



February 2015 MEE Questions and Analyses



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Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2015 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Constitutional Law question on the February 2015 MEE tested the following areas from the Constitutional Law outline: II.A.3., The separation of powers—The powers of Congress—Power to enforce the 13th, 14th, and 15th Amendments; and IV.C., Individual rights—Equal protection.

For more information about the MEE, including subject matter outlines, visit the NCBE website at www.ncbex.org.

Description of the MEE

The MEE consists of six 30-minute questions and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Civil Procedure, Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Secured Transactions). Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Answer all questions according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

NOTE: Examinees testing in UBE jurisdictions must answer according to generally accepted fundamental legal principles rather than local case or statutory law.

February 2015 MEE Questions

Agency/Torts

Constitutional Law

Secured Transactions

Real Property

Civil Procedure

Decedents' Estates

AGENCY/TORTS QUESTION

For many years, a furniture store employed drivers to deliver furniture to its customers in vans it owned.

Several months ago, however, the store decided to terminate the employment of all its drivers. At the same time, the store offered each driver the opportunity to enter into a contract to deliver furniture for the store as an independent contractor. The proposed contract, labeled “Independent-Contractor Agreement,” provided that each driver would

- (1) provide a van for making deliveries;
- (2) use the van only to deliver furniture for the store during normal business hours and according to the store’s delivery schedule; and
- (3) receive a flat hourly payment based upon 40 work hours per week, without employee benefits.

The proposed Independent-Contractor Agreement also specified that the store would not withhold income taxes or Social Security contributions from payments to the driver.

The store also offered each driver the opportunity to lease a delivery van from the store at a below-market rate. The proposed lease required the driver to procure vehicle liability insurance. It also specified that the store would reimburse the driver for fuel and liability insurance and that the lease would terminate immediately upon termination of the driver’s contract to deliver furniture for the store.

All the drivers who had been employed by the store agreed to continue their relationships with the store and executed both an Independent-Contractor Agreement and a lease agreement for a van.

Three months ago, a driver delivered furniture to a longtime customer of the store during normal business hours. The customer asked the driver to take a television to her sister’s home, located six blocks from the driver’s next delivery, and offered him a \$10 tip to do so. The driver agreed, anticipating that this delivery would add no more than half an hour to his workday.

In violation of a local traffic ordinance, the driver double-parked the delivery van in front of the sister’s house to unload the television. A few minutes later, while the driver was in the sister’s house, a car swerved to avoid the delivery van and skidded into oncoming traffic. The car was struck by a garbage truck, and a passenger in the car was seriously injured.

The passenger has brought a tort action against the store to recover damages for injuries resulting from the driver’s conduct. Pretrial discovery has revealed that delivery vans routinely double-park; survey evidence suggests that, in urban areas like this one, 80% of deliveries are made while the delivery van is double-parked.

In this jurisdiction, there is no law that imposes liability on a vehicle owner for the tortious acts of a driver of that vehicle solely on the basis of vehicle ownership.

Agency/Torts Question

The store argues that it is not liable for the passenger's injuries because (a) the driver is an independent contractor; (b) even if the driver is not an independent contractor, the driver was not making a delivery for the store when the accident occurred; and (c) the driver himself could not be found liable for the passenger's injuries.

1. Evaluate each of the store's three arguments against liability.
2. Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? Explain.

CONSTITUTIONAL LAW QUESTION

State A, suffering from declining tax revenues, sought ways to save money by reducing expenses and performing services more efficiently. Accordingly, various legislative committees undertook examinations of the services performed by the state. One service provided by State A is firefighting. The legislative committee with jurisdiction over firefighting held extensive hearings and determined that older firefighters, because of seniority, earn substantially more than younger firefighters but are unlikely to perform as well as their younger colleagues. In particular, exercise physiologists testified at the committee's hearings that, in general, a person's physical conditioning and ability to work safely and effectively as a firefighter decline with age (with the most rapid declines occurring after age 50) and that, as a result, firefighting would be safer and more efficient if the age of the workforce was lowered.

State A subsequently enacted the Fire Safety in Employment Act (the Act). The Act provides that no one may be employed by the state as a firefighter after reaching the age of 50.

A firefighter, age 49, is employed by State A. He is in excellent physical condition and wants to remain a firefighter. His work history has been exemplary for the last two decades. Nonetheless, he has been told that, as a result of the Act, his employment as a firefighter will be terminated when he turns 50 next month.

The firefighter is considering (a) challenging the Act on the basis that it violates his rights under the Fourteenth Amendment's Equal Protection Clause, and (b) lobbying for the enactment of a federal statute barring states from setting mandatory age limitations for firefighters.

1. Does the Act violate the Equal Protection Clause of the Fourteenth Amendment? Explain.
2. Would Congress have authority under Section Five of the Fourteenth Amendment to enact a statute barring states from establishing a maximum age for firefighters? Explain.

SECURED TRANSACTIONS QUESTION

Acme Violins LLC (Acme) is in the business of buying, restoring, and selling rare violins. Acme frequently sells violins for prices well in excess of \$100,000. In addition to restoring violins for resale, Acme also repairs and restores violins for their owners. In most repair transactions, Acme requires payment in cash when the violin is picked up by the customer. It does, however, allow some of its repeat customers to obtain repairs on credit, with full payment due 30 days after completion of the repair. In those cases, the payment obligation is not secured by any collateral and the payment terms are handwritten on the receipt.

Acme maintains a stock of rare and valuable wood that it uses in violin restoration. Acme also owns a variety of tools used in restoration work, including a machine called a “Gambretti plane,” which is used to shape the body of a violin precisely.

Six months ago, Acme borrowed \$1 million from Bank. The loan agreement, which was signed by Acme, grants Bank a security interest in all of Acme’s “inventory and accounts, as those terms are defined in the Uniform Commercial Code.” On the same day, Bank filed a properly completed financing statement in the appropriate state filing office. The financing statement indicated the collateral as “inventory” and “accounts.”

Last week, Acme sold the most valuable violin in its inventory, the famed “Red Rosa,” to a violinist for \$200,000 (the appraised value of the instrument), which the violinist paid in cash. The sale was made by Acme in accordance with its usual practices. The violinist, who has done business with Acme for many years, was aware that Acme regularly borrows money from Bank and that Bank had a security interest in Acme’s entire inventory. The violinist did not, however, know anything about the terms of Acme’s agreement with Bank.

Acme is 15 days late in making the payment currently due on its loan from Bank. Bank’s loan officer, who is worried about Bank’s possible inability to collect the debt owed by Acme, has asked whether the following items of property are collateral that can be reached by Bank as possible sources of payment:

- (1) Acme’s rights to payment from customers for repair services obtained on credit
- (2) Used violins for sale in Acme’s store
- (3) Violins in Acme’s possession that Acme is repairing for their owners
- (4) Wood in Acme’s repair room that Acme uses in repairing violins
- (5) The Gambretti plane, used by Acme in violin restoration
- (6) The Red Rosa violin that was sold to the violinist

Yesterday, a creditor of Acme obtained a judicial lien on all of Acme’s personal property.

1. In which, if any, of the items listed above does Bank have an enforceable security interest? Explain.
2. For the items in which Bank has an enforceable security interest, is Bank’s claim superior to that of the judicial lien creditor? Explain.

REAL PROPERTY QUESTION

Seventeen years ago, a property owner granted a sewer-line easement to a private sewer company. The easement allowed the company to build, maintain, and use an underground sewer line in a designated sector of the owner's three-acre tract. The easement was properly recorded with the local registrar of deeds.

Fifteen years ago, a man having no title or other interest in the owner's three-acre tract wrongfully entered the tract, built a cabin, and planted a vegetable garden. The garden was directly over the sewer line constructed pursuant to the easement the owner had granted to the sewer company. The cabin and garden occupied half an acre of the three-acre tract. The man moved into the cabin immediately after its completion and remained in continuous and exclusive possession of the cabin and garden until his death. However, he did not use the remaining two and one-half acres of the three-acre tract in any way.

Eight years ago, the man died. Under the man's duly probated will, he bequeathed to his sister "all real property in which I have or may have an interest at the time of my death." The man's sister took possession of the cabin and garden immediately after the man's death and remained in exclusive and continuous possession of them for one year, but she, too, did not use the remaining two and one-half acres of the tract.

Seven years ago, the man's sister executed and delivered to a buyer a general warranty deed stating that it conveyed the entire three-acre tract to the buyer. The deed contained all six title covenants. Since this transaction, the buyer has continuously occupied the cabin and garden but has not used the remaining two and one-half acres.

A state statute provides that "any action to recover the possession of real property must be brought within 10 years after the cause of action accrues."

Last month, the property owner sued the buyer to recover possession of the three-acre tract.

1. Did the buyer acquire title to the three-acre tract or any portion of it? Explain.
2. Assuming that the buyer did not acquire title to the entire three-acre tract, can the buyer recover damages from the sister who sold him the three-acre tract? Explain.
3. Assuming that the buyer acquired title to the entire three-acre tract or the portion above the sewer-line easement, can the buyer compel the sewer company to remove the sewer line under the garden? Explain.

CIVIL PROCEDURE QUESTION

MedForms Inc. processes claims for medical insurers. Last year, MedForms contracted with a data entry company (“the company”) to enter information from claims into MedForms’s database. MedForms hired a woman to manage the contract with the company.

A few months after entering into the contract with the company, MedForms began receiving complaints from insurers regarding data-entry errors. On behalf of MedForms, the woman conducted a limited audit of the company’s work and discovered that its employees had been making errors in transferring data from insurance claims forms to the MedForms database.

The woman immediately reported her findings to her MedForms supervisor and told him that fixing the problems caused by the company’s errors would require a review of millions of forms and would cost millions of dollars. In response to her report, the supervisor said, “I knew we never should have hired a woman to oversee this contract,” and he fired her on the spot.

The woman properly initiated suit against MedForms in the United States District Court for the District of State A. Her complaint alleged that she had been subjected to repeated sexual harassment by her supervisor throughout her employment at MedForms and that he had fired her because of his bias against women. Her complaint sought \$100,000 in damages from MedForms for sexual harassment and sex discrimination in violation of federal civil rights law.

After receiving the summons and complaint in the action, MedForms filed a third-party complaint against the company, seeking to join it as a third-party defendant in the action. MedForms alleged that the company’s data-entry errors constituted a breach of contract. MedForms sought \$500,000 in damages from the company. MedForms served the company with process by hiring a process server who personally delivered a copy of the summons and complaint to the company’s chief executive officer at its headquarters.

MedForms is incorporated in State A, where it also has its headquarters and document processing facilities. The woman is a citizen of State A. The company’s only document processing facility is located in State A, but its headquarters are located in State B, where it is incorporated and where its chief executive officer was served with process.

State A and State B each authorize service of process on corporations only by personal delivery of a summons and complaint to the corporation’s secretary.

The company has moved to dismiss MedForms’s third-party complaint for (a) insufficient service of process, (b) lack of subject-matter jurisdiction, and (c) improper joinder.

How should the District Court rule on each of the grounds asserted in the company’s motion to dismiss? Explain.

DECEDENTS' ESTATES QUESTION

A husband and wife were married in 2005.

In 2009, the husband transferred \$600,000 of his money to a revocable trust. Under the terms of the properly executed trust instrument, upon the husband's death all trust assets would pass to his alma mater, University.

In 2012, the husband properly executed a will, prepared by his attorney based on the husband's oral instructions. Under the will, the husband bequeathed \$5,000 to his best friend and the balance of his estate "to my wife, regardless of whether we have children." The husband failed to mention the revocable trust to his attorney during the preparation of this will, and the attorney did not ask the husband whether he had made any significant transfers in prior years.

In 2013, the husband and wife had a daughter.

In 2014, the husband was killed in an automobile accident. After his death, the wife found the husband's will and the revocable trust instrument on his desk. On the first page of the will, beginning in the left-hand margin and extending over the words setting forth the bequests to the husband's best friend and his wife, were the following words: "This will makes no sense, as most of my assets are in the trust for University and neither my wife nor my daughter seems adequately provided for. Estate plan should be changed. Call lawyer to fix." The statement was indisputably in the husband's handwriting. The wife also found a voice message on the phone from the husband's lawyer, which said, "Calling back. I understand you have concerns about your will."

The husband is survived by his wife, their daughter, and the husband's best friend. The assets in the revocable trust are now worth \$900,000. The husband's probate estate is worth \$300,000. He owed no debts at his death.

All the foregoing events occurred in State A, which is not a community property state. State A has enacted all of the customary probate statutes, but of particular relevance to the wife are the following:

- (i) If a decedent dies intestate survived by a spouse and issue, the decedent's surviving spouse takes one-half of the estate and the decedent's surviving issue take the other half.
 - (ii) A revocable trust created by a decedent during the decedent's marriage is deemed illusory and the decedent's surviving spouse is entitled to receive one-half of the trust's assets.
1. How should the assets of the husband's probate estate be distributed? Explain.
 2. How should the assets of the revocable trust be distributed? Explain.

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AGENCY/TORTS ANALYSIS

(Agency and Partnership III.; IV.A./Torts II.B.2., F.)

ANALYSIS

Legal Problems:

- (1) Is the driver an independent contractor or an employee of the store?
- (2) Did the driver's violation of the store's delivery rules place his act outside the scope of his employment?
- (3) May the driver be found liable to the passenger in the car for personal injuries resulting from his violation of a double-parking ordinance?
- (4) If the store pays damages to the passenger, is it entitled to indemnification from the driver?

DISCUSSION

Summary

The driver is likely to be characterized as an employee, not as an independent contractor, because his conduct was subject to the store's control. Under the *respondeat superior* principle, an employer is liable for the tortious acts of its employee if those acts were performed within the scope of the employee's employment. Here, the driver's violation of the store's delivery rules likely did not place his act outside the scope of his employment because the driver did not deviate substantially from his route and the risks caused by his deviation were not different from the risks inherent in his authorized activities. In virtually all jurisdictions, the driver could be found liable for the passenger's injuries. The driver was negligent in violating a traffic ordinance and the type of harm that occurred, a traffic accident, was among those that the ordinance was aimed to avert. Finally, if the store is found liable for the driver's negligence and pays damages to the passenger, under common law principles the store is entitled to indemnification from the driver because the store was not itself at fault in causing the accident.

Point One (30%)

Although the store characterized the driver as an independent contractor, the store had the right to control his conduct and thus the driver was an employee of the store.

The store can be found liable under these facts if the driver is treated as its employee acting within the scope of his employment. The store is not liable for torts committed by the driver if the store employed him as an independent contractor to deliver furniture. RESTATEMENT (THIRD) AGENCY §§ 2.04 & 7.03; RESTATEMENT (SECOND) AGENCY § 250.

The test of whether a person is an employee is whether the person's "physical conduct in the performance of the services is subject to the [employer's] control or right to control." RESTATEMENT (SECOND) AGENCY § 220(1); *see also* RESTATEMENT (THIRD) AGENCY § 7.07(3)(a) ("[A]n employee is an agent whose principal controls or has the right to control the

manner and means of the agent's performance of work.")). This is generally a question of fact. RESTATEMENT (SECOND) AGENCY § 220 cmt. c. A number of factors are relevant, including the level of skill required to perform the work, who supplies the instrumentalities used, the duration of the relationship, and whether the work is part of the principal's regular business. No single factor is determinative. *See* RESTATEMENT (SECOND) AGENCY § 220; RESTATEMENT (THIRD) AGENCY § 7.07 cmt. f.

Here, the Restatement factors strongly suggest that the store had a right to control the driver's work. First, the job of furniture delivery driver does not require a tremendous amount of skill as compared to occupations such as plumber or electrician that are typically performed by independent contractors. Second, while the "Independent-Contractor Agreement" between the parties required the driver to supply the van used in the deliveries, the store was primarily responsible for the van: the store leased the van to the driver at a below-market rate; the store was responsible for the expenses of operating the van; and the lease terminated upon the termination of the driver's relationship with the store. Third, the driver's relationship with the store was ongoing, indefinite, and substantial; it was not specific to a single delivery or series of deliveries. Fourth, the driver was paid by the hour, not by the job, and worked a regular 40-hour week. Fifth, furniture delivery was a regular part of the store's business. Finally, although the "Independent-Contractor Agreement" between the store and the driver provided that the driver was an independent contractor and had discretion over the means and manner of performing the terms of the contract, "[i]t is not determinative that the parties believe or disbelieve that the relation of [employer] and [employee] exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other." RESTATEMENT (SECOND) AGENCY § 220 cmt. m. In sum, the facts strongly suggest that the driver was the store's employee.

[NOTE: The Restatement (Second) of Agency uses the terminology "master" and "servant"; the Restatement (Third) of Agency uses the terminology "employer" and "employee." This shift in terminology does not affect the analysis. The test is still control of, or the right to control, the performance of the agent's work.]

Point Two (30%)

The driver was acting within the scope of his employment because his conduct was substantially similar to authorized acts, and the driver did not deviate substantially from his route or likely consume a substantial amount of time by deviating.

If the driver is characterized as an employee instead of an independent contractor, the store will be liable for the driver's tortious conduct only if it occurred within the scope of his employment. RESTATEMENT (SECOND) AGENCY § 219(1); RESTATEMENT (THIRD) AGENCY § 7.07(1). Whether an employee was acting within the scope of his employment is generally a question of fact. RESTATEMENT (SECOND) AGENCY § 228 cmt. d. An employee's conduct is within the scope of his employment if (1) it is of the kind that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; and (3) it is motivated, at least

in part, by a purpose to serve the employer. RESTATEMENT (SECOND) AGENCY § 228(1)(a)–(c); *see also* RESTATEMENT (THIRD) AGENCY § 7.07(2) (“An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.”). The fact that the act was not authorized is not determinative. *Id.*

Here, it is highly likely that the driver will be found to have been acting within the scope of his employment. First, the conduct that caused the accident, parking, was exactly the kind of conduct that the driver was employed to perform, and the risks of double-parking were characteristic of those his employment entailed. *See Ira S. Bushey & Sons v. United States*, 398 F.2d 167 (2d Cir. 1968). Second, the time and space deviations from his authorized activities were not substantial: the driver drove a mere six blocks out of the way; he did so during regular business hours; and as an experienced furniture delivery person, the driver would probably have used no more than half an hour for the deviation. Finally, the driver may have been motivated at least in part by a desire to serve the store. The driver may have believed that making the delivery of the television for a longtime customer would generate goodwill for the store. In sum, the delivery of the television appears to have been a minor detour that did not take the driver out of the scope of employment. *Cf.* RESTATEMENT (THIRD) AGENCY § 7.07(2) (“An employee’s act is not within the scope of employment when it occurs within an independent course of conduct *not intended by the employee to serve any purpose of the employer.*”) (emphasis added).

[NOTE: While the formulation of the scope of employment doctrine in the Restatement (Third) of Agency “is phrased in more general terms” than in the Restatement (Second), the drafters state that the definition “reflects the definition of scope of employment applied in most cases and in most jurisdictions.” RESTATEMENT (THIRD) AGENCY § 7.07 cmt. b. In sum, the results under both formulations should be similar.]

Point Three (25%)

The driver may be found negligent per se in causing the passenger’s injuries because a purpose of the double-parking prohibition was almost certainly to prevent traffic accidents. The fact that the driver’s violation of the statute conformed to custom does not alter this conclusion.

“An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010). Health and safety statutes, like traffic ordinances, are typically deemed to protect the public at large. *See* RICHARD A. EPSTEIN, TORTS 150 (1999).

In order to make use of a statutory standard to establish negligence, the plaintiff must show that the type of injury is one the statute is aimed against. However, “courts are astute at finding multiple and subsidiary statutory purposes.” EPSTEIN, *supra*, at 151. Here, the double-parking ordinance was almost certainly aimed at preventing both traffic congestion and damage resulting from traffic accidents; vehicles parked in the path of moving traffic are a hazard that forces

drivers into lanes of oncoming traffic. The damage resulting from traffic accidents includes personal injuries, so the passenger's injuries involve the right type of harm.

The fact that the driver's actions conformed to custom does not mean that he cannot be found negligent; "there are precautions so imperative that even their universal disregard will not excuse their omission." *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). Courts have sometimes read into statutes customary exceptions to a custom embodied by the statute. *See Tedla v. Ellman*, 19 N.E.2d 987, 989 (N.Y. 1939) (interpreting statute that required pedestrians to walk on the left—the common-law custom—to include the common-law exception which required pedestrians to walk with the traffic when traffic coming from behind was much lighter than oncoming traffic). They have done so on the theory that a legislature would not have intended to decree that individuals should follow a general rule of conduct "even under circumstances where observance would subject them to unusual risk." *Id.* Here, there is no evidence that double-parking was a safer alternative than parking legally or that the driver was following any custom dictated by safety concerns. Therefore, a jury could properly conclude that the driver was negligent per se in violating the double-parking ordinance and that the driver's negligence was the legal cause of the passenger's injuries.

Point Four (15%)

If the driver's negligence subjects the store to liability and the store pays damages to the passenger, under the common law the store is entitled to indemnification from the driver because there is no evidence that the store itself engaged in tortious conduct related to the passenger's injuries.

Indemnification (*full* reimbursement for damages paid to the plaintiff) is available to a tort defendant who has paid the plaintiff's damage award when, as between the paying and nonpaying defendants, the paying defendant was not at fault in causing the plaintiff's injuries and the nonpaying defendant was at fault. By contrast, a joint tortfeasor who was at fault in causing the plaintiff's injuries is entitled only to contribution, i.e., *partial* reimbursement for damages paid to the plaintiff. *See EPSTEIN, supra*, at 235–36. A classic case in which indemnification is appropriate is that of an employer, like the store, who is liable to the plaintiff based solely on the principle of *respondeat superior*. *See id.* at 236–39.

Consequently, if the store is required to pay damages to the passenger, the driver will be liable to the store for the amount paid.

[NOTE: In some states, this common law principle has been modified by statutes or court decisions that prevent employers from seeking indemnification from employees in certain circumstances.]

[NOTE: An examinee who concludes that the store's delivery drivers routinely double-parked, and that the store had actual or implied notice of that practice, should conclude that the store could be found negligent and that contribution but not indemnification would be available to the store.]

CONSTITUTIONAL LAW ANALYSIS

(Constitutional Law II.A.3.; IV.C.)

ANALYSIS

Legal Problems:

- (1) Does the Act violate the Equal Protection Clause of the Fourteenth Amendment?
- (2) Would Congress have authority under Section Five of the Fourteenth Amendment to enact a statute barring states from establishing a maximum age for firefighters?

DISCUSSION

Summary

The lowest level of equal protection scrutiny—so-called “rational basis” scrutiny—applies when a state government engages in age-based discrimination. The question is whether the distinctions drawn by the Act on the basis of age are rationally related to a legitimate governmental purpose. The court is likely to answer that question in the affirmative because safe and efficient firefighting is a legitimate governmental purpose and, in light of the legislative committee’s findings, the Act is rationally related to that purpose.

With respect to Congress’s power to enact a statute barring states from establishing a maximum age for firefighters, Congress has the power to enforce the Fourteenth Amendment pursuant to its powers under Section Five of the Fourteenth Amendment. However, Congress can exercise its authority only if it does so in a way that is “congruent and proportional” to any constitutional violation that it may be addressing. A federal statute prohibiting states from having a mandatory retirement age for firefighters would not meet that standard. The statute would be unconstitutional because it would ban conduct by a state that is not itself unconstitutional and that is not related to any constitutional violations by the state.

Point One (50%)

A court would assess the constitutionality of the Act under the “rational basis” test. Here, the state has a “legitimate interest” in promoting safe and efficient firefighting, and lowering the retirement age is “rationally related” to achieving this interest. Thus, a court is likely to conclude that State A has not violated the Equal Protection Clause of the Fourteenth Amendment.

The applicable constitutional provision is the Equal Protection Clause of the Fourteenth Amendment, which states: “Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” Amend. XIV, Sec. 1. The allegedly unconstitutional discrimination is age-based discrimination because employees like the firefighter cannot continue as firefighters once they reach 50 years of age.

The Supreme Court has developed three levels of scrutiny for equal protection claims: strict, intermediate, and the lowest, “rational basis.” The Court has consistently applied rational basis scrutiny to age-based classifications. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S.

307 (1976) (upholding 50-year-old retirement age for state police); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (applying rational basis review to age-based classification).

Under the rational basis test, the issues are whether State A has a “legitimate interest” that is served by the discriminatory classification and whether the means used to achieve this legitimate state interest are “reasonably related” or “rationally related” to that state interest. The Court generally applies this test with substantial deference to legislative judgment. *See, e.g., Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

Here, the firefighter will likely argue that State A is violating his right to the “equal protection of the laws” by depriving him, and other firefighters, of employment solely because they have reached the age of 50. More specifically, he will argue that he and the other firefighters 50 and older are being forced to retire without regard to whether they are capable firefighters, an action not taken against those under the age of 50.

State A will likely argue that lowering the retirement age for firefighters will improve workforce quality, enhance public safety, and reduce expenses. Because these are “legitimate” state interests, this argument is likely to succeed.

Given the legitimacy of State A’s objectives, the question then becomes whether a mandatory retirement at age 50 is reasonably related to attaining those objectives. Although the firefighter may be a qualified firefighter notwithstanding his age, that is not the relevant question. The question is whether State A has reason to believe that one’s physical fitness and ability to be a firefighter, in general, decline with age. The question specifies that the legislature heard evidence from relevant professionals in support of that position. Hence, the conclusion that a mandatory retirement age would, in general, improve the fitness of the workforce is reasonable. Under the rational basis test, it is not necessary for the fit between ends and means to be perfect. The fit merely has to be “reasonable” or “rational.” *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 756–58 (8th ed. 2010) (discussing application of rational basis test to mandatory retirement rules).

The fact that State A may have also enacted the statute to save money does not alter this analysis. One legitimate purpose to which the lines drawn by the statute are rationally related is sufficient to uphold a statute under the lenient rational basis test. Because State A has a legitimate governmental purpose for enacting this statute, and because lowering the retirement age is rationally related to the achievement of this purpose, a court is likely to conclude that the Act does not violate the Equal Protection Clause of the Fourteenth Amendment.

Point Two (50%)

Because age-based discrimination, in the form of a mandatory retirement age, is not a plausible constitutional injury, Congress does not have the authority under Section Five of the Fourteenth Amendment to enact legislation to remedy that injury.

Congress's powers are limited to those expressed or implied in the Constitution. To enact a law on a particular topic, Congress must rely on some identified grant of legislative authority in the Constitution. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Section Five of the Fourteenth Amendment is one such grant of authority. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

While a mandatory retirement age for firefighters does not violate the Equal Protection Clause of the Fourteenth Amendment (*see* Point One), “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’[s] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional” *Id.* at 518. Congress’s power, however, is remedial. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. *Id.* at 519. In drawing “the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law,” the Court, in *City of Boerne v. Flores*, stated that the constitutional question is whether there is a “congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end.” *Id.* at 519–20. Lacking such a connection, legislation may become substantive in operation and effect. The proportionality requirement of *Flores* allows Congress to outlaw conduct that courts likely would hold unconstitutional under existing judicial precedent. Congress may also outlaw a broader range of conduct to prevent constitutional violations. But Congress cannot rely on its Fourteenth Amendment enforcement power to prohibit a kind of behavior that is unlikely to involve a constitutional violation at all.

Because age is not a suspect classification under the Equal Protection Clause, states may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The proposed federal statute would prohibit mandatory retirement requirements that courts likely would find constitutional. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that a federal statute generally prohibiting age discrimination by employers (including states) exceeded the power of Congress to legislate pursuant to Section Five of the Fourteenth Amendment). Indeed, Congress’s primary goal here would be to outlaw a kind of discrimination that does not violate the Fourteenth Amendment. *Flores* clearly held that Congress cannot, under its Fourteenth Amendment power, legislate to prohibit constitutional behavior where there is no constitutional injury to be prevented or remedied. Therefore, a court would likely hold that Congress would not have the power under Section Five of the Fourteenth Amendment to enact a statute barring age requirements for firefighters.

[NOTE: This question does not raise any questions about sovereign immunity under the Eleventh Amendment inasmuch as Congress can abrogate that immunity when it acts pursuant to Section Five of the Fourteenth Amendment. In addition, this question does not ask whether Congress could pass such a statute under its Commerce Power. *See, e.g.,* the Age Discrimination in Employment Act.]

SECURED TRANSACTIONS ANALYSIS

(Secured Transactions II.D., E.; III.B.; IV.A., B., C.)

ANALYSIS

Legal Problems:

- (1) Does Bank have an enforceable and attached security interest in the collateral described in the loan agreement?
- (2) Does Bank's security interest cover
 - (a) Acme's rights to payment from customers who obtained repair services from Acme on credit?
 - (b) the used violins that are for sale in Acme's store?
 - (c) the violins in Acme's possession that it is repairing for others?
 - (d) the wood used by Acme in repairing violins?
 - (e) the Gambretti plane?
- (3) Does Bank's security interest cover the Red Rosa violin after its sale to the violinist?
- (4) Is Bank's security interest superior to the interest of a judicial lien creditor in the same property?

DISCUSSION

Summary

Bank has an enforceable and attached security interest in the property described in the loan and security agreement—Acme's "inventory and accounts."

The amounts owed to Acme by customers for violins repaired on credit are "accounts" covered by Bank's security interest. The used violins for sale in Acme's store are "inventory" covered by Bank's security interest. The violins that Acme is repairing for others are not subject to the security interest because they are not held by Acme for sale or lease and thus are not "inventory." The wood used in repairing violins is "inventory" subject to Bank's security interest. The Gambretti plane is equipment, rather than inventory or accounts, and not covered by Bank's security interest.

Although the Red Rosa violin was inventory subject to Bank's security interest, Bank's interest was cut off by the sale of Red Rosa to a buyer in ordinary course of business.

Because Bank's enforceable and attached security interest was perfected, it is superior to the rights of a judicial lien creditor that arose subsequent to perfection.

Point One (15%)

Bank has an enforceable and attached security interest in the property described in the loan and security agreement.

A security agreement is enforceable and attached if the three criteria described in UCC § 9-203(b) are satisfied. The first criterion is that “value has been given.” UCC § 9-203(b)(1). This is satisfied by the loan from Bank to Acme. The second criterion is that the debtor “has rights in the collateral or the power to transfer rights in the collateral to a secured party.” UCC § 9-203(b)(2). This is satisfied with respect to Acme’s inventory and accounts. The third criterion is satisfied because Acme has authenticated (signed, in this case) a security agreement that provides a description of the collateral. UCC § 9-203(b)(3)(A). Thus, since all three criteria have been satisfied, Bank’s security interest in the property described in the loan and security agreement is enforceable and attached.

Point Two(a) (10%)

Acme’s rights to payment from customers who obtained repair services on credit are “accounts” subject to Bank’s security interest.

Bank’s security interest covers “accounts,” as the term is defined in the Uniform Commercial Code. Acme’s rights to payment for repair services provided on credit are accounts because they are “right[s] to payment . . . for services rendered or to be rendered.” UCC § 9-102(a)(2)(ii). Thus, these rights to payment are subject to Bank’s security interest.

Point Two(b) (5%)

The used violins that are for sale in Acme’s store are “inventory” subject to Bank’s security interest.

Bank’s security interest covers “inventory.” The used violins that are for sale in Acme’s store are “inventory” under UCC § 9-102(a)(48) because they are “. . . goods . . . which . . . are held by a person for sale” Thus, those violins are subject to Bank’s security interest.

Point Two(c) (10%)

The violins in Acme’s possession that it is repairing for others are not covered by Bank’s security interest because they are not “inventory” and are not owned by Acme.

Bank’s security interest does not cover the violins that Acme is repairing for their owners. This conclusion can be reached in either of two ways. First, those violins are not “inventory” because they are not held by Acme for sale or lease. UCC § 9-102(a)(48)(B). Second, because the violins are not owned by Acme, but rather are owned by the individuals who brought them to Acme to be repaired, the security interest would not attach because Acme has neither rights in those violins nor the power to transfer rights in them to a secured party. UCC § 9-203(b)(2).

[NOTE: An examinee might argue that Acme has some rights in the violins it holds for repair because it has lawful possession of them, the right to repair them, the right to collect payment for repairs, and (in some jurisdictions) the right to assert an artisan’s lien if a repair bill is unpaid. An examinee who makes an argument of this sort should also note that these limited rights will not

Secured Transactions Analysis

help Bank for two reasons. First, as already noted, the violins don't fall within the scope of the security interest in any event, because they are not "inventory" or "accounts." Second, even if the violins held for repair were within the scope of the security agreement, Bank's rights against the owners of the violins would be no greater than Acme's and it could, at best, arrange for repairs to be performed and collect amounts due. Moreover, while it is possible that, because Acme deals in violins and the owners of the violins brought to Acme for repair entrusted them to Acme, buyers in ordinary course of business of those violins would get good title to them under UCC § 2-403(2), that provision does not give rights to secured parties.]

Point Two(d) (5%)

The wood used by Acme in repairing violins is "inventory" and subject to Bank's security interest.

Bank's security interest in inventory covers the wood that Acme uses to repair violins. "Inventory" includes "raw materials" that are consumed in the business of the debtor. *See* UCC § 9-102(a)(48)(D) and cmt. 4(a). Thus, Bank has a security interest in the wood as inventory.

Point Two(e) (5%)

The Gambretti plane is not included in Bank's collateral.

The Gambretti plane that Acme uses to shape the violins it repairs is not "inventory" because it is not held for sale or lease by Acme and does not otherwise fit into the other categories of "inventory" under UCC § 9-102(a)(48). Rather, the Gambretti plane is "equipment" (*see* UCC § 9-102(a)(33)) and not covered by Bank's security interest.

Point Three (25%)

The Red Rosa violin was subject to Bank's security interest prior to its sale, but the violinist was probably a buyer in ordinary course of business and therefore took the violin free of Bank's security interest under UCC § 9-320(a).

Bank's security interest in inventory covered the violin "Red Rosa" when it was held by Acme for sale. UCC § 9-102(a)(48). Furthermore, under UCC § 9-315(a)(1), except as otherwise provided in Article 9 "a security interest . . . continues in collateral notwithstanding sale . . . unless the secured party authorized the disposition free of the security interest"

Here, there are no facts to indicate that Bank authorized the disposition of Red Rosa free of its security interest. Nonetheless, the violinist's interest in Red Rosa is likely to prevail over Bank's security interest because the violinist probably qualifies as a "buyer in ordinary course of business."

Under UCC § 9-320(a), ". . . a buyer in ordinary course of business . . . takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence." Under UCC § 1-201(b)(9), a buyer in ordinary course of business is "a person that buys goods in good faith, without knowledge that the sale violates the rights of

another person in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind.”

Acme is in the business of selling rare violins like Red Rosa, and the violinist apparently bought Red Rosa in the ordinary course of Acme’s business. There are no facts to indicate that the purchase was in bad faith or irregular in any way. Although the violinist was aware of Bank’s security interest in Acme’s inventory, there was no indication that the sale to the violinist violated any of Bank’s rights. Thus, while the violinist was aware of the existence of the security interest, that knowledge does not disqualify the violinist as a buyer in ordinary course who takes free of a security interest. *See* UCC § 9-320(a). As a buyer in ordinary course of business, the violinist would take Red Rosa free of Bank’s security interest.

Point Four (25%)

Bank’s security interest in its collateral was perfected; therefore, the security interest is superior to the rights of a judicial lien creditor that arose subsequently.

A security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. UCC § 9-317(a)(2). Thus, if Bank’s security interest was not perfected at the time that creditor obtained its judicial lien, the security interest would be subordinate to that lien. Bank’s security interest was perfected, however. A security interest is perfected when it has attached and the other elements of perfection have been satisfied. UCC § 9-308(a). As described in Point One, Bank’s security interest in its collateral was attached. The filing of the financing statement was sufficient to perfect this attached security interest. UCC § 9-310(a). Thus, both elements of perfection were satisfied and Bank’s security interest was perfected before the lien creditor obtained its lien. Therefore, the security interest is superior to the rights of the lien creditor. *See also* UCC § 9-201(a).

REAL PROPERTY ANALYSIS

(Real Property II.B.; V.A., B.1.)

ANALYSIS

Legal Problems:

- (1)(a) Were the acts of possession by the man, his sister, and the buyer sufficient to acquire a title by adverse possession?
- (1)(b) Can the periods of possession during which the man, his sister, and the buyer occupied the cabin and garden be aggregated for the purpose of satisfying the statutory possession requirement?
- (1)(c) If the acts of possession were sufficient to acquire a title by adverse possession, did the adverse possession claim extend to the entire three-acre tract or only to the portion of land on which the cabin and garden were located?
- (2) Can the buyer recover damages from the man's sister, who gave a warranty deed for the three-acre tract?
- (3) Did the buyer take subject to an underground sewer-line easement created before the adverse possession began?

DISCUSSION

Summary

The possessory acts of the man, his sister, and the buyer were sufficient to acquire title by adverse possession as to the half acre of the three-acre tract on which the cabin and garden are located because they were (1) actual, (2) open and notorious, (3) exclusive, (4) continuous, and (5) hostile and under claim of right. Because the man, his sister, and the buyer were in privity with one another, their aggregate time of possession determines whether the 10-year statute of limitations has run. Here, the aggregate time of possession exceeds 10 years. Thus, the buyer acquired title to this one-half acre by adverse possession. However, because there were no possessory acts with respect to the remaining two and one-half acres, the buyer did not acquire title by adverse possession to the entire three-acre tract.

Because the buyer did not acquire title to the entire three-acre tract, the buyer can successfully sue the sister for damages because the sister purported to convey the entire three-acre tract by warranty deed and, under the warranty deed, she covenanted that she had good title to the entire three-acre tract.

The adverse possessors took subject to the sewer-line easement, as their acts of possession probably did not interfere with that easement or give the sewer company a cause of action against them. Thus, the buyer cannot compel the company to remove the sewer line.

Point One(a) (35%)

The acts of possession of the man, his sister, and the buyer were sufficient to acquire title by adverse possession to the one-half acre actually possessed by them.

To acquire title by adverse possession, the possession must be (1) actual, (2) open and notorious, (3) exclusive, (4) continuous, and (5) hostile and under claim of right. HERBERT HOVENKAMP AND SHELDON F. KURTZ, *THE LAW OF PROPERTY* § 4.3 (5th ed. 2001). Here, all of these requirements were satisfied as to the one-half acre on which the cabin was built and the garden planted. The facts state that the possession of the man, his sister, and the buyer was exclusive and continuous, satisfying these two requirements of the test.

To be actual, acts of possession must be consistent with how a reasonable owner of land would have used it if in possession. *Id.* at 64–66. Here, the acts of possession included building and occupying a cabin as well as planting, harvesting, and maintaining a garden. These acts are consistent with how a reasonable owner would have used the one-half acre.

To be open and notorious, the acts of possession must be such that they would have put an owner on notice of the adverse possession had the owner inspected the land. Here, the cabin and garden occupied a half acre and were visible. When the owner acquired the land, it was vacant. Had the owner inspected, he would have determined that someone else was in possession.

Most courts and scholars agree that hostility and claim of right are present when a possessor is on the land without the owner’s permission. *See generally* WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 857–859 (3d ed. 2000). Some courts do hold that to acquire title by adverse possession, the possessor must have a good-faith belief that she has a good title to the land; others hold that the possessor must believe that she does not have a good title to the land. *See, e.g., Carpenter v. Ruperto*, 315 N.W.2d 782 (Iowa 1982) (good-faith belief required); *Mid-Valley Resources Inc. v. Engelson*, 13 P.3d 118 (Ct. App. Or. 2000) (subjective intent to show adverse possessor intended to take title away from the record owner); *see generally* JOSEPH WILLIAM SINGER, *PROPERTY* 151–156 (4th ed. 2014). But most courts and scholars reject these contradictory “subjective hostility” tests. *See, e.g., Chaplin v. Sanders*, 676 P.2d 431, 435–436 (Wash. 1984) (claimant’s subjective intent is irrelevant); *Nickell v. Southview Homeowners Ass’n*, 271 P.3d 973, 978 (Ct. App. Wash. 2012); STOEBUCK & WHITMAN, *supra*. Thus, in the vast majority of jurisdictions (also including Missouri, Alabama, Montana, and Minnesota), the fact that the man, his sister, and the buyer were on the tract of land without the permission of the owner would suffice to satisfy the hostility and claim of right requirement.

Thus, the man, his sister, and the buyer satisfied the requirements for acquiring title by adverse possession as to the one-half-acre portion of the three-acre tract that they actually possessed.

Point One(b) (20%)

Although neither the man, nor his sister, nor the buyer individually possessed the property for the statutory 10-year period, their periods of possession can be aggregated because they were all in privity with one another. Thus, the 10-year statute has run, and the buyer has acquired title to the one-half acre.

Real Property Analysis

The period during which possession must endure to create title by adverse possession is determined by statute. Here, the local statute provides that “any action to recover the possession of real property must be brought within 10 years after the cause of action accrues.”

A cause of action to recover possession of real property “accrues” when a wrongful act of possession occurs. *See RDG Partnership v. Long*, 350 S.W.3d 262, 270 (Tex. App. 2011). Here, the initial cause of action thus accrued when the man wrongfully entered a portion of the three-acre tract 15 years ago.

Here, the man possessed the property for seven years, the man’s sister possessed it for one year, and the buyer possessed it for seven years. Although none of these individual periods of possession equals the 10-year statutory period, when multiple adverse possessors are in “privity” with one another, the period of their respective possessions can be aggregated for the purpose of determining whether the statutory period (here, 10 years) has run against the holder of the cause of action. In this context, privity denotes a relationship between possessors arising because of a voluntary transfer between them, descent under the laws of intestacy, or testamentary succession as the result of a bequest. *Fredericksen v. Henke*, 209 N.W. 257, 259 (Minn. 1926). Here, the man and his sister were in privity as a result of testamentary succession, namely the bequest in the man’s will of all real property “in which I have or may have an interest” to his sister. The sister and the buyer were also in privity because of the voluntary transfer between them. *See generally* HOVENKAMP & KURTZ, *supra*, at 74–75.

Thus, because the 10-year statutory period has elapsed, the buyer has acquired title by adverse possession to the one-half-acre portion of the three-acre tract that he, the sister, and the man actually possessed.

Point One(c) (15%)

The buyer did not acquire title to the unpossessed two and one-half acres because he did not possess or use that portion of the tract.

The buyer acquired title by adverse possession only to the portion of the tract for which he met all requirements of the five-prong test. (*See* Point One(a).) Because the man, his sister, and the buyer never possessed (or even used) any of the two and one-half acres beyond the garden, the buyer cannot claim title by adverse possession to those acres.

The doctrine of constructive adverse possession does not alter this result. Under this doctrine, if a possessor enters under color of title (i.e., an instrument creating the possibility of a title in the grantee who enters under the instrument) and the possessor takes possession of only a portion of the land described in the instrument, the possessor’s possession is deemed to constructively extend to the portion of the described land. Here, neither the man nor his sister entered under color of title. Although the buyer did enter with a deed and, arguably, color of title, his constructive possession endured only seven years, short of the statutory period in which the legal title holder may regain possession. *See* HOVENKAMP & KURTZ, *supra*, at 78–80.

Point Two (15%)

The buyer is entitled to damages from the sister because the sister did not convey title to the three-acre tract by a general warranty deed.

A warranty deed includes numerous covenants. Two of them—the covenant of seisin and the right to convey—are essentially the same, and they guarantee that the seller owns the conveyed land. Here, the sister did not own the three-acre tract when she purported to convey it to the buyer by a general warranty deed. Thus, she was in breach of the covenant of seisin and the right to convey, and the buyer is entitled to damages for that breach.

[NOTE: Some examinees may confuse the warranty issue with the concept of marketable title. It is true that the man’s sister did not have a marketable title when she conveyed to the buyer because her adverse possession claim was clearly subject to the risk of litigation. Nonetheless the buyer agreed to go forward with the transfer, and the sister gave the buyer a warranty deed. Had she given the buyer a quitclaim deed, no warranties would have been breached.]

While the deed also includes a covenant of quiet enjoyment and a covenant of warranty, no facts suggest that these have been breached here, as the buyer has not been evicted.]

Point Three (15%)

The buyer cannot compel the company to remove the sewer line from under the garden because he took subject to the sewer-line easement and probably did not interfere with that easement.

Where an adverse possessor acquires title by adverse possession, the nature of the acquired title is no greater than the title of the holder of the cause of action who was barred by the running of the statute of limitations. Here, the owner’s title was subject to the properly recorded sewer-line easement at the time the man wrongfully entered the land.

The man, his sister, and the buyer cannot claim to have adversely possessed the easement unless their possession interfered with the rights of the sewer company, giving it a cause of action against the man, the sister, and the buyer while they were in possession. There is nothing in the facts, however, suggesting that planting and maintaining a garden interfered with the sewer company’s access to the sewer line. In the absence of such interference, the company has no cause of action against the possessors, in which case the buyer acquired the owner’s title only—a title subject to the sewer-line easement. III AMER. LAW OF PROPERTY § 15.13 at 826 (1952).

Examinees who make a plausible argument that possession of the garden *did* interfere with the easement *should* conclude that the buyer could compel the sewer company to remove the sewer line. In that case, its failure to do so within the 10-year statutory period would result in the buyer acquiring a title that is superior to both the owner and the sewer company.

CIVIL PROCEDURE ANALYSIS

(Civil Procedure I.A., B., C.; III.D.)

ANALYSIS

Legal Problems:

- (1) Do the Federal Rules of Civil Procedure permit service of process on a corporation to be made by delivery of the summons and complaint to a chief executive officer of the corporation at corporate headquarters when the relevant state law requires service on the corporation's secretary?
- (2) Are two corporations diverse for purposes of federal jurisdiction when they are incorporated and headquartered in different states but their main facilities are located in the same state, which is also the state of incorporation of one of the businesses?
- (3) Can a third-party defendant be joined to a case when the claim against that third-party defendant is factually related to the plaintiff's original cause of action but the claimant does not allege that the third-party defendant is liable to the original plaintiff or responsible for the original plaintiff's damages?

DISCUSSION

Summary

The company was properly served. Federal Rule of Civil Procedure 4(h) provides that service of process may be made on a corporation by delivering a copy of the summons and complaint to a corporate officer or to a general or managing agent. Because the Federal Rules explicitly authorized this manner of service, it does not matter that it did not comply with State A or State B law.

The District Court has diversity jurisdiction over MedForms's state-law claim against the company. The amount at stake (\$500,000) satisfies the amount-in-controversy requirement, and the parties are diverse. MedForms is a citizen of State A, where it is incorporated and has its headquarters. The company is a citizen of State B, where it is incorporated and has its headquarters. The fact that the document processing facilities for both companies are in State A does not prevent them from being diverse.

However, the third-party complaint should be stricken. Federal Rule of Civil Procedure 14(a) authorizes a defendant to bring a complaint against a nonparty (a "third-party complaint") only in situations in which the original defendant asserts that the third-party defendant is somehow liable for whatever the original defendant might owe the original plaintiff. Here, MedForms is not asserting that the company is liable to MedForms for any damages owed to the woman. Rather, MedForms seeks to obtain relief for separate injuries it suffered as a result of the company's breach of contract. It cannot bring such a claim as a third-party complaint in this action.

Point One (30%)

MedForms's delivery of the summons and complaint to the company's CEO satisfies the requirements of Federal Rule of Civil Procedure 4(h) and of the Constitution.

Under Federal Rule of Civil Procedure 4(h), service upon a corporation may be effected within a United States judicial district by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made,” *or* “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent.” Here, MedForms did not serve the secretary of the company and therefore did not comply with the service laws of either State A, where the District Court sits, or State B, where service was made. However, MedForms nonetheless properly served the company under Rule 4(h) because it delivered a copy of the summons and complaint to the company’s CEO. This service was explicitly authorized by Rule 4(h). Rule 4(h) does not specify which corporate representatives count as “officers” for the purpose of receiving service of process, but a court would almost certainly conclude that service on a CEO satisfies the rule because such an official would be “so integrated with the corporation sued as to make it *a priori* supposable that he will realize his responsibilities and know what he should do with any legal papers served on him.” *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders’ and Exhibitors’ Assoc. of America*, 344 F.2d 860, 866 (9th Cir. 1965) (quoting 19 C.J.S. *Corporations* § 1312).

It is irrelevant that the manner of service chosen by MedForms was in violation of state law. Rule 4 of the Federal Rules of Civil Procedure, which governs the service of process, regulates procedural matters and thus is controlling law in federal diversity suits, notwithstanding any conflict with state service law. *See Hanna v. Plumer*, 380 U.S. 460 (1965). Finally, this method of service (personal delivery of the summons and complaint to the CEO) was reasonably calculated to provide the company with actual notice of the case and therefore satisfies constitutional requirements. *See Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950).

Point Two (35%)

The District Court has diversity jurisdiction over MedForms’s breach of contract claim because the amount in controversy exceeds \$75,000 and MedForms and the company are citizens of different states.

MedForms’s breach of contract claim against the company is created by state law and therefore cannot support federal-question jurisdiction. *See* 28 U.S.C. § 1331. Original jurisdiction will exist, if at all, under 28 U.S.C. § 1332 (diversity jurisdiction).

Federal district courts can exercise jurisdiction over claims between citizens of different states where the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. Here, MedForms has claimed damages of \$500,000, and the court will accept this as the amount in controversy unless the allegation was made in bad faith or it appears to a legal certainty that the plaintiff cannot recover that amount. There is nothing in the facts of this problem to suggest that MedForms’s claim was made in bad faith or that its damages were less than \$75,000 to a legal certainty. Hence, the amount-in-controversy requirement is satisfied.

The question is therefore whether MedForms (the third-party plaintiff) and the company (the third-party defendant) are citizens of different states. For diversity purposes, corporations have

dual citizenship. A corporation is a citizen both of the state where it is incorporated and also of the state where it has its principal place of business. A corporation's principal place of business is the corporation's "nerve center" (i.e., "the place where a corporation's officers direct, control, and coordinate the corporation's activities"). *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010). Ordinarily, this will be "the place where the corporation maintains its headquarters," unless the facts indicate that the corporation's designated "headquarters" is not really its "nerve center" but is simply an office for occasional meetings. *Id.*

In this case, MedForms is incorporated in State A. It also has its principal place of business in State A, as that is where its headquarters is located. There is no evidence that its headquarters is not its nerve center. Therefore, MedForms is a citizen of State A.

On the other hand, the company is incorporated in State B. Its principal place of business is also in State B, as that is where its headquarters is located. There is no evidence that its headquarters is not its nerve center. The fact that the company's only document processing facility is in State A does not matter. In *Hertz Corp.*, the Supreme Court determined that a corporation's principal place of business (and citizenship) for diversity purposes would be determined by the location of the corporation's headquarters or "nerve center," rather than by the location of its business activities. Thus, the company is a citizen of State B.

Hence, MedForms and the company are citizens of different states and diversity exists.

[NOTE: An examinee who incorrectly concludes that there is no diversity jurisdiction should go on to analyze whether the district court could exercise supplemental jurisdiction over MedForms's claim. 28 U.S.C. § 1367 would authorize the district court to exercise supplemental jurisdiction over MedForms's claim against the company if it is part of the same constitutional "case or controversy" as the woman's discrimination claim against MedForms. In this case, there would be no supplemental jurisdiction because the two claims are not part of the same case or controversy.]

Claims form part of the same case or controversy if they arise out of a common nucleus of operative facts. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Here, the woman's and MedForms's claims arise from related facts, but they do not arise from a common nucleus of *operative* facts. The operative facts underlying the woman's claim are based on how her MedForms supervisor treated her and his allegedly gender-based firing of her. MedForms's claim rests on the company's unsatisfactory performance of its data-entry obligations under the contract. The main operative facts that form the basis of the two claims are completely separate—the supervisor's alleged harassment and biased action on the one hand, and the company's alleged inadequate contract performance on the other.]

Point Three (35%)

MedForms's joinder of the company as a third-party defendant is improper because a third-party defendant may be joined by the original defendant only when the original defendant claims that the third party is liable for all or part of the plaintiff's original claim.

Federal Rule of Civil Procedure 14(a) authorizes a defendant to bring a nonparty into an action only in very limited circumstances. If the defendant claims that the nonparty “is or may be liable to [the defendant] for all or part of the claim against it,” then the defendant may bring a third-party complaint against the nonparty and the nonparty may be joined as a third-party defendant.

Here, MedForms has attempted to bring the company into the action by alleging that the company breached its contract with MedForms. MedForms does not claim that the company is or might be liable for any damages that MedForms might be ordered to pay to the woman. Moreover, there are no facts that suggest that the company played any role in, or had any obligation to indemnify MedForms for, the behavior of MedForms’s supervisor that is the basis for the woman’s claim against MedForms. In short, any liability that the company might have to MedForms is entirely independent of any liability MedForms may incur to the woman. Thus, MedForms’s attempt to bring a third-party complaint against the company exceeds the bounds of proper joinder, and MedForms’s complaint should be stricken.

[NOTE: In the facts, the company moves to “dismiss MedForms’s third-party complaint for . . . (c) improper joinder.” Fed. R. Civ. P. 14(a)(4) allows a “motion to strike” a third-party claim for improper impleader, but makes no mention of a motion to dismiss a third-party complaint. Litigants, however, commonly move to dismiss, and courts regularly grant such motions, without regard to terminology. *See, e.g., AIG Europe Limited v. General System, Inc.*, 2013 WL 6654382 (D. Md. 2013). Similarly, although Rule 14 does not use the word “joinder,” litigants, courts, and scholars commonly refer to third-party complaints as a form of joinder. *See, e.g., FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE* 83 (4th ed. 2005) (“It is important to distinguish impleader from the other claim-joinder devices that are available.”)]

Many examinees may discuss this issue in terms of the joinder standards of Rule 18 (Joinder of Claims) or Rule 19 (Required Joinder of Parties). These examinees fail to recognize that the standards for Rule 14 impleader are different. Those who take this approach might be given some credit if they recognize that it is proper to strike MedForms’s claim against the company because that claim is only tangentially related to the claim of the original plaintiff (the woman) against MedForms. However, full credit is appropriate only if the examinee also recognizes that a third-party complaint is not appropriate merely because the claims are related or arise out of the same transaction. A third-party claim must be based on some legal theory of derivative liability (e.g., that the third-party defendant has a legal obligation to indemnify the original defendant in the event of the original defendant’s liability).]

DECEDENTS' ESTATES ANALYSIS

(Decedents' Estates II.F.3., K.4.; III.)

ANALYSIS

Legal Problems:

- (1) Was the husband's will revoked by physical act because of the handwritten statement across the bequests to his wife and his best friend?
- (2) Is the husband's daughter, born after the execution of his will, entitled to a share of his probate estate?
- (3) How should the assets of the revocable trust deemed illusory under state law be distributed upon the husband's death after the wife claims her one-half share in those assets?

DISCUSSION

Summary

A will can be revoked by a physical act, such as a cancellation, when the marks of cancellation are placed on the text of the will with the intent to revoke the will. Here, the words the husband wrote on the will evidence only an intent to have the will re-evaluated. Thus, the will was not revoked and its terms, subject to a possible claim by his daughter, will be given effect.

Under some state pretermitted (a/k/a "afterborn" or "omitted") child statutes, the husband's daughter, born after the execution of his will, would be entitled to that share of his probate estate she would have taken by intestacy unless the will otherwise provides. In other states, however, she would not be entitled to a share of the husband's probate estate because his will left the bulk of his probate estate to his wife, the daughter's other parent. Here, there are two reasons the daughter may not take a pretermitted child's share: (1) the phrase "regardless of whether we have children" evidences the husband's intent that the daughter not take that share, or (2) the assumed state law bars the share if the will left the whole or substantially all of the estate (as here) to the child's surviving parent.

Under the state statute, the wife is entitled to a one-half share of the revocable trust created by the husband. It is unclear whether the remaining half would pass to the wife as residuary legatee under his will or to University, the named remainderman of the revocable trust. Case law is divided on this point.

[NOTE: If the will was revoked, the husband's probate estate of \$300,000 would pass \$150,000 to each of the wife and the daughter and nothing would pass to the friend; if not revoked, the friend takes \$5,000 and the wife \$295,000 from the probate estate, subject to any claim the daughter might have. Since the pretermitted child's claim is weak here, the conservator for the daughter has an incentive to challenge the will.]

Point One (55%)

The husband's will was not revoked because there is no evidence that he intended to revoke the will when he wrote on it.

A will may be revoked by the execution of a new will or by some physical act, such as cancellation or other writings on the will, if the testator (or someone acting at the testator's direction) performs the physical act with the intent to revoke the will. The burden of proof to establish that a validly executed will has been revoked is upon the party seeking to revoke the will. *See WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, WILLS, TRUSTS & ESTATES 260 (4th ed. 2010).*

Here, that burden cannot be met. The husband's handwritten statement on the will does not show intent to revoke the will. Instead, it suggests that he wanted to re-evaluate his overall estate plan in light of the fact that a large portion of his assets were held in the revocable trust and that he did not believe that either his wife or his daughter was adequately provided for. The phrases "estate plan should be changed" and "call lawyer to fix" show intent to do something *in the future* after consultation with his attorney, not to revoke the will now. In addition, the discovery of the documents found on the husband's desk, his sudden death, and the voice message on his phone from his lawyer suggest that the husband had only recently discovered the problem and called his lawyer to work it out, not that he had revoked his will.

Thus, because the will was not revoked, the friend should take \$5,000 under the husband's will and his wife should take \$295,000, the balance of the probate estate (possibly increased by assets from the trust (*see Point Three*) but subject to the daughter's claim, if any (*see Point Two*)).

[NOTE: Alternatively, the markings on the will might be construed as evidencing an intent to revoke the will. The husband appears to have recognized that the will made no sense in light of his family circumstances. The markings state that the plan should be changed and that the husband will take steps to make that change by calling his lawyer which, in fact, he did. Thus, so the argument goes, the will was revoked by cancellation. If the will was revoked, then the husband died intestate and half the estate would pass to the wife and half to the daughter under the intestacy law of the state.]

[NOTE: The argument claiming that there was an intent to revoke is not as strong as the argument in favor of no revocation because of the language of futurity in those markings.]

Point Two (15%)

Most likely the husband's daughter is not entitled to a pretermitted child's share. The phrase in the will "regardless of whether we have children" suggests that the husband wanted the wife to take even if they had children, thus evidencing his intent that the pretermitted child statute not apply.

Most states have "pretermitted child" statutes aimed at ensuring that children born after the execution of a will are not inadvertently disinherited. Many of these statutes provide that, under

Decedents' Estates Analysis

certain circumstances, a child born to a testator after the testator's will is executed is entitled to whatever share of the testator's estate the child would have received if the testator had died intestate. In states with such statutes, bequests in favor of an afterborn child's other parent are irrelevant. *See, e.g.*, IOWA CODE § 633.267 (a surviving spouse who is the parent of the decedent's surviving child is entitled to the entire estate (*see* IOWA CODE § 633.211), and the daughter would take nothing); 755 ILL. REV. STAT. 5/4-10 (a surviving spouse is only entitled to one-half of an intestate decedent's estate (*see* 755 ILL. REV. STAT. 5/2-1), and the daughter's share would be one-half of the estate). However, a testator can avoid the consequences of such a statute if the will evidences intent to do so. Here, that seems to be the husband's intent as evidenced by the phrase "regardless of whether we have children."

In other states, an afterborn child is denied a share of the decedent parent's estate if the decedent parent bequeathed all or substantially all of his estate to the child's other parent. *See, e.g.*, UNIF. PROB. CODE § 2-302(a)(1). In states that follow the UPC approach, the daughter would not be entitled to any share of the husband's estate because her mother (the wife) is entitled to substantially all of the husband's estate.

[NOTE: Regardless of how examinees conclude Point One, there were enough signals in the question to have prompted discussion of this issue even if they concluded that the will had been revoked.]

Point Three (30%)

The wife is entitled to take one-half of the revocable trust under the state statute. Either the wife, as residuary legatee under the husband's will, or University, as remainderman of the trust, is entitled to the other half.

Under the law of the state, the wife is entitled to a one-half share of the revocable trust created by the husband because the trust was in existence during the marriage. This leaves open the question of who is entitled to the balance of the trust's assets. Under the statute, the trust is characterized as "illusory." This characterization is ambiguous regarding whether it is just illusory as to the wife or illusory for all purposes. If the former, then the wife is entitled to her half share, as that share only is illusory, and the balance of the trust (not deemed illusory) should pass to University, as the designated remainderman. *See Montgomery v. Michaels*, 301 N.E.2d 465 (Ill. 1973). On the other hand, if a court deems the trust illusory for all purposes, then the trust is void and the trust assets are distributed to the wife as residuary legatee of the husband's estate, assuming that the will is valid. *See Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937). If, however, the will is invalid, the trust assets pass equally to the wife and her daughter as intestate property.



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