QUESTION ONE

This question constitutes approximately 30% of the overall exam. Suggested time: One hour minimum. Word count: 900. Bluebook pages: 12 pages, one side, every other line (one bluebook)

Reynolds and McCloud are neighbors in the small town of Arcadia on the Gulf Coast. Reynolds owns two residential lots right on the Cajun River. She has a house on one lot and the other is currently vacant; Reynolds has a vegetable garden and a small orchard on the lot. McCloud lives across the street. He thus does not have riverfront property.

For many years, McCloud has tried to buy the vacant lot from Reynolds, but Reynolds has never been interested in selling. The two remained cordial, however, despite this lack of agreement. Each had a key to the other's house and each would look after the other's house when the other was out of town.

When Hurricane Kevin threatened the Gulf Coast, Reynolds was visiting her mother in California. McCloud remained at his home even when the authorities recommended evacuation. The storm surge from the hurricane caused the Cajun River to flood. As the flood waters rose, McCloud used his key to enter Reynolds' house. He and his two sons spent the better part of the day moving her possessions from her house to his, which was on higher land. Reynolds' house was in fact flooded by the river, but the waters did not come up to McCloud's property.

When Reynolds returned home she was so grateful for McCloud's assistance that she asked him what she could do to thank him. He said, "you know what I'd like." She replied, "Do you mean to say that even after this awful flood you still want to live on the river?" "Yep," he said. "Well, let's swap places, then," she said, and laughed. "Done," McCloud said. He stuck out his hand and Reynolds, after a moment of hesitation, took it and laughed again.

That night, as McCloud thought things over, he became concerned that Reynolds would have a change of heart. First thing in the morning, he made appointments with an architect and a contractor and made plans to tear down Reynolds' flood-damaged home and rebuild a larger home on the two lots. He paid each a sizeable down payment.

As McCloud drove up to his home on his return from his appointments, Reynolds came out of her home and walked up to him. "I've decided to sell you the vacant lot," she says. "I'll sell it to you for the tax appraisal, which is $25,000, even though that's probably less than the market value, to thank you for your generosity in saving all my things."

"I thought we were going to swap," McCloud says. "Oh come on, you know I wasn't serious – we were just having a laugh. I was born in this house," Reynolds replies.

"I'll get back to you," McCloud says. He then calls you, his lawyer. McCloud is perfectly aware that the sensible thing to do is to accept Reynolds' offer and take the vacant lot, as insisting on the house swap is liable to cause friction. But he's kind of a stickler for his rights and before he decides to go that route he wants to know whether he has the right to insist on what he calls "the original deal," meaning the swap of his house for Reynolds' two lots. He thinks that was a fair deal, as he thinks that the cost of tearing down the damaged home and rebuilding on two lots is equivalent to the value of getting a sound house on one lot.

Please advise McCloud on his legal rights in this case.

QUESTION TWO

This question represents approximately 70% of the overall exam. Suggested time: 2 hours minimum. Word count: 1800. Bluebook: 24 pages, one side, every other line (two books).

MEMO
To: A. N. Associate
From: Senior Partner
Re: ExCo v. Landowner

We have been retained to represent Landowner, Inc., in a lawsuit filed against it by Extracation Co. ("ExCo")

The facts as we know them are as follows. Landowner and ExCo entered into a lease on May 1, 2004. The written agreement provides that Landowner would lease a gravel pit to ExCo for a term of five years, with an option to renew for another three years. The agreement also gives ExCo the right to mine gravel from the leased property, including the right to construct any necessary roads or buildings needed for the mining operation. As rent, ExCo would pay Landowner $100 for every ton of gravel excavated from Landowner's property or a flat payment of $5,000 per month, whichever is greater. The contract does not contain a merger clause.

For eight months, there were no problems. During that time, ExCo mined on average 600 tons of gravel from the leased property each month, thus paying on average $60,000 per month. After mining the gravel, ExCo sold it to various third parties, such as landscapers, the state department of transportation for road beds, etc.

ExCo was unable to mine any gravel during the months of January and February, due to above average snowfall, and paid the $5,000 each month without comment. At the beginning of March, 2005, there was a thaw, and ExCo discovered that the gravel pit had filled with water, preventing them from mining. That spring was wetter than normal and due to water in the pit, ExCo continued to be unable to excavate any gravel for four months, during which time they continued to pay $5,000 a month.

By the beginning of July, when the water in the pit still prevented mining, ExCo hired a hydrologist who examined the property and informed ExCo that their mining operations had lowered the bottom of the pit below the water table and that the only way to continue mining in that location was to install pumps that would need to run continuously. The hydrologist estimated that it would cost over a million dollars to install such pumps, not to mention the cost of running them.

At this point, ExCo contacted Landowner and announced there was a problem. They asserted that, during negotiations over the lease, ExCo had told Landowner that they would need to extract at least 30,000 tons of gravel from the pit in order to break even and that Landowner had replied that there were over 50,000 tons of gravel on the property. They demanded that Landowner install the pumps and assume the cost of running them.

Landowner refused and the parties continued to argue about the matter over the ensuing five months. During that period, from July through November, ExCo excavated no gravel and paid no rent. During that time, the gravel pit was – and currently is – still full of water.

On December 1, 2005, ExCo filed suit against Landowner. The first count alleges that the parties had a contract, that a term of that contract was Landowner's oral guarantee to ExCo

that it would be able to mine 50,000 tons of gravel from the pit, that Landowner has breached that contract term, that ExCo performed the contract until Landowner's breach, and that the breach caused damages of $4,000,000.00 (four million dollars).

The second count seeks, in the alternative, to rescind the contract based on the parties' erroneous belief that the gravel pit contained 50,000 tons of accessible gravel when in fact it only contained 4,800 tons (i.e., eight months x 600 tons per month). In this second count, ExCo seeks to recover $50,000.00 (fifty thousand dollars) that it alleges it spent to construct fencing and roads on the property and to purchase and install modular units on the property for storage and office space. They also seek another $30,000.00 (thirty thousand dollars), representing the rent they paid for the six months of January through June, when they were unable to mine any gravel. Finally, they allege the loss of another $1,000,000.00 (one million dollars) in "start-up" costs.

Please analyze the legal issues raised by this lawsuit as well as our chances of successfully defending our client.

MEMO
To: Senior Partner
From: Perry Paralegal
Re: ExCo v. Landowner

I interviewed the person who negotiated the contract with ExCo. She said that, during negotiations, ExCo had asked if Landowner had any idea how much gravel the property contained and she answered that they had a geologist's report that estimated the gravel deposit on the property at 50,000 tons. She does not recall ExCo saying that they needed any specific amount of gravel from the deal, and she quite emphatically insists that she never promised or guaranteed that they would be able to mine any specific amount from the property.

She said there had been some back and forth on the length of the lease and that the five year term, with ExCo having the option to renew for another three years, represented a compromise between the parties. Landowner had wanted a ten year lease and ExCo had wanted only a four year lease and this was the compromise.

She also indicated that the minimum rent payment term was included in the contract because Landowner, at the time they entered into the contract, intended to obtain a mortgage on the property (which they subsequently did, so the mortgage is subject to the lease, meaning that ExCo gets to use the property even if Landowner were to default on the mortgage)and that amount represents its monthly payment on the mortgage.

Finally, she mentioned as an "oh, by the way" kind of thing that they had a side deal with ExCo where they could "buy-back" excavated gravel from ExCo for $100 ton and that they'd done this on a couple of occasions. I asked if there was anything in writing confirming this, and she said no.

I asked for a copy of the geologist's report. It does contain the 50,000 ton estimate. It also contains a paragraph on the water table, which states that there is some indication that the water table had fluctuated in the past but that currently it is sufficiently deep for mining operations to recover the gravel deposit on the property.

I asked around and found out that the market cost for gravel these days is $200 a ton. Also, based on the size of ExCo's operation at the pit, it is estimated that their labor, cost of gas,

and other overhead is probably around $50,000 a month.

You also asked if I could figure out where that $4 million dollar damage figure in Count I came from. Here's my guess: If you take 50,000 tons (the estimated tonnage of the gravel deposit) and subtract 30,000 tons (what they claim they needed to break even), you get 20,000 tons, and if you multiply 20,000 tons by $200 (the market value of a ton of gravel), you get $4 million.

Finally, you asked me to investigate the $1 million in "start-up" costs. The company itself is about ten years old, so the company didn't "start-up" with this contract. There sure isn't anything currently on the property that would come close to that in value (although the $50,000 for fencing, modular units, etc., is probably pretty accurate). I did some searching and discovered that ExCo's fleet of trucks, bulldozers, and other equipment probably had a combined purchase price of around $1 million, although all of their equipment was purchased prior to 2004. I couldn't find anything else, so I'm guessing that $1 million is meant to cover the cost of their equipment.

Let me know if there's anything else you want me to look into.