporate entity. 5a._____

   5b. She was treated unjustly. 5b._____

6. Alice and Bob failed to abide by the articles of incorporation. e.g., they failed to hold annual meetings; they acted for over three years without authority; and they borrowed freely from ABC. 6._____

Bob's/Carol's Claims

7. Majority shareholder owes fiduciary duty to minority shareholder(s). 7._____

   7a. By selling ABC without Bob's approval, Alice violated that duty. 7a._____

Bob's Claims

8. Bob must show that the sale of assets was not approved by shareholders and that the sale was unfair to him. 8._____

9. Difficult for Bob to claim unfairness; he made good return on the sale. 9._____

21551

Essay 5 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen
and write numbers clearly

1. Vendor's March 5 phone call was an offer to sell Nutacre to Byers. 1._____

2. An offer is a manifestation to enter into a bargain, made to invite another to accept that invitation. 2._____

   2a. An offer must contain all relevant terms such as: what is to be sold, for how much, and by when. 2a._____

3. An offer is not revoked until the offeror has communicated its revocation to the offeree. In other words, revocation occurs when the offeror takes action inconsistent with the offer and the offeree acquires reliable information to that effect. 3._____

4. Thus, the mere selling of Nutacre to Smith did not operate as revocation because Byers did not know about the sale. 4._____

5. However, Byers reading about the sale on March 22 was a revocation which did terminate the offer. 5._____

6. The offer could not be revoked if Vendor's assurance not to sell created an option contract. 6._____

7. Recognition of statute of frauds issue. 7._____

8. An option contract for the sale of real estate is created if it satisfies requirements which include:

   8a. that the promise to keep the offer open must be in writing and signed, and 8a._____

   8b. that it must be supported by consideration. 8b._____

9. The problem here is that the contract option was not signed by Vendor. 9._____

21610

Essay 6 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen
and write numbers clearly

1. A testator may revoke a will by intentionally performing a revocatory act on the will, including destroying the will or any part of it. 1._____

2. Bob's attempted revocation of his will of January 1, 1995 is invalid because he did not destroy the original will. 2._____

3. A will is valid as a holograph will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting. 3._____

4. The document dated January 31, 1997, which was written entirely in Bob's handwriting and signed by him, is a valid holographic will in the nature of a codicil. 4._____

5. Both wills are effective because when a testator writes more than one will, all of the wills will be read together and given effect unless one or more of the subsequent wills revokes a prior will or are inconsistent. 5._____

6. When specifically devised property is sold or given away by the testator before death, the gift is considered to have been adeemed, or canceled. 6._____

7. The gift of the coin collection to Gary has been adeemed so that he will receive nothing. 7._____

8. Reading both wills together, Sue will receive the stamp collection. 8._____

9. Reading both wills together, the residue of Bob's estate passes to his girlfriend, Allison. 9._____

10. Fred gets nothing. 10._____

42345

Essay 7 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. The letter must be authenticated under F.R.E. 901 in order to be admissible. 1. _____

2. Paula's testimony that she recognized Dan's handwriting would be sufficient to authenticate the letter under F.R.E. 901(b)(2). 2. _____

3. Since Paula is trying to prove the contents of the writing she must comply with the Best Evidence Rule, F.R.E. 1002. 3. _____

4. Identify that since the original of the letter was not destroyed in bad faith, she can use other evidence (her own testimony) to prove the contents of the letter. 4. _____

5. Identify issue of hearsay. 5. _____

6. Define hearsay: a statement other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. 6. _____

7. Dan's letter is admissible as an admission by a party opponent under F.R.E. 801 (d)(2)(A). 7. _____

8. Identify issue of relevance. 8. _____

9. F.R.E. 404(a) prohibits the use of character evidence to prove an act in conformity therewith on a particular occasion. 9. _____

10. F.R.E. 406 allows the use of evidence of habit to show that the conduct of a person on a particular occasion was in conformity with his habit. 10. _____

21686

Essay 8 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Identification of negligence as the potential cause of action. 1. _____

   1a. Elements of negligence are: duty, breach, causation, and loss or damage. 1a. _____

2. Happy Trails had duty to exercise reasonable care. 2. _____

3. Happy Trails had a duty to either modify the dropoff, block it with a fence, or notify the ski patrons of the dropoff. 3. _____

4. Happy Trails breached its duty by not choosing to modify or to mark the dropoff in some way. 4. _____

5. Causation can be proved; "but for" the unmarked steep dropoff, Sam would not have broken his leg in this accident. 5. _____

6. Final element of negligence — injury or loss — can be proven in this case, considering the injury. 6. _____

7. Identification of negligence per se as a potential cause of action. 7. _____

8. Happy Trails liable for negligence per se if it violated standard of care set forth in applicable statute. 8. _____

9. Identification of comparative/contributory negligence as possible defense. 9. _____

10. Identification of assumption of risk as a possible defense. 10. _____

11. Explanation that assumption of risk requires that the plaintiff know that a risk is present and he must understand its nature. 11. _____

12. Here, Sam will probably not be assumed to have accepted the risk of his accident, because the conditions of that risk were unknown to him. 12. _____

13. Ski ticket provisions would not relieve Happy Trails of any injuries caused by risks unknown to skiers or duties imposed by statutes. 13. _____

21741

Essay 9 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Agency is a consensual and fiduciary relationship between the parties in which the agent is authorized to act for the principal. 1. _____

2. Actual authority in an agent is the result of a principal expressly or impliedly assigning such responsibility to the agent. 2. _____

3. If Vernal did not have express authority to place this order, then he acted outside the scope of his employment or agency relationship and violated his fiduciary duty to Talman. 3. _____

4. Apparent authority is an agent's authority which results from a principal manifesting some consent to a third party. 4. _____

5. Talman may be liable for Vernal's action because of Vernal's apparent authority to bind Talman. 5. _____

6. Ratification is the affirmation by the principal to treat the agent's prior unauthorized acts as if they were authorized from inception. 6. _____

7. Talman may be deemed to have ratified Vernal's action by placing the goods in inventory instead of refusing delivery. 7. _____

8. Vernal may be liable to Talman for his actions to bind Talman and any resulting damages. 8. _____

9. Servants who perform tortious acts outside their authorized appointment may not render the master liable under respondent superior if the servant is on a frolic and detour of their own. 9. _____