AM Essay 1 - Ex. 1

1. Peter should pursue a recission claim on the basis of misrepresentation or fraud. Recission allows an individual to void a contract and place parties to the contract in the original positions they were in before the contract. A proper basis for seeking recission occurs where a party to a contract misrepresents a material fact of a contract and the other side relies on that fact. Here David misrepresented that the car was a Duesenberg when in fact it was only a replica. This was a material fact of the contract since the contract was based on the purchase of a Duesenberg and Peter relied on the statement by David that it was a Duesenberg. To get recission, Peter must show inadequate remedy at law, remedy (equitable relief is feasible) and misrepresentation. Here, Peter has no adequate remedy at law because the subject matter of the contract is unique-Duesenberg in mint condition. Also, recission is feasible here as long as the court has jurisdiction over David to order him to return the money/painting or its proceeds. As stated/explained above, Peter can also show misrepresentation.

2. David may raise the defense of unclean hands because Peter also made a misrepresentation. Unclean hands prevents a party from recovering and obtaining equitable relief where the party engaged in behavior that is offensive to the court. Here Peter knew/believed that the painting was worth no more than $10,000 but he represented to David that it was worth $20,000. Thus, Peter also acted in bad faith.

3. Peter may also seek equitable relief on the basis of unilateral mistake. Generally, unilateral mistake is no defense to a contract or no basis for recission except where the defendant/other party to the contract knew or should have known about the mistake. Here, Peter thought the painting was worth $10,000, which he represented as $20,000. David knew after an appraisal that it was worth
$5 million. Thus, David had actual knowledge that the painting was worth a significant amount more than Peter believed/represented. Yet, David capitalized on Peter's mistake instead of pointing out the error.

4. Peter may seek to recover the proceeds of the cars under a constructive trust theory or equitable lien theory. Constructive trust is available where an individual obtains title to property via misrepresentation, fraud, duress (i.e., wrongfully). It is usually used where the proceeds have increased in value and can be easily separated. Equitable lien is also available equitable relief where person obtains title wrongfully and is used where property purchased or traded with proceeds has lost value or cannot be easily separated. Here, if the value of the cars has diminished, or if commingled funds to purchase cars, use equitable lien. But if cars easily identified and value preserved, then constructive trust should be sufficient to hold cars for Peter.

AM Essay 1- Ex 2

1. Peter could pursue a recission claim against David if he can prove the requsite elements based on mistake and misrepresentation. Recession is an equitable remedy that can be had where there are 1) grounds for recicssion and 2) it is not subject to any defenses. Generally a unilateral mistake is not grounds for recission unless the other party knew or should have known of the mistake. Here, David arguably knew that Peter thought the car was an orginal because Peter told David he knew nothing about cars and should have known that Peter thought the car was an orginal.

Further, misrepresentation occurs where one misrepresents a material fact, involves scienter, the other justifiable relies on the representation, and there is casuation and damages. Here, David has represented that he has a 1936 Duesneberg in "mint condition." He never discloses the material fact that the car is a replica. David also told Peter that he was giving Petere a substantial "new-client" discount. However justiable reliance may be a problem in this case for Peter. Arguably it is not reasonable for Peter to think that he is getting a mint coundition car with a 60,000 discount. Further, David clearly sold the car "as is." This may have provided Peter was notice that the car is not an orginal and therefore Peter cannot justifiably rely on David representations.

2. One defense is that Peter may have unclean hands in that he represnted to David that the painting he was selling to him was apprasied at 20,000 when in fact he never had the painting apprasied an thought it was only worth 10,000. The general rule is that a court of equity will only do equity if you have clean hands. Unclean hands is an equitable defense that can be asserted by a party who commits some wrong in the transaction or claim.

Another defense for Peter, as mentioned above, is that Peter did not justiable rely on the mispresentation of David.

3. Peter may attempt to recover the painting on the basis of mistake. The general rule is that a court of equity will recind a contract if there is mutual mistake and not a unilateral mistake. However where the other party knew or should have known of the mistake a court of equity will grant recission for a unilateral mistake. Here there was not a uniltaterla mistake at issue but a mutual mistake at issue because neither party knew of that the painting was a Picasso. Generally a court of equity will grant recission where the mistake is material. If there a mistake as to price courts of equity are hestitant to assert a material mistake. However given the dramatic difference in price in this case, ia court of equity may grant recission based on a material mutual mistake in this case. However, David may still assert unclean hands against Peter for misrepresenting that he had the painting appraised. Thus a court of equity may leave both parties as they stand and not award relief for either party.

4. If the court finds that Peter is entitled to recission and David has sold the Picasso painting a court of equity may grant Peter a constructive trust or equitable lien over the proceeds. A constructive trust/equitable lien is an equtiable remedy that a court grants to prevent unjust enrichment where a wrongfoer has obtained title to new property that is fairly traceable to property that the wrongdoer has misappropriated. A court will typically grant an equitable lien where the value of the property is less than what was misappropriated and a constructive trust where the property is more valuable than what was misapprporiated (thus allowing a Plaintiff to obtain the benefit of any increase in value). Here if the cars David has purchased are worth more than the Picasso painting a court will grant Peter a contructive trust in the cars . If the a cars are less valuable, a court will grant Peter an equitable lien to the extent of the value of the cars and a deficiency jusgment as to the rest. However, if should again be noted that both of

these equitable remedies are subject to equitable defenses such as unclean hands, laches, Bona fie purchaser of value. Thus Peter may still not recover if he is found to have unclean hands.

AM Essay 1 - Ex 3

1) Peter should pursue a claim for recission on the basis of misrepresentation. At issue is under what basis a person can have a contract rescinded.

Recission is an equitable remedy in which the contract is disregarded and the parties are put back in the position as if the contract never existed. A contract can be rescinded based on mutual mistake as to a material fact or misrepresentation. Here, there was no mutual mistake as David was fully aware the car was not an antique. Thus, Peter must pursue recission under misrepresentation.

In order to prove misrepresentation, Peter must prove that there was a false statement of material fact, that David knew it was a false statement and intended for Peter to rely on it, that Peter did rely on it, and that he suffered harm as a result.

In this case, Peter can prove there was a false statement as David told him it was in "mint condition" and indicated to Peter it was an original. David can rebut this argument by stating that he never said it was an original and that Peter signed the contract with an "as is" clause. Next, the facts state that David in fact knew it wasn't an original and only a replica.

Additionally, because Peter told David he knew nothing about cars, it's clear David wanted Peter to rely on his statement. Where Peter will likely have the most problem is proving damages. Because he believed the painting was only worth $10,000, he paid $40,000 for a car that was worth $40,000. Thus, not taking into account the subsequent discovery of the value of the painting, Peter really didn't suffer any damages.

Because Peter may have trouble proving an actual express misrepresentation (except for the "new client discount") and damages (not considering the true value of the painting), it may be difficult for him to have the contract rescinded.

2. David may raise the defense of unclean hands. At issue is whether David has any defenses to the equitable claim for recission.

Where a party has acted improperly or been involved with misconduct as to the transaction at hand, the Court may preclude equitable relief. This is the defense of unclean hands. The misconduct must be in regards to the transaction itself.

In this case, Peter believed the painting was only worth $10,000. However, he misrepresented to David that the painting was worth $20,000, thus making David believe that he was getting a value of $50,000 ($20,000 + $30,000 cash) for the $40,000 sale price. Therefore, David could claim that Peter's dishonesty as to his belief of the value of the painting prevents him from receiving equitable relief. However, Peter could argue that since David knew the painting was actually worth more before agreeing to the deal, his small deception was not as to actual facts and therefore should not prevent recovery.

As an additional note, the facts do not state when Peter brought the action, but there may be a laches defense for delay as well.

3) Peter may attempt to rescind the contract based on unilateral mistake plus David's fraud. At issue is whether Peter's mistake as to the value of the painting and David's knowledge before the agreement will allow Peter to recover the painting.

A contract can be rescinded when there is a unilateral mistake plus fraud in the inducement. Unilateral mistake alone is not enough.

Here, Peter believed the painting only to be worth $10,000. If David never had it appraised, agreed to the deal and then found out it was worth $5M, it wouldn't be enough. However, because David knew before agreeing, it could be considered fraud on his part since he knew that Peter obviously didn't know the painting was worth that much. David would be unjustly enriched.

4) Peter may seek to impose a constructive trust or equitable lien on the cars. At issue is what remedy Peter has to recover the property David obtained due to his unjust enrichment.

Peter would want to impose a constructive trust if the value of the cars can be traced to the proceeds and are worth more than the painting. Then he could get any extra profit so David isn't unjustly enriched.

Peter should impose an equitable lien if he believes the cars can be traced (i.e. David used some of own money) or that there "street value" is not necessarily as much as the painting. Then he could sue David for any deficiency.

Additional Note Re: All Answers:
It should be noted that before Peter is entitled to any equitable remedy, he must show that legal remedy is inadequate (i.e. won't fully compensate) and that equitable relief is feasible. While he will likely have no problem w/the painting (it's rare), this could be an issue as to the car.

AM Essay 2 - Ex 1

If RNR wants to enforce the contract, it should file a motion to dismiss based on lack of jurisdiction or failure to state a claim upon which relief can be granted. Either of these motions may be filed before an answer is filed. RNR should file one of these motions because the arbitration provision essentially provides that the parties agreed to resolve all disputes via arbitration, and thus either this court does not have jurisdiction to hear the dispute based on the arbitration provision or this court may not grant the party the relief it seeks because the party agreed to arbitrate the dispute. Arbitration provisions are enforceable if reasonable and if not unconscionable. Even if a court grants RNR relief and sends the dispute to arbitration, the court may stay proceedings until arbitration is final.

2. Instead of immediately filing a motion to dismiss, RNR may choose to file an answer, thereby admitting and denying the allegations of Kid. RNR in the answer may include affirmative defenses and may also assert a counterclaim against Kid for selling the DVD of the show. The counterclaim may also be included in a separate filing/pleading but must be filed within ten days after the answer is filed. The counterclaim must include specific factual allegations because Missouri is a fact pleading state and a claim for relief, which must be specific if RNR seeks money damages as a result of Kid's conduct unless RNR's counterclaim rests in tort, in which case only a request for reasonable relief will be sufficient. Also, RNR's counterclaim here may be compulsory because it appears to arise out of the same transaction and thus should be brought or it will be lost.

3. During pretrial discovery, RNR can obtain the identity, qualifications, and general subject matter of the expert's opinion using interrogatories. Interrogatories are written questions directed at a party for the purpose of gaining information about the party's claims and defenses. Using interrogatories, RNR may also learn the fee charged by the expert. Using a deposition, an oral examination of a witness before trial and under oath, to gain specific details of the expert's opinion and basis thereof can also gain info about prior work as an expert. Additionally, a party has a duty to supplement discovery – interrogatories – if basis for expert's opinion changes or he/she relies on new facts.

4. RNR can remove the case to federal court. Generally, a defendant can remove a case to federal court within 30 days of being served if the federal court has subject matter and personal jurisdiction over the case and parties. A defendant cannot remove if he/it is a citizen of the state where federal court sits, but that is not the case here because RNR is citizen of Delaware and California. A party can remove a case beyond the 30 day rule where the case later becomes removal, so long as not attempted to remove beyond one year. Here, case became removable after non-diverse party, Money, a Missouri Corp, was dismissed. This occurred before one year. Thus, RNR can remove if federal court has jurisdiction. Here, state law claim, so seek federal court's diversity jurisdiction. Assuming amount in controversy satisfied (i.e., $75,000) diverse citizenship of parties also satisfied because Kid is a Missouri resident/citizen and RNR is considered a citizen of California (i.e., location of principle place of business) and Delaware (i.e., place of incorporation.) Federal court also has personal jurisdiction over RNR if state court did because you remove to federal court embracing the area of state court.

AM Essay 2 Ex 2

1. Assuming RNR wants to enforce the arbitration provision it should file a motion to dismiss the action on the grounds that it fails to state a claim where the contract specifies that all disputes should be resolved via arbitration.

2. RNR should file an answer and counterclaim. At issue is whether RNR may properly assert or join its claims against Kid within the context of Kids action. A claim asserted by a defendant against a plaintiff is a counterclaim. A counterclaim is either permissive or compulsory. A defendant may, but need not join as permissive counterclaims any claims the defendant has against the plaintiff, in the current action. If defendant chooses not to join its claims as counterclaims, the defendant may pursue those claims in a separate action. Compulsory counterclaims are those claims that a defendant has against the plaintiff that arise out of the same transaction or occurrence as plaintiff's claims. If a counterclaim is compulsory, the defendant must assert it or it is lost. In this case, because RNR's claim arises out of Kid's performance of services under the contract, and Kid's claims also arise out of the Kid/RNR contract, RNR's claim would be a compulsory counterclaim and must be asserted with its answer.

3. Assuming Kid intends to use forensic accountant as an expert witness at trial RNR may discover the witness's identity, qualifications, basis for opinions and actual opinions. Under Federal Rule of Civil Procedure 26, the parties to an action are required to make certain disclosures even absent formal discovery requests. For instance, parties are required to disclose known witnesses, documents, damages, and the existence of insurance. In addition, Rule 26 provides mandatory expert disclosures including identity, qualifications, opinions and basis for opinions. At the time of disclosure, the disclosing party must also provide the expert's report. A party may also inquire about experts via interrogatories, and requests for production of documents, which may include all documents upon which the expert relied. The expert may also be subjected to deposition regarding his/her opinions qualifications, and bases for opinions.

Missouri state rules do not require the same disclosures as the federal courts, but the experts' identity and qualifications may be inquired about through interrogatories, and the subjects of opinion and bases for opinions may be the subject of examination at deposition.

4. RNR could likely remove Kid's lawsuit to federal ct. An action filed in state court is removable to federal court if the action could have initially been filed in Fed. Ct. To remove an action, the party desiring removal must file a notice of removal within 30 days of filing of the petition or complaint, or first pleading which evidences grounds for removal, but in no case greater than 1 year after commencement of suit.

To be properly removable, an action must satisfy a federal court's jurisdictional requisites for either federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction exists where a claim arises under federal law or requires resolution of significant federal question. Diversity jurisdiction exists where no plaintiff is domiciled in the same state as any defendant (there is complete diversity) and the amount in controversy exceeds $75,000.

In this case, there does not appear to be any basis for federal question jurisdiction. However, diversity jurisdiction likely exists. Although diversity did not exist at the time Kid filed suit (Kid and Money are both Missouri residents). A corporation is deemed a resident of the states in which it is incorporated and in which it maintains its primary place of business. Here, Money is a Missouri corporation with its only office in Missouri so Money and him were not diverse. However, RNR is a Delaware Corporation with its only office in California, therefore, once Money was dismissed Kid and RNR were diverse. Although a defendant cannot remove an action to the federal district in the state of its own residence on diversity grounds, that is not a problem here. Assuming therefore, that the amount in controversy exceeds $75,000, where the first evidence of grounds for removal occurred within 6 months of commencement, assuming RNR files a notice of removal within 30 days of dismissal of Money, removal is proper.

AM Essay 2 - Ex. 3

1. RNR should file a motion to dismiss for lack of jurisdiction. A motion to dismiss for lack of jurisdiction would be proper because Kid signed the arbitration provision of the contract, thereby waiving any forum other than arbitration for any action he might bring against RNR.

2. RNR must file a compulsory counterclaim against Kid asserting RNR's claim against Kid for seeling the DVD of the show. Under Missouri law, a defendant (RNR) must assert any counterclaims it has against the Plaintiff (Kid) in its answer that arise out of the same transaction, occurance, or conduct, or else it waives these claims forever. Here, RNR's claim arises out of Kid's recording a show he is required to perform under the same contract Kid is suing RNR for breaching. Therefore, because RNR's claim arises out of the same transaction, RNR is required to assert this counterclaim against Kid in its answer or it will be deemed to have waived it forever.

3. Under Missouri law, if Kid intends to use his forensic accountant as an expert witness at trial, RNR can obtain the following information about this expert witness and his work during pretrial discovery, either through interogatories or a deposition:

(a) his name;
(b) his experience in the field;
(c) his previous times testifying as an expert witness;
(d) the topics he intends to testify about;
(e) his expert conclusion that the books had been cooked and that RNR has made a substantial profit over the last six months;
(f) and what basis he has for this conclusion and what evidence he relied upon in making this conclusion.

4. RNR can remove the case to federal court. A defendant can remove a case from state court to federal court if the case could have initially been brought in federal court. Federal courts are courts of limited jurisdiction, so in order for a case to be brought in federal court, it must (1) arise under federal law or (2) have diversity jurisdiction. If the breach of contract claim against RNR is created by federal law or requires the determination of a substantional federal question, it would arise under federal law and the federal court would have subject matter jurisdiction over the claim. If the claim does not arise under federal law, there must be complete diversity between plaintiffs and defendants (i.e. no one plaintiff can be a citizen of the same state as any one defendant) and the amount in controvery must exceed $75,000.

At the time Kid originally brought his claims against RNR and Money, Kid was a citizen of Missouri because he was domiciled in St. Louis, Missouri because he was present in St. Louis with an intent to remain therein. RNR is a corporation, so it is deemed to be a citizen of the state in which it wsa incorporated and the state where it has its principal place of business. RNR was incorporated in Deleware, so it is a citizen of Deleware, and its only office was in Hollywood, California, so it is also a citizen of California. Money was also a corporation, incorporated in Missouri with its only office in St. Louis, Missouri. Therefore, Money was a citizen of Missouri. Therefore, at the time Kid filed his petition, there was not complete diversity because Kid and Money were both citizens of Missouri. However, once Kid dismissed his claims against Money, there was complete diversity because Kid was a citizen of Missouri and RNR was a citizen of Deleware and California. Therefore, if at the time Kid dismissed his claims against Money, the amount in controversy that Kid is alleging in his petition exceeded $75,000, RNR could remove the case to federal court under diversity jurisdiction.

AM Essay 3 - Ex. 1

1. Joe will be able to successfully defend against Bank's claim that he is personally liable to the Bank on the Note. At issue is whether this case meets the requirements for the doctrine of de facto corporation or the doctrine of corporation by estoppel.

First, once a corporation is properly formed (or recognized as formed by one of the two doctrines explained below), its shareholders are shielded from personal liability on any actions against the corporation. Here, the Bank is trying to recover personally from Joe.

Both the doctrine of de facto corporation and the doctrine of corporation by estoppel apply when, but for some technical or innocent mistake, a corporation would have been formed. The **doctrine of de facto corporation** applies when the incorporator of the corporation goes through will all steps necessary to form a de jure corporation and believes a de jure corporation has indeed been formed. The court will apply the de facto corporation doctrine and hold that, although some innocent or technical mistake occurred that prevented true de jure formation, the incorporator in good faith and without notice set the corporation out to act as a corporation. The **doctrine of corporation by estoppel** has the same basic requirements; however, with this doctrine, the court will look to the interaction of the as-yet-to-be formed corporation with third parties. If the corporation sets itself out to a third party as a corporation and the third party has no reason to believe otherwise, then the corporation will be estopped from breaching any contracts based on its true unincorporated nature. This doctrine also applies if a third party transacts with the corporation, then that party -can be estopped from breaching its duties to the as-of-yet-to-be formed corporation. In both cases, once the incorporator realizes its mistake, it must fix it and become properly incorporated.

Here, both doctrines apply. Joe and Mom legitimately believed - in good faith and without any notice - that Joe's Auto Body, Inc. was acting as a de jure (properly formed) corporation until Joe's accountant indicated otherwise to Joe (and not to Mom). Moreover, Joe's Auto Body, Inc. was held out to the community as a corporation. Thus, this meets the requirements for the doctrine of de facto corporation. After the court finds that a de facto corporation existed, Joe will be shielded against liability for the Note. Moreover, the Bank relied as a third party upon the belief that the corporation was properly formed. Thus, the doctrine of corporation by estoppel will apply and the Bank will be estopped from suing Joe personally for the Note.

Note: Joe should definitely look into a suit against Lawyer for the tort of malpractice or for breach of Lawyer's fiduciary duty of care as an agent of Joe.

2. Joe will not be able to successfully defend against Suzie's claim that he is personally liable for the amount she overpaid. At issue is when the above doctrines will no longer protect Joe from liability.

Here, the two equitable doctrines will not provide a defense for Joe. Once the accountant notified Joe of the failed incorporation, Joe had a duty to properly incorporate and to refrain from operating as a corporation until proper formation. The two doctrines are based on innocent or technical mistake. Upon notice, Joe could no longer claim such protection and he will be held personally liable for the overcharge.

3. Mom will be able to successfully defend against Suzie's claim that Mom is personally liable to Suzie. At issue is Mom's amount of interaction with the corporation and Joe's failure to give her notice of the status of the corporation.

Courts will normally not hold inactive shareholders personally liable for the misfeasance or malfeasance of the active shareholders. Here, the facts do not indicate the level of Mom's interaction with the business; however, based on the fact that she only owned 10% of the common shares and that she had no notice of the failure of formation, it can be assumed that her interactions would not meet the amount needed to be held personally liable to Suzie.

AM Essay 3 - Ex. 2

Corporations

(1)
Joe can successfully defend Bank's claim that he is personally liable on the note.

At issue is whether Joe's Auto Body was a valid corporation. Shareholders like Joe are generally not liable for the debts of their corporation, absent conduct that would permit the piercing of the corporate veil. The corporate veil may pierced by either alter ego conduct by the shareholders or undercapitalization of the corporation. For these to even apply though, there must be a valid corporation. Here, there was a defect in the filiings for the incorporation of Joe's auto body, and the articles of incorporation were not recorded by the Secretary of State. But, Joe's Auto body can still have corporate status even though the articles were defective if Joe had no knowledge of this fact and if Joe made a good faith attempt to comply with the requirements for incorporation under the law of Missouri. The "corporation" is then accorded the rights and privileges of a real corporation, even though they did not comply with the formation requirements for a corporation.

In this case, we are told that Joe consulted with his lawyer to draft the articles of incorporation. We are told nothing to lead us to believe that Joe had knowledge that the filing was defective because of his choice of name. Joe can arguably be said to have made a good faith effort to comply with the filing requirements because he constuled with his lawyer and relied on his lawyer's services.

Since there was therefore a valid corporation by de facto - where a corporation is afford the protections of corporate status even though they did not comply with the formalities of corporate formation - Joe will not liable on the debt to Bank. Joe signed the note in his capacity as President of Joe's Auto Body. The bank also did not require a personal gurantee of Joe on the note. We are told of no conduct that would rise to the level of piercing the corporate veil. This was merely a loan to Joe for working capital. The bank knew they were lending money to Joe's Auto Body and failed to get a personal gurantee.

It should also be noted that bank may be estopped from denying the existence of the corporation. Bank treated Joe's Auto Body as a corporation when they made the loan to it, by recognizing the status by letting Joe sign as President of Joe's Auto Body. Bank should therefore be estopped from denying the corporate existence now.

(2)
Joe will not be successful in defending Suzie's claim that he is personally liable for the amount for repairs to her car.

The de facto status that Joe's Auto Body had acquired by making a good faith attempt to comply with the formalities to corporate formation and lack of knowledge of their deficieny has ceased to exist. We are told that Joe is informed by his lawyer that his corporation had not been afforded corporate status by the Secretary of State. Joe acquired this knowledge before the repairs were made to Suzie's car. Therefore, since Joe had knowledge that his corporation did not exist - he may not claim defacto status - and will therefore be personally liable on Suzie's claim.

No facts are presented to permit an inference that Joe's Auto Body should be recognized by corporation by estoppel. Nothing is to suggest that Suzie dealt with Joe in such a manner that

she should be estopped from claiming that a valid corporation does not exist.

(3)

Mom can successfully defend Suzie's claim that she is personally liable to Suzie.

As stated in (2), there Joe's auto body will not be afforded corporate status - even as a de factor corporation. If their was a proper corporate status, Mary may have been liable if she actively participated in the management of the business. But we are told that Mom took no part in the management or day to day operation of Joe's Auto Body. Generally, shareholders are not liable for the debts of a corporation absent some conduct that permits piercing of the corporate veil.

In the absence of the corporate status then, Mom will not be liable to Suzie. Mom had no knowledge that the articles of incorporation were defective, so it may be argued that the corporation should be afforded de facto status with respect to her.

In any event, the fact remains that Mom did not take an active part in the managing of the business. Joe will therefore be liable for his actions in overcharging Suzie for the repairs. Mom will not be liable on these claims.

Because Joe's Auto Body will not be treated as a corporation, it may be treated as a partnership. For a partnership to exist there must be an agreement by two or more person to carry on as co-owners (sharing of profits and losses) of a business for profit. We are not given any facts that would lead to this conclusion. We are only told that Mom purchased 10% of the business. While a sharing of profits by two people creates a presumption that a partnership existed, no facts are presented that suggest a sharing of the profits between Joe and Mom. If Mom did share the profits with Joe, there would likely be a partnership - and Mom would therefore be liable on the debts of the partnership with Joe. All partners are liable for the debts of partnership.

AM Essay 3 Ex 3

(1) Yes. Joe can defend Bank's claim by arguing that a de facto corporation existed at the time he entered into the loan. A de facto corporation exists where there is a law under which the entity could have been validly incorporated, there is a colorable attempt to comply with the law and form a valid corporation, and the business exercises the corporate privilege by doing business with a corporate name. A de facto corporation is treated the same as a de jure corporation for all purposes other than a suit brought by the state.

In this case, Joe could have validly incorporated the business under Missouri's General Business Corporations Law. He made a colorable attempt to comply with the law, hiring a lawyer to prepare and file Articles of Incorporation, Bylaws and shares of common stock. He conducted business by exercising the corporate privilege, using the name Joe's Auto Body, Inc., and he believed a valid corporation existed. Thus, there was a de facto corporation, and Joe may successfully defend against the Bank's claim, because the shareholders of a de facto corporation are not personally liable for the acts of the corporation.

Alternatively, Joe could argue that the Bank is estopped from denying the corporation's existence. Where a third party treats an entity as a corporation and conducts business with it as such, it may be estopped from later denying the existence of the corporation. Here, the Bank made a loan to Joe's Auto Body, Inc. and Joe signed the note as President of that entity. The Bank did not require a personal guarantee from Joe. Because Bank conducted business with Joe's Auto Body, Inc. as if it were a corporation, it may be estopped from denying the existence of the corporation and, thus, estopped from recovering against Joe personally.

(2) No, Joe cannot successfully defend Suzie's claim that he is personally liable. A person who conducts business in a corporate name knowing that no valid corporation exists is personally liable to third parties who deal with the business. Unlike the situation with the Bank, where Joe believed a valid corporation existed at the time of his dealings with Bank, Joe knew there was no valid corporation when he performed the repairs on Suzie's car. Because he knew there was no valid corporation, Joe is personally liable to Suzie.

(3) Mom can successfully defend Suzie's claim using the same de facto corporation defense that Joe can use against Bank. Unlike Joe, Mom had no knowledge that a valid corporation did not exist. Further, she did not actively participate in operating the business. Thus Mom, as a share holder in a de facto corporation, is not personally liable to Suzie.

AM Essay 4 - Ex. 1

1. I should begin this action with the Missouri Public Service Commission (PSC). This is a contested case because it requires a hearing to determine the private rights of Mega Corp in regards to whether or not all of Big Manufacturer's facilities are located within Mega Corp's service area and that Mega Corp is entitled to provide telephone service to Big Manufacturer. This hearing must take place before the agency who was given the power and authority to make these determinations. Here, Missouri law provides that PSC has the authority and responsiblity to allocate the specific geographic areas of the state in which specific telephone companies are authorized to provide telephone service to the public and to regulate the provision of these services. Therefore, PSC is the proper agency before which to bring this action.

2. Contested cases must first exhaust all adminstrative remedies provided by the agency. Therefore, if PSC has a special appeals process, Mega Corp or Mini Corp must first follow that avenue for appeal. The exceptions to this requirement are if (1) the administrative review would be futile because the outcome has already been predetermined; (2) if the appeal is based solely on a matter of law; or (3) if the harm would be great and immediate, therefore not allowing time for exhaustion of administrative remedies. None of these situations exist here, so Mega Corp or Mini Corp would need to first exhaust all administrative remedies.

Once they have exhausted all adminstrative remedies, Mega Corp and Mini Corp can appeal the final agency determination to the Missouri Circuit Court, within 30 days of being notified of the final agency decision. Mega Corp or Mini Corp may seek direct review of the agency determination, but not enforcement review. The proper venue for bringing this appeal would be the circuit court in either Cole County or where the county in which plaintiff (Mega Corp or Mini Corp) is a resident.

In order to appeal, Mega Corp or Mini Corp would need standing and the issue would need to be ripe for the appellate court's determination. Standing requires (1) an injury in fact, (2) the harm to be the type intended to be protected against by the statute, and (3) redressibility. Mega Corp or Mini Corp would have standing because they would have been injured in fact by not having Big Manufacturer's business, this type of injury is the type the PSC is means to protect against, and an appellate court could redress the injury because a reversal of the agency's decision would give Mega Corp or Mini Corp the business they wanted.

The issue would be ripe after Mega Corp or Mini Corp had exhausted all their administrative remedies and had received a final agency decision because the record would be fit for the court's consideration and the parties' would suffer from a delay.

3. The standard of review that should be applied is the substantial evidence test.

The determination by the agency that Big Manufacturer's facilities are all located within Mega Corp's authorized service area is a determination of fact. A merits challenge to a contested case on a determination of fact is governed by the substantial evidence test standard of review. This standard requires that the agency's determination be supported by competent and substantial evidence. The residuum rule applies to this standard and requires that at least a residue of the evidence must contain legally admissible facts, and if inadmissible facts are not objected to, they are deemed competent and the agency is allowed to rely on them. Therefore, so long as there is substantial and competent evidence supporting PSC's finding, the circuit court will not reverse PSC's decision.

4. The standard of review that should be applied is substituted judgment with some deference by the court.

A determination by an agency about whether or not it has statutory authority to act is a jurisdictional issue. A challenge to PSC's determination that it has the statutory authority to prohibit any regulated telephone company from providing service to a customer outside the utility's service area is a challenge to PSC's interpretation of its enabling statute (the Missouri law that created the PSC and gave it its power). The courts are in a better position to interpret statutes than the agency, and therefore the court will apply the substituted judgment standard to this decision and do a de novo review. However, the court will give some defererence to the agency's determination when it is conducting its de novo review.

AM Essay 4 - Ex 2

1. Mega Corp should begin its request for a determination at the Missouri Public Service Commission (PSC). The organic act appears to vest authority for allocating geographic areas of service with the PSC, thus it has jurisdiction over this dispute. Mega Corp should start at the agency level because a private party is required to exhaust administrative remedies before the matter can be heard in a court. Mega Corp should begin by filing a petition with the PSC. It will be a contested case, in other words a case in which the PSC decides individual rights of a party. Here, the interests/rights of two parties are at stake. Mini Corp will contest that all Big Manufacturer's facilities are located within Mega Corp's service area. A contested case before the PSC should give Mega Corp the opportunity to present evidence and hear and contest evidence against it. The amount of process Mega Corp receives may vary based on agency practices, but at a minimum should include a hearing in which to present and contest evidence to protect it's due process rights in the interest in profits from Big Manufacture's facilities.

2. Mega Corp should first appeal its decision using any mechanics available within the agency itself. Failure to do so will result in the contention that it failed to exhaust administrative remedies and thus will cause a court to refuse to hear the case until exhaustion occurs. There are exceptions to exhaustion when there are pure issues of law or where the agency cannot provide relief, but exceptions do not apply here. If Mega Corp successfully exhausts, but is the aggrieved party (i.e., has not obtained a finding that it controls the geographic area of Big Manufacturer), then Mega Corp may appeal an agency decision in a contested case to the Circuit Court of Cole County (i.e., where agency sits) or circuit court of county in which Mega Corp is located.

3. On appeal, the court would apply a substantial evidence standard of review. The standard of review applied depends on the type of decision. Here, a finding that all facilities are located in Mega Corp's area is a finding of fact. A court reviews agency findings of fact under a substantial evidence standard. A court will uphold an agency finding if it is based on substantial evidence based on a review of the whole record. In other words, the court considers whether the decision is reasonable based on the evidence in the record. Additionally, the court applies the residuum rule which requires that the agency decision be based on at least some residuum of competent, admissible evidence.

4. The court should apply a de novo review or substituted judgment to the finding that the agency has the statutory authority to prohibit a company from providing service to a customer outside the service area. A court employs de novo review or substituted judgment to agency decisions in contested cases regarding their jurisdiction and authority to act. While the court may grant the agency some deference, the question here is one of law and thus the court will generally substitute its judgment by considering the issue a new and interpreting the law pursuant to its judgment.

AM Essay 4 - Ex. 3

1. Here the case must be brought before the PSC agency. When the legislature gives authority to an agency, they should decide issues. Here the PSC is explicitly charged with allocation of the specific geographic areas of the state in which specific telephone companies are authorized to proved telephone service to the public and to regulate the provision of these services. Parties are requesting a determination of where exactly Big Manufacturer's facilities are located and who is entitled to provide telephone sevice to them. This falls squarely withing the expertise given to the PSC agency. Thus even if an action could be brought in state court, the agency is held to have origional jurisdiction to decide the dispute. Even though a decison may later be appealed through the courts, the action must first be brought to the agency.

2. Parties can appeal the decision to the circut court of Missouri by filing a notice of appeal with the circut court. Parties could also appeal to the state review board if they wanted to. The state review board provides a forum for issues such as licensing which may not be appropriate here. Here the circut court seems the most appropriate forum for an appeal.

If this is a contested case, parties must first exhaust all agency remedies before appealing.

Parties must have standing to appeal. In contested cases parties must show that they were adversely affected by the ruling. In non-contested cases Parties must show that they have a valid interest that was adversly affected by the ruling. Parties would want to show that they have a protectible interest, and are aguably within the zone the legislature was trying to protect with the agency.

Venue for contested cases is either Cole County of the County of P's residence; for non-contested cases the county where the agency is performs their duties or the county of P's residence.

3. A finding that Big Manufacturer's facilities are located within Mega Corp's authorized service area is a finding of fact that should be reviewed under the substantial evidence standard of review. Substantial evidence requires that the decision be based on legally admissible evidence (the residium rule). This requires that there be some residue of legally admissible evidence. However if the other side does not object, inadmissible evience (ex. hearsay) may be considered. There must be substantial evidence to support the decision. Here courts basically want to see how the agency made their decision. Therefore the circut court will apply the substantial evidence standard of review here.

A finding of fact and policy is reviewd under the abuse of discretion standard of review. There the reviewing court asks if the agency considered any irrelevant facts, failed to consider any relevant facts, and whether the decision was unreasoanble.

4. A jurisdictional decision is reviewd under the substituted judgment standard of review, or de-novo review. Because the agency has determined that is has teh statutory authority to prohibit companies from providing service to a customer outside the utility's service ares this is a jurisdictional decisionl. Jurisdictional review is given little or no deference. Courts are the final arbitrator in jurisdictional and constitutioanl cases.

If this decision is a statement by the agency on how to read their organic act, the courts will still apply a de-novo standard of review and give the agency little deference to their interpretation of their organic act.