



**February 2020**

**California  
Bar  
Examination**

**Performance Test  
INSTRUCTIONS AND FILE**

**WESTERN INSURANCE COMPANY v. SECURETRADE, INC.**

Instructions.....

FILE

Memorandum to Applicant from Jessie Parker.....

Letter from Martin Chan to Jessie Parker.....

Complaint.....

# **WESTERN INSURANCE COMPANY v. SECURETRADE, INC.**

## **INSTRUCTIONS**

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

**RAND SPIVEY LLP**  
**202 First Street**  
**Northport, Columbia**

MEMORANDUM

To: Applicant  
From: Jessie Parker  
Date: February 25, 2020  
Re: Western Insurance Company v. SecureTrade, Inc.

---

We represent both Western Insurance Company (Western) and Assurance North America Brokers and Administrators, Inc. (Assurance) in two actions against a company named SecureTrade, Inc. (SecureTrade). The two actions arise from two transactions. The material facts are set forth in our complaint in the Western-SecureTrade action.

SecureTrade sells consumers extended warranties for various products. SecureTrade has to have an insurance policy to back up these warranties to cover claims by consumers. To obtain the required insurance policy and to provide for review of consumer claims prior to approval or rejection, SecureTrade entered into a contract with Assurance (the Brokerage & Administration Agreement). The Brokerage & Administration Agreement contains an arbitration clause. Assurance in turn procured the required insurance policy (the Insurance Policy) for SecureTrade from Western, which is an insurance company affiliated with Assurance. SecureTrade entered into the Insurance Policy with Western. The Insurance Policy does *not* contain an arbitration clause.

In its action against SecureTrade, Assurance claims that SecureTrade breached the Brokerage & Administration Agreement. Invoking the arbitration clause in the Brokerage & Administration Agreement, SecureTrade successfully moved to submit the breach of contract claim to arbitration – the Assurance-SecureTrade arbitration.

In its separate action against SecureTrade, Western claims that SecureTrade committed fraud with regard to the Insurance Policy.

Counsel for SecureTrade sent me a letter requesting that Western voluntarily submit its fraud claim to arbitration as part of the Assurance-SecureTrade arbitration in order to avoid wasting time and money on a motion to compel arbitration that he asserts the Superior Court would “doubtless” grant.

Please draft a letter for my signature in response, stating that Western will not voluntarily submit its fraud claim to arbitration and explaining why any motion by SecureTrade to compel arbitration would be denied and why counsel’s contrary argument is unsound.

**ALLEN & PROCTOR LLP**  
**Three Emerson Center**  
**Northport, Columbia**

February 20, 2020

Jessie Parker  
Rand Spivey LLP  
202 First Street  
Northport, Columbia

Re: *Western Insurance Company v. SecureTrade, Inc.*

Dear Ms. Parker:

On behalf of SecureTrade, Inc. (SecureTrade), we hereby request that Western Insurance Company (Western) voluntarily submit its fraud claim in the above-referenced action to arbitration as part of an arbitration that was initiated by Western's affiliate, Assurance North America Brokers and Administrators, Inc. (Assurance), and is currently pending before the Columbia Arbitration Board in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*

As you are aware, relying on an arbitration clause in a so-called Brokerage & Administration Agreement to which SecureTrade and Assurance were parties, SecureTrade requested Assurance to voluntarily submit a breach of contract claim it had brought in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.* to arbitration before the Columbia Arbitration Board. Assurance refused. Because of Assurance's refusal, SecureTrade was forced to waste time and money to move the Superior Court — successfully — to compel Assurance to arbitrate.

We make our request that Western voluntarily submit its fraud claim to arbitration to avoid the waste of time and money that would be incurred if SecureTrade were again forced to move to compel arbitration. To expend time and money on such a motion

would be needlessly wasteful. That is because the Superior Court would doubtless grant the motion.

The Columbia Arbitration Act reflects a strong policy in favor of compelling arbitration. *Tuscany Builders v. Norman Properties* (Colum. Supreme Ct. (2011)).

The Columbia Arbitration Act's strong policy operates to compel arbitration whenever an action is intertwined with an arbitration and whenever a party to an action has a preexisting relationship with a party to an arbitration. *Tuscany Builders*. So it is here: Western and Assurance are affiliates and as such have a preexisting relationship; the Brokerage & Administration Agreement Assurance entered into with SecureTrade and the Insurance Policy Western issued to SecureTrade are intertwined.

In any event, the Columbia Arbitration Act's strong policy operates to compel arbitration whenever a party in an action seeks or obtains a direct benefit from a signatory to a contract containing an arbitration clause. *Tuscany Builders*. So it is here: Western obtained a direct benefit from SecureTrade, a signatory to the Brokerage & Administration Agreement, which contains an arbitration clause, by obtaining a premium from SecureTrade for the Insurance Policy.

Please respond, in writing, by March 2, 2020, and inform us whether Western will voluntarily submit its fraud claim to arbitration. If Western declines to do so, please state its reasons so that we may inform the court when we file a motion to compel.

Very truly yours,

**ALLEN & PROCTOR LLP**

*Martin Chan*

---

Martin Chan

Jessie Parker  
RAND SPIVEY LLP  
202 First Street  
Northport, Columbia

Attorneys for Plaintiff  
Western Insurance Company

SUPERIOR COURT OF THE STATE OF COLUMBIA  
COUNTY OF SPRINGFIELD

<p>WESTERN INSURANCE COMPANY, Plaintiff, v. SECURETRADE, INC., Defendant.</p>	<p>Case No.: 170717 <b>COMPLAINT FOR FRAUD</b></p>
---	--

By this Complaint, Plaintiff Western Insurance Company (Western) brings this action against Defendant SecureTrade, Inc. (SecureTrade), and alleges as follows:

**THE PARTIES**

1. Western is a Columbia corporation with its principal place of business at 59 Maiden Lane, Northport, Columbia.
2. SecureTrade is a Columbia corporation with its principal place of business at 360 Third Street, Northport, Columbia.



## **JURISDICTION AND VENUE**

3. Jurisdiction in this Court is proper under section 410 of the Columbia Code of Civil Procedure because SecureTrade maintains its principal place of business in the State of Columbia and the County of Springfield and does business there.
4. Venue in this Court is proper under section 395(a) of the Columbia Code of Civil Procedure because SecureTrade maintains its principal place of business in the State of Columbia and the County of Springfield and does business there.

## **GENERAL ALLEGATIONS**

5. SecureTrade sells consumers extended warranties, which provide repair and replacement coverage for a variety of consumer products.
6. The extended warranties are contracts between SecureTrade and individual consumers. They are not insurance policies.
7. In general terms, an extended warranty provides a consumer with additional protection for certain forms of product failure or damage in addition to the standard warranty provided for by the manufacturer of the product.
8. SecureTrade is required to carry insurance from an insurer to back up its extended warranties.
9. Western and SecureTrade were parties to a Contractual Liability Insurance Policy (Insurance Policy). The Insurance Policy is a commercial insurance product that covers the contractual obligations of the insured – in this case SecureTrade – to consumers on extended warranties. SecureTrade paid a premium to Western for the Insurance Policy and Western issued the Insurance Policy to SecureTrade.

Western and SecureTrade are the sole signatories to the Insurance Policy. The Insurance Policy does not contain an arbitration clause.

10. Assurance North America Brokers and Administrators, Inc. (Assurance) is an affiliate of Western. Assurance procured the Insurance Policy for SecureTrade pursuant to a contract referred to as a "Brokerage & Administration Agreement." Assurance and SecureTrade are the sole signatories to the Brokerage & Administration Agreement. The Brokerage & Administration Agreement contains an arbitration clause.
11. Subsequently, Assurance brought an action against SecureTrade in the Springfield County Superior Court, entitled *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*, which raised a single claim for breach of the Brokerage & Administration Agreement. Under the Brokerage & Administration Agreement, SecureTrade engaged Assurance not only to obtain the Insurance Policy, but also to review consumer claims prior to approval or rejection. Under the Brokerage & Administration Agreement, SecureTrade obligated itself to provide Assurance with timely and accurate reports to enable it to approve all consumer claims that were supported and to reject all consumer claims that were not supported. SecureTrade, however, failed to provide Assurance with timely or accurate reports.
12. Invoking the Brokerage & Administration Agreement's arbitration clause, SecureTrade successfully moved to compel Assurance to submit its claim to arbitration before the Columbia Arbitration Board under the Columbia Arbitration Act. Thereupon, Assurance initiated an arbitration before the Columbia Arbitration Board, similarly entitled *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.* The arbitration remains pending.
13. SecureTrade sold millions of extended warranties to consumers directly. The Insurance Policy insured SecureTrade's contractual obligations on these extended warranties.

14. Under certain conditions stated in the Insurance Policy, the extended warranties provide consumers with the right to seek reimbursement directly from Western. Among other things, the conditions impose claims-handling obligations on SecureTrade, requiring it to reasonably determine whether any consumer has presented a valid claim for product failure or damage and to certify in good faith whether Western is responsible for satisfying any such claim.
15. Over time, SecureTrade purportedly complied with its claims-handling obligations under the Insurance Policy, and so represented to Western, intending to induce its reliance. SecureTrade purportedly reasonably determined that more than 17,000 consumers had presented valid claims for product failure or damage totaling more than \$36 million, and so represented to Western, intending to induce its reliance. And SecureTrade purportedly certified in good faith that Western was responsible for satisfying the claims, and so represented to Western, intending to induce its reliance. Having reasonably relied on SecureTrade's representations, Western satisfied all of these claims in timely fashion and in full.
16. In fact, however, SecureTrade did not comply with its claims-handling obligations under the Insurance Policy. Nor did SecureTrade reasonably determine that any of the more than 17,000 consumers had presented valid claims for product failure or damage totaling even a penny of the \$36 million. Neither did SecureTrade certify in good faith that Western was responsible for satisfying any of the claims. In doing all of these things, SecureTrade acted fraudulently.

**CLAIM**  
**(Fraud)**

17. Western incorporates by reference the allegations contained in the foregoing paragraphs.
18. SecureTrade represented to Western that SecureTrade: (1) complied with its claims-handling obligations under the Insurance Policy; (2) reasonably determined

that more than 17,000 consumers had presented valid claims for product failure or damage totaling more than \$36 million; and (3) certified in good faith that Western was responsible for satisfying the claims.

19. SecureTrade's representations, however, were false.
20. SecureTrade knew that its representations were false when it made them.
21. SecureTrade intended that Western rely on its representations.
22. Western reasonably relied on SecureTrade's representations.
23. As a result, Western was harmed, in an amount equal to at least \$36 million.

#### **PRAYER FOR RELIEF**

WHEREFORE, Western prays for the following relief:

- A. An order requiring SecureTrade to pay damages, in an amount to be determined at trial but at least \$36 million, to compensate Western for its damages incurred as a result of SecureTrade's acts of fraud;
- B. An order requiring SecureTrade to pay punitive damages to Western as a result of SecureTrade's acts of fraud;
- C. An order requiring SecureTrade to pay prejudgment and post-judgment interest on all sums that it is ordered to pay to Western;
- D. The costs of bringing this action; and
- E. Such other and further relief as the Court may deem just and proper.

DATED: February 14, 2020

RAND SPIVEY LLP

*Jessie Parker*

By: \_\_\_\_\_

Jessie Parker  
Attorneys for Plaintiff  
Western Insurance Company



**February 2020**

**California  
Bar  
Examination**

**Performance Test  
LIBRARY**

**WESTERN INSURANCE COMPANY v. SECURETRADE, INC.**

LIBRARY

*Tuscany Builders v. Norman Properties*

Columbia Supreme Court (2011) .....

**Tuscany Builders, et al. v. Norman Properties, et al.**  
**Columbia Supreme Court (2011)**

In this matter, we consider the trial court's denial of a motion to compel arbitration pursuant to an arbitration clause in a real estate purchase and sale contract — the Purchase and Sale Contract — and the Court of Appeal's affirmance of the denial. Both the trial court and the Court of Appeal concluded that the arbitration clause could not be invoked by a nonsignatory to the Purchase and Sale Contract. In so concluding, both erred.

This is a complex residential real estate development project gone almost-inconceivably wrong. Suffice it to say that a group of plaintiffs, including buyers, sellers, and government agencies, sued another group of defendants, including other buyers, sellers, and government agencies, when the development project collapsed. Although the plaintiffs' complaint raises sixteen disparate claims, it essentially prays for relief, including damages, for breach of the Purchase and Sale Contract. The defendants filed a motion to compel the plaintiffs to arbitrate their claims under the Columbia Arbitration Act pursuant to the arbitration clause of the Purchase and Sale Contract. The plaintiffs opposed the motion, noting that none of the defendants was a signatory to the Purchase and Sale Contract, and that, although some of the plaintiffs were signatories, others were not. The trial court denied the motion, and the Court of Appeal affirmed.

We granted review in this matter to answer two related questions of first impression in Columbia. First, may a party who is *not* a signatory to a contract with an arbitration clause compel a party who *is* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel? Second, may a party who is *not* a signatory to a contract with an arbitration clause compel another party who is *not* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel? As we shall explain, the answer to both questions is: Yes.

While the Columbia Arbitration Act reflects a strong policy in favor of arbitration, generally speaking, arbitration is nevertheless a matter of contract and a party cannot



be compelled to arbitrate any dispute that he or she has not agreed to arbitrate.

As for the first question, we observe that sister-state courts have not been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel a party who *is* a signatory to arbitrate under the doctrine of equitable estoppel. The doctrine rests on the premise that a signatory should not be permitted to avoid arbitrating claims of the very type that he or she agreed to arbitrate simply because a nonsignatory seeks to arbitrate such claims. These courts have therefore concluded that a nonsignatory may compel a signatory to arbitrate when the claims the nonsignatory is seeking to arbitrate are intertwined with the contract containing the arbitration clause. We agree with the reasoning of these courts and with their result. Thus, we conclude that a nonsignatory may compel a signatory to arbitrate under the Columbia Arbitration Act via equitable estoppel when the signatory raises claims against the nonsignatory that are intertwined with the contract containing the arbitration clause, *i.e.*, dependent on rights or duties under the contract.

It follows that, under the facts, even though they are not signatories to the Purchase and Sale Contract with its arbitration clause, the defendants may nevertheless compel the signatory plaintiffs to arbitrate the claims they raise in their complaint. The signatory plaintiffs expressly allege that the defendants “breached the Purchase and Sale Contract,” that the “breach” subjected them to “injury,” and that the “injury” entitles them to “damages.” The signatory plaintiffs’ claims are therefore intertwined with the Purchase and Sale Contract because they are dependent on rights granted to the signatory plaintiffs.

As for the second question, we observe that, in contrast, sister-state courts have indeed been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel another party who is *not* a signatory to arbitrate under the doctrine of equitable estoppel. It is foreseeable and therefore reasonable that a party who has chosen to become a signatory to a contract with an arbitration clause might be compelled to arbitrate not only with other signatories but also with nonsignatories. But it

is not at all foreseeable or reasonable that a party who has *not* chosen to become a signatory to any contract with an arbitration clause might be compelled to arbitrate with anyone. These courts have therefore concluded that a nonsignatory may compel another nonsignatory to arbitrate only when the other nonsignatory has sought or obtained a direct benefit from the contract containing the arbitration clause — that is to say, only when the nonsignatory attempts to recover, or actually recovers, for breach of the contract as, for example, a third-party beneficiary. In so concluding, these courts have extended the settled rule that a *signatory* may compel a *nonsignatory* to arbitrate only when the *nonsignatory* has sought or obtained such a direct benefit from the contract containing the arbitration clause. On this point too, we agree with the reasoning of these courts and with their result. Thus, we conclude that a nonsignatory may compel another nonsignatory to arbitrate under the Columbia Arbitration Act via equitable estoppel, but only when the nonsignatory has sought or obtained such a direct benefit from the contract containing the arbitration clause.

We recognize that some sister-state courts have stated in dictum that a party who is not a signatory to a contract containing an arbitration clause may be said to seek or obtain a direct benefit from the contract if he or she alleges a preexisting relationship with one of the signatories. In this case, however, we need not and do not determine whether this dictum is sound. In any event, we believe that whether a nonsignatory has sought or determined a direct benefit from the contract should turn ultimately on what the nonsignatory *has done*, *i.e.*, effectively suing on the contract, rather than on what the nonsignatory *may be*, *i.e.*, factually or legally related to one of the signatories.

It follows that, under the facts, even though they are not signatories to the Purchase and Sale Contract with its arbitration clause, the defendants may nevertheless compel the nonsignatory plaintiffs to arbitrate the claims they raise in their complaint. The nonsignatory plaintiffs' claims are obscure and convoluted. As a result, we are not quite sure on what basis the nonsignatory plaintiffs are attempting to recover for breach of the Purchase and Sale Contract. But we are quite sure that the nonsignatory plaintiffs are attempting to do so. Like the signatory plaintiffs, the

nonsignatory plaintiffs expressly allege that the defendants “breached the Purchase and Sale Contract,” that the “breach” subjected them to “injury,” and that the “injury” entitled them to “damages.”

For these reasons, we reverse the judgment of the Court of Appeal and remand the matter to that court to remand it, in turn, to the trial court to grant the motion to compel arbitration.

