

July 2017

New York State
Bar Examination

MEE & MPT Questions

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MEE 1

On the evening of July 4, a woman went to the end of her dock to watch a fireworks display on the lake where her house was located. The woman's husband remained inside the house. The fireworks display was sponsored by the lake homeowners association, which had contracted with a fireworks company to plan and manage all aspects of the fireworks display.

The fireworks display was set off from a barge in the middle of the lake. During the finale, a mortar flew out horizontally instead of ascending into the sky. The mortar struck the woman's dock. She was hit by flaming debris and severely injured. When the woman's husband saw what had happened from inside the house, he rushed to help her. In his hurry, he tripped on a rug and fell down a flight of stairs, sustaining a serious fracture.

All the fireworks company employees are state-certified fireworks technicians, and the company followed all governmental fireworks regulations. It is not known why the mortar misfired.

The woman and her husband sued the homeowners association and the fireworks company to recover damages for their injuries under theories of strict liability and negligence. At trial, they established all of the above facts. They also established the following:

- 1) Nationally, accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. About 15% of these accidents are caused by mortars misfiring in the course of professional fireworks displays, and some of these accidents occur despite compliance with governmental fireworks regulations.
- 2) Even with careful use by experts, fireworks mortars can still misfire.
- 3) Although a state statute requires a "safety zone" of 500 feet from the launching site of fireworks when those fireworks are launched on land, the statute does not refer to fireworks launched on water. Neither the homeowners association nor the fireworks company established such a zone.
- 4) The average fireworks-to-shore distance for this display was 1,000 feet. The woman's dock is 450 feet from the location of the fireworks barge; at only three

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other points on the lake is there land or a dock within 500 feet of the fireworks barge location.

After the conclusion of the plaintiffs' case, both the homeowners association and the fireworks company moved for a directed verdict on the basis that the facts established by the evidence did not support a verdict for the plaintiffs.

The trial judge granted the motion, based on these findings:

1. Fireworks displays are not an abnormally dangerous activity and thus are not subject to strict liability.
2. Based on the evidence submitted, a reasonable jury could not conclude that the conduct of the fireworks company was negligent.
3. The misfiring mortar was not the proximate cause of the husband's injuries.
4. The homeowners association cannot be held liable for the fireworks company's acts or omissions.

As to each of the judge's four findings, was the judge correct? Explain.

MEE 2

Businesses in the United States make billions of dollars in payments each day by electronic funds transfers (also known as "wire transfers"). Banks allow their business customers to initiate payment orders for wire transfers by electronic means. To ensure that these electronic payment orders actually originate from their customers, and not from thieves, banks use a variety of security devices including passwords and data encryption. Despite these efforts, thieves sometimes circumvent banks' security methods and cause banks to make unauthorized transfers from business customers' bank accounts to the thieves' accounts.

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To combat this type of fraud, State A recently passed a law requiring all banks that offer funds transfer services to State A businesses to use biometric identification (e.g., fingerprints or retinal scans) to verify payment orders above \$10,000. Although experts dispute whether biometric identification is significantly better than other security techniques, the State A legislature decided to require it after heavy lobbying from a State A–based manufacturer of biometric identification equipment.

A large bank, incorporated and headquartered in State B, provides banking services to businesses in every U.S. state, including State A. Implementation of biometric identification for this bank’s business customers in State A would require the bank to reprogram its entire U.S. electronic banking system at a cost of \$50 million. The bank’s own security experts do not believe that biometric identification is a particularly reliable security system. Thus, instead of complying with State A’s new law, the bank informed its business customers in State A that it would no longer allow them to make electronically initiated funds transfers. Many of the bank’s business customers responded by shifting their business to other banks. The bank estimates that, as a result, it has lost profits in State A of \$2 million.

There is no federal statute that governs the terms on which a bank may offer funds transfer services to its business customers or the security measures that banks must implement in connection with such services. The matter is governed entirely by state law.

The bank’s lawyers have drafted a complaint against State A and against State A’s Superintendent of Banking in her official capacity. The complaint alleges all the facts stated above and asserts that the State A statute requiring biometric identification as applied to the bank violates the U.S. Constitution. The complaint seeks \$2 million in damages from State A as compensation for the bank’s lost profits. The complaint also seeks an injunction against the Superintendent of Banking to prevent her from taking any action to enforce the allegedly unconstitutional State A statute.

1. Can the bank maintain a suit in federal court against State A for damages? Explain.
2. Can the bank maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the State A statute? Explain.
3. Is the State A statute unconstitutional? Explain.

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MEE 3

A garment manufacturer sells clothing to retail stores on credit terms pursuant to which the retail stores have 180 days after delivery of the clothing to pay the purchase price. Not surprisingly, the manufacturer often has cash-flow problems.

On February 1, the manufacturer entered into a transaction with a finance company pursuant to which the manufacturer sold to the finance company all of the manufacturer's outstanding rights to be paid by retail stores for clothing. The transaction was memorialized in a signed writing that described in detail the payment rights that were being sold. The finance company paid the manufacturer the agreed price for these rights that day but did not file a financing statement.

On March 15, the manufacturer borrowed money from a bank. Pursuant to the terms of the loan agreement, which was signed by both parties, the manufacturer granted the bank a security interest in all of the manufacturer's "present and future accounts" to secure the manufacturer's obligation to repay the loan. On the same day, the bank filed a properly completed financing statement in the appropriate filing office. The financing statement listed the manufacturer as debtor and the bank as secured party. The collateral was indicated as "all of [the manufacturer's] present and future accounts."

There are no other filed financing statements that list the manufacturer as debtor.

On May 25, the manufacturer defaulted on its repayment obligation to the bank. Shortly thereafter, the bank sent signed letters to each of the retail stores to which the manufacturer sold clothing on credit. The letters instructed each retail store to pay to the bank any amounts that the store owed to the manufacturer for clothing purchased on credit. The letter explained that the manufacturer had defaulted on its obligation to the bank and that the bank was exercising its rights as a secured party.

The finance company recently learned about the bank's actions. The finance company informed the bank that the finance company had purchased some of the rights to payment being claimed by the bank. The finance company demanded that the bank cease its efforts to collect on those rights to payment.

Meanwhile, some of the retail stores responded to the bank's letters by refusing to pay the bank. These stores contend that they have no obligations to the bank and that payment to the manufacturer will discharge their payment obligations.

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1. As between the bank and the finance company, which (if either) has a superior right to the claims against the retail stores for the money the retail stores owe the manufacturer for clothing they bought on credit before February 1? Explain.
2. Are the retail stores correct that they have no obligations to the bank and that paying the manufacturer will discharge their payment obligations? Explain.

MEE 4

In 2012, Testator wrote by hand a document labeled “My Will.” The dispositive provisions in that document read:

- A. I give \$50,000 to my cousin, Bob;*
- B. I give my household goods to those persons mentioned in a memorandum I will write addressed to my executor; and*
- C. I leave the balance of my estate to Bank, as trustee, to hold in trust to pay the income to my child, Sam, for life and, when Sam dies, to distribute the trust principal in equal shares to his children who attain age 21.*

After Testator finished writing the will, he walked into his kitchen where his cousin (Bob) and his neighbor were sitting. After showing them the will and telling them what it was but not what it said, Testator signed it at the end in their presence. Testator then asked Bob and his neighbor to be witnesses. They agreed and then signed, as witnesses, immediately below Testator’s signature. The will did not contain an attestation clause or a self-proving will affidavit.

When the will was signed, Sam and his only child, Amy, age 19, were living. Testator also had an adult daughter.

In 2015, Testator saw an attorney about a new will because he wanted to change the age at which Sam’s children would take the trust principal from 21 to 25. The attorney told Testator that he could avoid the expense of a new will by executing a codicil that would republish the earlier will and provide that, when Sam died, the trust principal would pass

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to Sam's children who attain age 25. The attorney then prepared a codicil to that effect, which was properly executed and witnessed by two individuals unrelated to Testator.

Two months ago, Testator died. The documents prepared by Testator and his attorney were found among Testator's possessions, together with a memorandum addressed to his executor in which Testator stated that he wanted his furniture to go to his aunt. This memorandum was dated three days after Testator's codicil was duly executed. The memorandum was signed by Testator, but it was not witnessed.

Testator is survived by his aunt, his cousin Bob, and Sam's two children, Amy, age 24, and Dan, age 3. (Sam predeceased Testator.) Testator is also survived by his adult daughter, who was not mentioned in any of the documents found among Testator's possessions.

This jurisdiction does not recognize holographic wills. Under its laws, Testator's daughter is not a pretermitted heir. The jurisdiction has enacted the following statute:

Any nonvested interest that is invalid under the common law Rule Against Perpetuities is nonetheless valid if it actually vests, or fails to vest, within 21 years after some life in being at the creation of the interest.

To whom should Testator's estate be distributed? Explain.

MEE 5

A woman is on trial for the attempted murder of a man whom she shot with a handgun on March 1. According to a State A police report:

The woman started dating the man in August. A few months later, after the woman broke up with him, the man began calling the woman's cell phone and hanging up without saying anything. In February, the man called and said, "I promise you'll be happy if you take me back, but very unhappy if you do not." The following week, to protect herself against the man, the woman lawfully bought a handgun.

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On March 1, the woman was working late in her office. At 10:00 p.m., the man entered the woman's office without knocking. The woman immediately grabbed the gun and shot the man once, hitting him in the shoulder.

The police arrived at the scene at 10:10 p.m. By this time, a number of people had gathered outside the doorway of the woman's office. A police officer entered the office, and his partner blocked the doorway so that the woman could not leave and no one could enter. The officer immediately seized the gun from the woman and asked her, without providing Miranda warnings, "Do you have any other weapons?" She responded, "I have a can of pepper spray in my purse. Is that a weapon?"

At 10:20 p.m., after the woman had been arrested and the man taken to the hospital, a custodian told the police officer, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

A few hours later, at the hospital, the man told the police officer that he had entered the woman's office just to speak with her and that the woman had shot him without provocation.

The woman will defend against the attempted murder charge on the ground that she acted in self-defense. In State A, self-defense is defined as "the use of force upon or toward another person when the defendant reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

State A has adopted evidence rules identical to the Federal Rules of Evidence. State A follows the doctrine of the Supreme Court of the United States when interpreting protections provided to criminal defendants under the U.S. Constitution.

The prosecution and the defense have fully complied with all pretrial notice requirements, the authenticity of all the evidence has been established, and the court has rejected defense objections based on the Confrontation Clause.

The woman, the man, and the police officer will testify at trial. The custodian is unavailable to testify at trial.

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Under the Miranda doctrine and the rules of evidence, explain how the court should rule on the admissibility of the following evidence:

1. Testimony from the woman, offered by the defense, repeating the man's statement, "I promise you'll be happy if you take me back, but very unhappy if you do not."
2. Testimony from the police officer, offered by the prosecution, repeating the woman's statement, "I have a can of pepper spray in my purse. Is that a weapon?"
3. Testimony from the police officer, offered by the prosecution, repeating the custodian's statement, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

MEE 6

Taxes Inc. ("Taxes") is a tax preparation business incorporated in State A, where it has its corporate headquarters. Taxes operates five tax preparation offices in the "Two Towns" metropolitan area, which straddles the border between State A and State B. Three of the Taxes tax preparation offices are located in Salem, State A; the other two are in Plymouth, State B.

A woman, a recent college graduate, was hired by Taxes and trained to work as a tax preparer in one of its offices in Salem, State A. The woman and Taxes entered into a written employment contract in State A that included a noncompete covenant prohibiting her from working as a tax preparer in the Two Towns metropolitan area for a period of 24 months after leaving Taxes's employ. The employment contract also provided that it was "governed by State A law."

After working for Taxes for three years, the woman quit her job with Taxes, moved out of her parents' home in State A (where she had been living since her college graduation), and moved into an apartment she had rented in Plymouth, State B. Two weeks later, she opened a tax preparation business in Plymouth.

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Taxes promptly filed suit against the woman in the federal district court for State A, properly invoking the court's diversity jurisdiction. The complaint alleged all the facts stated above, claimed that the woman was preparing taxes in violation of the noncompete covenant in her employment contract, and sought an injunction of 22 months' duration against her continued preparation of tax returns for any paying customers in the Two Towns metropolitan area.

Taxes delivered a copy of the summons and complaint to the home of the woman's parents in State A (the address that she had listed as her home address when she was employed by Taxes). The process server left the materials with the woman's father.

Each state has service-of-process rules identical to those in the Federal Rules of Civil Procedure.

Under State A law, covenants not to compete are valid so long as they are reasonable in terms of geographic scope and duration. The State A Supreme Court has previously upheld noncompete covenants identical to the covenant at issue in this case. When determining whether to give effect to a contractual choice-of-law clause, State A follows the Restatement (Second) of Conflict of Laws.

Under State B law, covenants not to compete are also valid if they are reasonable in scope and duration. However, the State B Supreme Court has held that noncompete covenants are unreasonable and unenforceable as a matter of law if they exceed 18 months in duration. While State B generally gives effect to choice-of-law clauses in contracts, it has a statute that provides that choice-of-law clauses in employment contracts are unenforceable. When there is no effective choice-of-law clause, State B follows the *lex loci contractus* approach to choice of law in contract matters.

Rather than file an answer to Taxes's complaint, the woman filed a motion pursuant to Rule 12(b)(6) to dismiss the action for failure to state a claim upon which relief can be granted. The woman's motion argued that the noncompete covenant is invalid and unenforceable as a matter of law. Two days after filing the motion to dismiss, and before Taxes had responded to the motion, the woman filed an "amended motion to dismiss." The amended motion sought dismissal on the same basis as the original motion (failure to state a claim), but also asked the court to dismiss the action pursuant to Rule 12(b)(4) for insufficient service of process.

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1. Should the court consider the woman's motion to dismiss for insufficient service of process? Explain.
2. If the court considers the woman's motion to dismiss for insufficient service of process, should it grant that motion? Explain.
3. In ruling on the woman's motion to dismiss for failure to state a claim, which state's choice-of-law approach should the court follow? Explain.
4. Which state law should the court apply to determine the enforceability of the noncompete covenant? Explain.

MPT 1 – In re Peek et al. v. Doris Stern and Allied Behavioral Health Services

The client, Rita Peek, is the named plaintiff in a federal class action brought pursuant to 42 U.S.C. § 1983. The complaint alleges that the defendants, who have contracted with the county to provide probation services, have discriminated against female probationers by failing to provide court-ordered counseling in a timely manner. Peek was convicted in Union County district court of a misdemeanor and sentenced to 10 months in jail, with the jail sentence stayed on the condition that she successfully complete 18 months of probation. The district court imposed certain conditions of probation, including receiving mental health counseling. At a recent case-management conference, the federal judge raised the issue of whether the defendants are state actors and requested simultaneous briefing on that sole issue. Examinees' task is to draft the argument section of the plaintiffs' brief, following office guidelines and persuading the court that under the relevant tests and approaches, the defendants are state actors and therefore subject to suit under 42 U.S.C. § 1983. The File contains the instructional memorandum, the firm's guidelines for drafting simultaneously filed persuasive briefs, the sentencing order, a memo to the file, and excerpts from the deposition transcript of one of Allied's employees. The Library contains the relevant Franklin statutes on probation and a case from the U.S. Court of Appeals.

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MPT 2 – In re Zimmer Farm

In this performance test, examinees work in the office of the Hartford County Attorney. The president of the county board has received complaints about activities at the farm owned by John Zimmer and his son Edward. The Zimmers raise apples and strawberries for sale but have also begun operating a bird sanctuary on the farm. Residents in the adjacent housing developments are complaining about the smells and noise from the birds and also object to the crowds and loud music at the four “bird festivals” that the Zimmers held on their farm in the past year. Examinees’ task is to prepare an objective memorandum analyzing whether the Hartford County zoning code can be applied to shut down the bird rescue operation and stop the festivals. As part of completing the task, examinees must also address whether the Franklin Right to Farm Act affects the county’s ability to enforce its zoning ordinance with respect to the Zimmers’ activities. The File contains the instructional memorandum, an email from a complaining resident, and the investigator’s report about the Zimmers. The Library contains an excerpt from the Hartford County Zoning Code, excerpts from the Franklin Agriculture Code that contain the Franklin Right to Farm Act, a Senate Committee report about the Act, and three appellate court cases, two from Franklin and one from Columbia.

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New York State
Bar Examination

Sample Answers

JULY 2017 NEW YORK STATE BAR EXAMINATION

SAMPLE CANDIDATE ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. The issue is whether fireworks are an abnormally dangerous activity, thus being subjected to strict liability.

As per rule, an activity is considered abnormally dangerous and is subject to strict liability when the nature of the activity enacts a duty to conduct the activity in a reasonably safe manner, despite the effort to make the activity safe it cannot be conducted in a safe manner and the activity is not common in the community. When both of these prongs have been met then there is a finding of an abnormally dangerous activity.

Here, the fireworks were released by the state certified technicians who were trained to handle the fireworks. From the facts established, even though the experts do have experience in dealing with the fireworks, they mortars can still catch fire. Additionally, although the fireworks were conducted in a manner that adhered with the regulations, nationally, accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. Furthermore, about 15% of those accidents were caused in the course of professional displays.

Therefore, due to their inability to be conducted in a safe manner, the judge was incorrect in finding that the fireworks display was not an abnormally dangerous activity.

2. The issue is whether a reasonable jury could find the conduct of the fireworks company was negligent.

As per rule, in order to hold a party liable for negligence there must be a duty for the defendant to conform to the applicable standard of care to prevent injury to the plaintiff, the defendant breached that duty, in breaching that duty they were the actual (but for) and proximate (legal/foreseeable) cause of the plaintiffs injuries and the plaintiff must have suffered some damages. There is a duty to any foreseeable person that may be injured. Absent a specific duty of care, the duty of care is to act as a reasonable person would under the similar circumstances. Actual cause is the but for causation of the injury meaning but for the defendant's breach the injury would not have occurred. The proximate cause is the foreseeable cause. The injury must have been foreseeable. Lastly, there must be some injury to the plaintiff.

Here, the husband and wife attended the fireworks display and it was sponsored by the homeowners association. They owed a duty to all that were attending to conduct the fireworks display in a reasonably safe manner, as the same individual conducting fireworks would under the circumstances. They knew that they would have many people watching and therefore they owed everyone there a duty. As to breach of their duty, although there was not safety zone statute requirement for the launching of the fireworks on water, the average fireworks-to shore distance for this display was 1,000 feet. The

woman's dock was only 450 feet and at only three other points on the lake is there a dock within 500 feet. Therefore, by launching the firework so close they breached their duty. As to the actual cause, but for the firework launching in the horizontal matter, the woman's dock would not have been hit. As to the proximate cause, it was foreseeable that if something were to go wrong, people standing by the fireworks and those in the proximity would be injured. Lastly, as to damages the woman was hit by flaming debris and severely injured.

Therefore, the judge was incorrect and a reasonable jury could conclude that the conduct of the fireworks company was negligent.

3. The issue was whether the misfiring mortar was the proximate cause of the husband's injuries.

As per rule, in order to be deemed the proximate cause of the plaintiff's injuries it must be foreseeable that the individual would be injured. Rescuers are always foreseeable plaintiffs.

Here, as stated above the company was negligent in releasing the fireworks so close to the dock. The woman was hit by the debris and severely injured. Her husband ran to go aid her and in going to help rescue his wife he rushed to help her. In his hurry, he tripped on a rug and fell down a flight of stairs, sustaining a serious fracture. The husband was going to help his wife and while on the way to help his wife he tripped and fell down the stairs. Although he was on his way to rescue or offer assistance. It was not foreseeable that he was going to trip inside the home on his way to help his wife.

Therefore, the judge did not err.

4. The issue is whether the homeowners association can be held liable for the fireworks company's acts or omissions.

As per rule, under the doctrine of respondeat superior, a company cannot be liable for the third party's acts unless there is assent, benefit and control. However, when they are involved in inherently dangerous activities, a company may be held liable.

Here, as discussed above, the fireworks were an inherently dangerous activity. Although the homeowners association contracted with a fireworks company to plan and manage, due to the inherently and abnormally dangerous activity that was occurring the homeowners association may be held liable. Therefore, the judge was incorrect.

ANSWER TO MEE 1

Directed verdict

1. Fireworks display is an abnormally dangerous activity

The judge was incorrect, and running fireworks displays is an abnormally dangerous activity. The key issue is the extent of the harm imposed by fireworks and whether it can be mitigated by exercising care.

Under tort law, strict liability is imposed on those who cause harm while engaging in an abnormally dangerous activity. Abnormally dangerous activities generally include such activities as blasting dynamite or transporting extremely hazardous materials. The factors used to determine whether a particular activity is abnormally dangerous include: 1) the severity of the harm caused by the activity; 2) whether the location of the activity is appropriate; 3) the benefit to society or to the community of engaging in the activity and whether it outweighs the harm; and 4) whether harm caused by the activity can be minimized by exercising care.

Here, the location of the activity--in the middle of the lake on the fourth of July--seems appropriate. Fireworks also bring a significant benefit to society by providing entertainment to a huge amount of people, particular for festive occasions such as the Fourth of July. However, the harm caused by fireworks is great; nationally, fireworks cause 9,000 injuries and 5 deaths per year. Furthermore, the plaintiffs established that fireworks can still misfire even with careful use by experts. While there are factors weighing in each direction, the fact that fireworks are explosive devices with a potential to cause harm including death even when exercising care cuts in favor of considering the use of fireworks to be an abnormally dangerous activity. And while fireworks are enjoyable, they do not provide the community with a necessary function. The judge was incorrect, and fireworks displays, because they are an abnormally dangerous activity, should subject defendants to strict liability.

2. A reasonable jury could conclude that the conduct of the fireworks company was negligent

The judge was also incorrect as to the second point; a reasonable jury could find that the fireworks company's conduct was negligent. The issue is whether the company breached its duty in the placement of the fireworks.

A prima facie showing of negligence requires duty, breach, actual and proximate causation, and damages. A defendant has breached its duty of care if it did not exercise the care that a reasonable person would have under similar circumstances.

Here, the company owed a duty of care to individuals who might be harmed by its fireworks display. The plaintiffs also showed cause, at least with respect to the wife's injury (the mortar hit her dock and hit her with flaming debris), and damages (she was severely injured). A reasonable jury may have found that the standard of care was determined by the applicable fireworks statute requiring a 500 foot safety zone around the launching site--though the statute does not prove a breach as it not apply to water launches, in the absence of other regulations, this is reasonable guidance. There is no indication that the defendants proved an industry standard for water launches that would have weighed in the opposite direction (though it would not have been dispositive). It seems that the company could have feasibly taken further measures to prevent or mitigate the injury, such as changing the launch location or warning all residents of the lake to stay back from the shoreline. Based on the evidence available, a reasonable jury could have found that launching fireworks from a site that was under 500 feet from four different land or dock locations on the lake was a breach of the company's duty of care.

3. The misfiring mortar was the proximate cause of the husband's injuries

The issue is whether, if the company is determined to have breached the standard of care, the husband's injury was a foreseeable consequence of the company's breach. A showing of both actual and proximate causation is necessary for a finding of negligence. Actual cause is "but-for" cause--the injury would not have occurred but for the actions constituting the breach. Proximate cause, on the other hand, means that the injury was the natural and probable consequence of the action. Where the resulting injury is caused indirectly, the harm must have been foreseeable. Generally, harm caused to rescuers of those who have been injured is considered foreseeable.

Here, the husband was inside the house, and saw his wife get injured by the mortar. He became injured after he ran out to help her, tripping on the rug, falling down the stairs, and sustaining a fracture. It is the natural and probable consequence of setting off fireworks too close to shore that someone on shore might get injured, and it is foreseeable that the rush to aid an injured person might cause additional injuries. It is not necessary that the particular injury of a fracture due to falling down a flight of stairs could specifically be anticipated--this injury is of the kind that is to be expected from those who rush to help someone who has been injured by fireworks. Therefore, the mortar was the proximate cause.

4. The homeowners association can be held liable for the fireworks company's acts or omissions

The homeowners association can be held liable. The issue is whether the homeowners association expressly authorized the tortious action here, or whether the action was committed in the scope of employment with a desire to serve the principle. Principals are liable for the torts of their agents if they expressly authorize them or if the torts are

committed in the scope of employment with a desire to service the principle. A principal/agent relationship exists when there is assent to the relationship, the activity engaged in by the agent benefits the principal, and the principal has control over the agent. Even where the control element is not met, and the company is considered an independent contractor, there is still liability for torts stemming from inherently dangerous activities. This is an exception from the general rule that principals are not liable for torts of an independent contractor.

Held liable if fireworks company was an agent and if vicarious liability applies: expressly authorized or scope of employment/desire to service. Here the fireworks company was a contractor, and it appears that the association did not have control over the manner of the company's performance. However, the homeowners association can still be held liable because, as explained above, fireworks are an abnormally dangerous activity. Therefore, the judge was wrong and the association is liable.

ANSWER TO MEE 2

1. Bank v. State A in federal court

The issue is whether this action is permitted under the 11th amendment.

The 11th Amendment prohibits federal law suits against states. It is based in the premise of state sovereign immunity. There are exceptions to the 11th amendment, for example, when a state waives sovereign immunity or 11th amendment protection or when congress, under its 14th Amendment sec 5 power abrogates the state sovereign immunity in a statute. Otherwise, citizens of the state or of other states are not permitted to sue a state directly for damages.

Here, the bank appears to be suing the state directly, along with the superintendent, seeking damages. There is no indication that the statute provides a waiver of the 11th amendment and there is no congressional statute on point, so there is not congressional abrogation. Therefore, the suit is not permitted under the 11th amendment and the bank cannot maintain the suit against the state itself in federal court.

Furthermore, while state officials can be sued in their individual capacities for damages, and in their official capacities for prospective injunctive relief, even if that relief would require some money from the state treasury, they cannot be sued for money damages or retrospective relief. Therefore, the bank's action for damages, even as against the superintendent will not be permitted in federal court.

2. Bank v. Superintendent in federal court

The main issue is whether against a state official in their official capacity seeking injunctive relief can be maintained in federal court given the 11th amendment.

As mentioned above, despite the 11th amendment, state officials can be sued in their individual capacities for damages, and in their official capacities for prospective injunctive relief, even if that relief would require some money from the state treasury. A suit against a state officer for injunctive relief will be maintained if it is seeking prospective relief and the effect on the state officers is incidental.

Here, the bank's action for injunctive relief can be maintained against the superintendent. The superintendent is sued in her official capacity and the bank is seeking to stop (enjoin) the enforcement of the statute. Therefore it can be maintained under an Ex Parte Young theory.

Note that the bank clearly has standing since it has already suffered a concrete and particularized injury (loss of \$2 million dollars) that is caused by the statute and would be redressed by a favorable finding (that the statute is unconstitutional). It can likely show that it will continue to lose money from lost business as a result of the statute, which would be redressed by an injunction.

In conclusion, this part of the bank's claim can proceed.

3. Constitutionality of Statute

The main issue is whether the statute violates the dormant commerce clause. The commerce clause grants to congress the right to regulate interstate commerce. While states have a general police power to regulate in the interest of the health, safety and welfare of their citizens, the negative implication of the commerce clause, often called the dormant commerce clause, limits what they can do when it places a burden on interstate commerce. Generally, if a state law discriminates against out-of-staters, or against interstate commerce, it will be struck down unless the state can show it is necessary to protect a substantial state interests (unrelated to protectionism). If it does not discriminate, it will be struck down if it places an undue burden on interstate commerce-- in other words, the burden on interstate commerce will be weighed against the interest of the state.

Here, while there is some protectionism motivating the statute (it was passed as a result of heavy lobbying by State A based manufacturer of biometric identification equipment), it does not appear to discriminate against out of state companies. It applies to both in state and out of state companies and to companies doing business only within the state, and to those doing business across states. Therefore, it likely does not discriminate. Therefore it will be subject to the balancing test. Here, the burden on interstate commerce appears to be somewhat substantial. Banks that operate in multiple states including State A, will be

forced to choose between updating their systems to have biometric identification, or cease to do that kind of business in the state. That could have a substantial impact on interstate commerce. The fact that the large bank has already made this choice is support of that. On the other hand, the state appears to have a strong interest in protecting its citizens against fraud. Despite the security measures of banks, customers are still being subjected to unauthorized transfers by thieves. To the extent that this is impacting its citizens, State A clearly has a strong interest in protecting them. However, it is not clear that this particular biometric approach is an improvement or will work. Experts disagree about whether it is significantly better and the bank clearly thinks it is not. However, given that the state has a strong interest, it likely will pass the balancing test and be upheld.

There are two exceptions, neither applicable here: the market participant exception and congressional authorization. There is no indication in the facts that either apply here. Furthermore, there is no preemption since congress has not regulated in this area.

Note that the privileges and immunities clause of Art IV does not apply because the bank is not an individual citizen, and because the statute, while possibly motivated by protectionism, does not appear to discriminate against out-of-staters.

ANSWER TO MEE 2

1.(a) The issue is whether the bank has standing to sue State A for damages.

The federal courts of the United States are courts of limited jurisdiction that can only hear live cases and controversies. Among the justiciability doctrines that govern federal courts is standing, which requires plaintiffs to establish that they have a live stake in the controversy. Standing has three constitutional elements and two congressionally created prudential limitations. The constitutional requirements are injury in fact, causation, and redressability. The prudential limitations are the ban on generalized grievances and the assertion of third party rights. A party must have standing for every type of relief sought; past harm can give rise to a claim for damages relief, but a party must show that a certain action is likely to affect them again in the future in order to support a claim for injunctive relief.

Injury in fact requires a harm that is concrete and not abstract; the harm may be widely shared, but it must still not be speculative or conjectural. Here, the bank has suffered a direct and concrete harm from the state's conduct; the bank has lost \$2 million in profits due to the shifting of business and it was unable to comply with the state's law because doing so would have required incurring a cost of \$50 million.

Causation requires that the plaintiff's harm is fairly traceable to the defendant's conduct. Here, the bank's actions are fairly traceable to the state; if the state had not implemented this statute, the bank could have continued operating as it saw fit. However, it faced a very expensive penalty to comply with the state regulation, and has lost business accordingly being unable to comply. Therefore, causation is satisfied.

Redressability requires that the plaintiff's harm will be mitigated in some way by the relief sought; the relief need not fully cure the plaintiff's harm, but it must be able to reduce the harm in some way. The harm is redressable here;

1.(b) The issue is whether State A is immune from suit under the Eleventh Amendment and the doctrine of state sovereign immunity.

A state defendant is immune from suit under the Eleventh Amendment or the corollary doctrine of state sovereign immunity when it is sued by citizens of the state or citizens of another state, including a corporation incorporated in another state. The defendant must be the state or a state agency or official in their official capacity. The doctrine of state sovereign immunity applies equally in state and federal courts and federal formal administrative proceedings. Sovereign immunity can be waived through Congress's conditional spending power or abrogated using the Reconstruction Amendments (13th, 14th, and 15th). Here, the corporation has sued the state on a federal law claim for damages. The doctrine of state sovereign immunity prevents this suit from progressing.

2. The issue is whether the state official in official capacity is immune from suit under the doctrine of state sovereign immunity.

Under the doctrine of *Ex Parte Young*, a plaintiff can maintain a claim for prospective (meaning injunctive) relief against a state official in their official capacity based on federal law without violating the state's Eleventh Amendment sovereign immunity. The only caveat is if Congress has passed a law with a comprehensive remedial scheme that, in effect, precludes an *Ex Parte Young* suit, as they did in the case of *Seminole Tribes*. Here, the bank is suing in federal court against a state official in their official capacity - the state Superintendent of Banking. Moreover, they are suing for injunctive relief - seeking to enjoin her from enforcing the State A statute. Finally, they are suing on a federal law claim - whether the state law violates the U.S. Constitution. Therefore, the suit against the Superintendent can proceed.

3. The issue is whether the State A statute violates the dormant commerce clause.

The Commerce Clause gives Congress power over interstate commerce. When Congress has not spoken on the subject in a federal statute, the power is said to be in its dormant or negative posture. The dormant commerce clause doctrine prohibits states from regulating in economic protectionist manners. States cannot pass laws that facially discriminate

against interstate commerce, regulate wholly out-of-state activities, or unduly burden interstate commerce. States are permitted, however, to favor state agencies or in-state businesses when they act as market participants and favor their own state-owned organs when acting in a traditional governmental function.

If a state law facially discriminates against interstate commerce, to survive constitutional review the state must show the law furthers a neutral, non- protectionist government interest and that there are no other less discriminatory means available to achieve the desired result.

If the state law is facially neutral, the reviewing court will balance the burden on interstate commerce, the state's interest in passing the law, and the availability of less restrictive means to achieve the state's goal. If the state's law still has an undue burden on interstate commerce as compared to the state's interest, the law will not survive constitutional review.

Here, the state law is neutral on its face. State A's law requires all banks that offer funds transfer services to State A business to use biometric identification to verify payment orders about \$10,000. This law does not show any economic protectionism on its face; it does not, for example, require banks to use biometric ID systems created by State A companies. However, the law likely does unduly burden interstate commerce; the government's interest was to provide security for substantial transactions. However, experts dispute whether biometric ID is significantly better than other security techniques. Moreover, the State A legislature decided to require it after heavy lobbying from a State A-based manufacturer, which suggests economic favoritism for an in-state actor. The burden on interstate commerce is potentially significant, as coming up to speed would require the banking system to spend \$50 million in the large bank in State B. Moreover, there likely are less burdensome alternatives available; the bank's own security experts do not believe biometric ID is particularly reliable. Therefore, the statute likely is unconstitutional because it unduly burdens interstate commerce.

ANSWER TO MEE 3

1. The Bank has a Superior Claim to the Claims Against the Retail Stores for the Money the Retail Stores Owe the Manufacturer.

1.a. The first issue is whether the bank and/or the financing company have a security interest in the accounts receivable.

Article 9 of the UCC governs the law of secured transactions. A security interest is an interest that one party--the secured party--has in the non-real property, known as

collateral, of another--the debtor. The security interest is created to provide collateral, similar to a down-payment or insurance--of a loan or other item of value provided by the secured party to the debtor. A security interest is created under Article 9 when a proper security agreement is executed and when attachment occurs. A security agreement is properly executed when there is a contract that (1) identifies the debtor and secured party, (2) identifies the collateral with a description sufficient to reasonably identify the collateral property, (3) grants the secured party an interest in that collateral in exchange for something of value, and (4) is signed by the parties. A description sufficient to meet the requirements of a security agreement can usually constitute the category classification identified by Article 9, including "inventory," "equipment," or "accounts receivable." The collateral can be for both present and future acquired collateral of that category, but the fact that the collateral covers future acquired property must be expressly stated in the security agreement. Attachment occurs when (1) the secured party provides the debtor with something of value, (2) the debtor has rights in the collateral, and (3) a valid security agreement has been created.

In this case, the financing company executed a contract that provided the finance company would pay the manufacturer for the rights to all of the manufacturer's current and future accounts receivable (i.e. the debt owed by the customers of the manufacturer for goods sold to them on credit). The agreement identified the collateral according to its UCC description of "accounts" and expressly stated that it would cover only the outstanding and present obligations owed. The agreement further identified the manufacturer as the debtor party and the financing company as the secured party, and expressly granted the secured party the rights to the accounts. Therefore, a valid security agreement was created between the manufacturer and the financing company. In addition, attachment occurred because the manufacturer had present rights in the collateral accounts receivable, even if they did not have possession of the money actually owed, and the financing company paid the agreed price to the manufacturer. Therefore, both attachment and a signed security agreement were created between the manufacturer and the financing company in all of the manufacturer's present and outstanding accounts receivable.

In addition, the bank also executed a valid security agreement that identified the manufacturer as the debtor, the bank as the secured party. The agreement provided the bank with an express grant to the rights in all present and future acquired accounts receivable, which is sufficient to satisfy both the requirement of a reasonable description of the collateral and an express grant of after-acquired collateral. The agreement was signed by both parties, and thus constituted a valid security agreement. Lastly, attachment occurred because the manufacturer had present rights in the collateral accounts receivable, and the bank provided the manufacturer with funds for the loan, which is certainly something of value to the manufacturer. Therefore, the bank too had a security interest in the accounts receivable outstanding at the time of the security agreement's execution, as well as all future acquired accounts receivable.

1.b. The second issue is whether the bank or the financing company has a priority interest in the accounts receivable collateral that they both have a security interest in.

Because it is possible for a debtor to provide the same collateral to multiple secured parties, secured parties are able to perfect their security interests, which provides them with a greater priority over unperfected security interests. This is important when a debtor party defaults on one or both of the security interests he has secured with the same collateral, as it determines the priority rights the secured parties have over the same collateral. A secured party with a perfected interest in collateral has a higher priority over a secured party with an unperfected interest. In order to perfect an interest, the most common method is filing a financing statement with the appropriate Secretary of State's office. A financing statement must be (1) authorized to be filed by the debtor party, (2) identify the secured party and debtor party, and (3) identify the collateral (including through the use of super-generic descriptions). The proper filing of a financing statement acts as constructive notice to the world that the secured party has a collateral interest in the property.

In this case, the bank properly filed a financing statement listing the debtor as the manufacturer and the bank as the secured party, and all the manufacturer's present and future accounts as the collateral interest. Assuming it was filed in the correct Secretary of State's office, the bank's interest was thus perfected upon the filing of the financing statement. The financing company, however, did not file a financing statement. Therefore, their interest in the outstanding collateral at the time they signed the security agreement with the manufacturer is unperfected.

Because a perfected interest will have priority over an unperfected interest, the bank will have a superior right to the claims against the retail stores for the money owed on the accounts receivable over the financing company.

2. The retail stores are incorrect that they have no obligation to pay the bank and that paying the manufacturer directly will discharge their payment obligations.

The issue is whether the retail stores have to comply with the bank's demand that they pay the bank the debts owed, rather than the manufacturer.

When a debtor defaults on a security agreement, the secured party is entitled to take possession of the collateral property, either as payment for the debt defaulted on and owed, or to sell in a commercially reasonable manner to satisfy the debt owed. In the case of accounts receivable, the secured party has the right to make a demand on the parties owing the debtor and whom the secured party has a collateral interest in the accounts receivable of. Once such a demand has been reasonably made to the debted parties owing the debtor under an accounts receivable that has been sold to the secured party, they must comply with the lawful demand.

In this case, the debtor manufacturer defaulted on the loan with bank. The collateral interest attached to the security agreement the bank had with the merchant provides that the bank has an interest in all present and future- acquired accounts receivable of the merchant. When the debtor manufacturer defaulted on the loan, the bank gave proper notice to the retail stores owing the merchant debts under an accounts receivable system. At such time, the retail stores must comply with the lawful demand of the secured party- bank. Indeed, that is the entire value in purchasing an accounts receivable portfolio.

Therefore, the retail stores are incorrect in asserting that they can pay the manufacturer instead of the bank, and must comply with the bank's lawful request for direct payment to satisfy the defaulted debt owed by the manufacturer.

ANSWER TO MEE 3

1. Bank v. Finance Company. The bank has a superior right to the claims against the retail stores for the money the retail stores owe the manufacturer for clothing they bought on credit before February 1. The issue is whether the bank or the finance company has priority in the retail store accounts.

Secured transactions are governed by Article 9 of the Uniform Commercial Code ("UCC"). Under Article 9 of the UCC, a creditor has rights in collateral against a debtor if that creditor has attached her security interest to the collateral. Attachment occurs when: (1) the creditor gives value to the debtor; (2) there is a contract or agreement between the creditor and the debtor indicating that the creditor will obtain a security interest in specific collateral; and (3) the debtor has rights in the collateral (which is typically achieved through possession or ownership). Furthermore, a creditor may also have rights against third party claimants in the same collateral if they perfected their security interest. Typically, for intangible goods such as accounts receivable, perfection is achieved by filing a financing statement in the appropriate public office. In a priority dispute, perfected attached creditors have priority and superior rights over unperfected attached creditors in the same goods.

Here, the finance company is an unperfected attached creditor in the outstanding retail store clothing accounts that existed on February 1. The finance company attached its security interest to these accounts when it (1) paid the manufacturer the agreed price for the rights; (2) created a contract between the manufacturer and the finance company that was signed by both parties memorializing the security interest the finance company would take in the accounts as collateral; and (3) the manufacturer has rights in the accounts as the owner of those accounts receivable from the retail clothing stores. Therefore, the finance company attached its security interest to these accounts. However, the finance company failed to perfect its security interest because it did not file a

financing statement putting others on notice of its security interest. It also does not have possession or control over these accounts.

On the other hand, the bank is a perfected attached creditor in all of the manufacturer's accounts, both existing before and after March 15. The bank attached its security interest to these accounts. The bank gave the manufacturer money in exchange for this security interest. The bank and the manufacturer entered into a signed agreement that described the security interest that the bank was taking in the present and future accounts of the manufacturer as collateral, creating a contract describing the security interest. Furthermore, as stated earlier, the manufacturer has rights as the possessor and owner of these accounts with the retail clothing store. Therefore, the bank attached its security interest to these accounts. The bank also perfected its security interest by filing a financing statement. The financing statement must include the name and address of the debtor, the name and address of the creditor, and a description of the collateral that a security interest was taken in. This description in the financing statement can be super generic as long as it allows others to be put on notice of a security interest and make a reasonable follow-up. Here, all these requirements were met because the manufacturer is listed, the bank is listed, and the collateral is described as all of the manufacturer's present and future accounts. Therefore, the bank is a perfected attached creditor.

Furthermore, it should be noted that the bank obtained an after-acquired collateral clause in its security agreement, which is permissible and enforceable as a security interest in all good except for consumer goods. Here, accounts receivable are not consumer goods, and therefore it is enforceable. This overlaps with the security interest of the finance company because the bank's interest includes all of the existing retail clothing store accounts that were present on February 1.

Because a perfected attached creditor has priority over an unperfected attached creditor in the same collateral, the bank has a superior claim. Therefore, the bank has a superior right to the claims against the retail stores for the money the retail stores owe to the manufacturer for clothing they bought on credit before February 1.

2. Retail Stores v. Bank. The retail stores are incorrect that they have no obligation to the bank and their payment obligations are not discharged by paying the manufacturer. The issue is whether the bank has validly exercised its powers of the accounts receivable.

When a default occurs, the secured party may take steps necessary to collect on its rights in the collateral in which it took a security interest. A default is defined by the security agreement. In this case, failure of the manufacturer to repay its obligation to the bank constitutes a default. Strict foreclosure is one method of a creditor may use to enforce its rights. In a strict foreclosure, the secured party takes possession or control of the collateral and keeps it as her own and discharges the debt of the debtor. Here, the bank

has exercised its right to direct payment on the accounts receivable to go to the bank rather than to the manufacturer. This is done to satisfy the debt.

This can be likened to an assignment of rights under contract law. In this case, the bank has been assigned rights in the accounts receivable as a result of the security interest and security agreement between the parties. The assignor is the manufacturer and the assignee is the bank. The obligor is the retailer, who still has the obligation to pay. The retailers have notice of this obligation because the bank has informed them, and they are aware of the assignment taken as a result of the default and security interest in the goods.

The retailers cannot refuse to pay. The retailers do not have any interest in the account receivable that is free and clear of the security interest, and their obligation is outstanding. They can only assert those defenses against the bank that it would have against the manufacturer. Therefore, the debt is not discharged by paying the manufacturer because it has notice that an assignment of the account has been made to the bank. It must pay the bank to satisfy its obligations.

ANSWER TO MEE 4

I. Bob should receive \$ 50,000.

For a will to be valid, the following elements must be met: (i) the testator must have legal capacity and testamentary capacity, (ii) the testator must intend for the instrument to be a will, and (iii) certain formalities must be followed. Testamentary capacity requires that the testator understands his act (he's making a will) as well as the nature of the property, and he is aware of the intended recipients. The testator must also be aware of all these elements together at once. As to the formalities, most jurisdictions require that the will be in writing, signed by the testator, and attested by at least two witnesses.

Here, there is no evidence that the testator lacked the legal or testamentary capacity for a will. Moreover, the will is in writing, signed, and attested by two witnesses. However, one of the witnesses, Bob (B) is also a beneficiary under the will. Under some jurisdictions, this fact would make B lack capacity to serve as a witness. The result would also depend on the jurisdiction. Originally, some jurisdictions would void the entire will; however, today, most would require that only the legacy at issue be void. Thus, if there had not been a subsequent codicil, it is likely that the gift to Bob would have been held to be invalid.

However, a codicil can serve to bootstrap a will and cure issues such as the potential voiding of the legacy to B, so long as the codicil is signed and executed following the appropriate formalities (i.e., the same as apply to a will). Therefore, the codicil in essence

cured the will's potential issue regarding the legacy to B, as it was signed, not by B, but by two unrelated witnesses.

Therefore, the legacy to B is valid, and B should receive \$50,000.

II. Although the answer may depend on the jurisdiction, the bequest of the household goods is likely to fail and go to the residuary beneficiary, i.e., the trust, instead of the testator's aunt.

A will's dispositive provisions could include provisions found in a separate document, but only if such a document is properly incorporated by reference. Generally, for a document to be incorporated by reference, the document must be in existence at the time the will is signed, and references thereto in the will must be sufficiently clear and specific, so as to make it possible to identify the document. In some states, exceptions to the "pre-existence" requirement apply to lists of tangible personal property prepared by the testator for purposes of cherry-picking items and selecting the desired beneficiaries.

Here, the memorandum did not exist until after the signing of the original will, and after the signing of the codicil. Moreover, the description of the memorandum in the will is arguably too vague to make the memorandum reasonably identifiable upon the testator's death. Thus, even in a jurisdiction that would otherwise allow for certain documents disposing personal property to be incorporated despite their non-existence at the time the will is executed, the memorandum is likely too vague to be properly incorporated by reference.

Therefore, the household items would likely go to the trust.

III. The rest of the estate should go to the Bank as trustee for Amy and Dan (remainder beneficiaries).

It is possible for a will to act as a "pourover" into a trust even if the trust does not exist yet at the time of the will. That is, if the trust deed exists before the testator's death, a will with a pourover provision such as the one in paragraph C of the will, the assets set aside for the trust will flow to it. This is the case even if the trust itself does not exist yet because no property has been transferred to it yet. Of course, if the trust had been revoked by the time of the testator's death, the gift would have lapsed.

Moreover, the interest in the trust does not violate the rule against perpetuities because the interest is created at the time of the testator's death. Therefore, we will know whether the interests of A and D will fail or vest within their lifetimes.

Here, the will essentially creates a testamentary trust deed. Just because Sam is deceased, it does not mean that the trust fails, as the testator clearly intended for the trust property

to also benefit Sam's children, specifically, the child that has attained age 25 (see above for a discussion on the validity of the codicil). Therefore, the executor should distribute to the Bank, which will hold the property (and make it productive) until either Amy or Dan reach age 25. If they both fail to reach age 25, the amount will go to T's descendants.

ANSWER TO MEE 4

1. The first issue is whether testator's original will was valid because it was holographic, and signed by an interested witness.

This jurisdiction does not recognize holographic (i.e. handwritten) wills, which must be handwritten and signed only by the testator. Therefore, a valid will must be signed by the testator in the presence of witnesses and signed by two witnesses, the testator must be of the age of majority (usually 18), and of sound mind, free from undue influence. The testator must intend to create a will and must recognize that what they are signing is their will. The witnesses to the will traditionally must be disinterested, i.e. they cannot be those who would take a devise from the will, but there is a modern trend away from enforcing this requirement.

Here, Testator wrote his will, and clearly intended it to be his will by telling two people that it was his will and labeling it "my will." Testator then showed the will to the two people he wanted to serve as witnesses, and signed it in front of them. The two witnesses then agreed to serve as witnesses and signed below Testator's signature. One of the witnesses, however, was Bob, who was meant to take from the will. Arguably, however, Bob was not "interested" because he did not know what the will said, i.e. that he would take. This would likely bode in favor of Bob being a valid witness in modern jurisdictions, but traditionally he would be considered an interested witness.

Because Bob was an interested witness, and because the jurisdiction does not recognize holographic wills, Testator's will as originally created was invalid.

2. The next issue is whether the valid codicil made testator's previously invalid will valid.

A codicil created after a will republishes the will as of the date of the codicil. A valid codicil can make a will which was originally invalid valid, if it is properly created.

Here, Testator properly executed a codicil to his original will in 2015, three years after the creation of the original will. This codicil incorporated the original handwritten will.

Because Testator later enacted a valid codicil to his originally invalid handwritten will, the original will became valid as of the date of the codicil.

3. The issue is whether \$50,000 should go to Bob.

Bob, Testator's cousin, received a specific devise of \$50,000 from the estate in Testator's will. A testator can specifically devise any of their property to whoever they would like (with certain exceptions for surviving spouses). Because Testator's original will was made valid by the codicil, this devise to Bob should occur per the Testator's will.

4. The issue is whether Testator's furniture should go to his aunt.

A testator can incorporate a document independent of the will so long as the document is sufficiently identifiable and verifiable. Some jurisdictions also require that the external document at issue already be in existence when the will was created.

Here, the testator referred to a specific document that he would create in his will that would be addressed to his executor. The document would then refer to "household goods." A document bequeathing furniture, a household good, to his aunt was found along with the testator's will and codicil, and was addressed to the executor and signed by the testator. This document was sufficiently identifiable and verifiable so as to be properly incorporated into the will. This document, however, was only created after the codicil was created.

As such, if the jurisdiction allows incorporated documents to be created after the date of the will then the furniture should go to the aunt, if not, the furniture should be included as part of the residuary of the estate.

5. The issue is whether the trust created by Testator is against the jurisdiction's Rule Against Perpetuities.

The statutory rule against perpetuities requires any nonvested interest to vest or fail to vest within 21 years after some life in being at the creation of that interest. The traditional rule against perpetuities makes any provision invalid if it would not vest within 21 years of some life in being at the creation of the interest. A gift from a will only creates an interest when the testator actually dies, prior to that there is merely an expectancy.

Here, the trust, and thus the relevant unvested interest, was created at the time that the testator died. The trust distributes its proceeds to the class of Sam's children who reach 21 years of age. As such, the relevant life in being would either be Sam or one of his children. Because Sam predeceased testator, the relevant class for the end of the trust is Sam's children, and is limited to Amy, age 24, and Dan, aged 3. The relevant life in being

here could either be Amy or Dan, either way the trust is valid. The trust is valid because the possible class has closed, and will vest or fail within 18 years of the trust's creation.

For this reason, the trust regarding the residuary is valid.

6. The issue is whether Testator's daughter was intentionally omitted.

A testator is allowed to disinherit a child. The general presumption is that a child is not intentionally disinherited unless there is some reason to believe that the child was intentionally left out of the will. If the child was mistakenly disinherited, they are entitled to a portion of the residuary split with their siblings in equal shares.

Here, there is reason to believe that the adult daughter was intentionally omitted. The testator specifically provided for treatment of the residuary of his estate, as well as leaving specific devises to other people, including other people's children. Additionally, his daughter was an adult, who presumably was no longer dependent on her father for survival.

For these reasons, it is likely that the daughter was intentionally disinherited.

ANSWER TO MEE 5

I) The man's statement will be admissible because it is not hearsay.

The first issue with any evidence is relevance. A piece of evidence is relevant if it makes a fact more or less likely to be true. It must also be legally relevant in that it will assist the finder of fact in determining guilt or innocence. In this case, the statement is both factually and legally relevant. The statement helps to give insight into the mental state of the woman and suggest that she has a reasonable fear of the victim. This makes a legally relevant fact more likely.

Hearsay is an out of court statement offered for its truth. Hearsay is not admissible unless it falls within an exception or exemption. In this case, the statement, "I promise you'll be happy if you take me back, but very unhappy if you do not" is not being offered for its truth but instead the effect of the statement on the woman. The truth of the testimony is irrelevant when compared with the fact that the woman heard the statement. Because the statement is not being offered for its truth, the statement is admissible.

II) The testimony about Pepper Spray will be admissible as a statement of a party opponent outside the Miranda Doctrine.

Under the Miranda doctrine, statements from a witness after custody and interrogation will not be admissible unless there has been a knowing and voluntary waiver of the Miranda Rights. In this case, since there was no Miranda warning, the key issue is if there was custody and interrogation sufficient to invoke Miranda rights. Custody is defined the declarant being put into a situation where a reasonable person would not believe that they are free to leave. Interrogation requires questioning with the purpose to elicit facts that will be used in a trial later on. In this case, the partner of the police officer blocked the door, the only path of escape unless the office had more than one exit. As a result, a reasonable person would believe at that point that they were under custody. As a result, there was sufficient custody to require Miranda Warnings. However, the police officer asked the question in order to handle a crisis situation and ensure the safety of himself, his partner, and any other individuals at the scene. The question lacked the required investigatory intent in order to be considered an interrogation. As a result, this will not be considered an interrogation and the Miranda doctrine will not prevent the admission of the evidence.

Even if the statement is not under the Miranda doctrine, the statement would still be considered hearsay. This is an out of court statement offered for its truth. As a result, it is clearly hearsay. It must fall within an exception or exemption in order to be admitted. A party opponent statement is a statement made by a party and offered against the opponent. It is admissible as non hearsay. In this case, the statement was made by a party in the case and is being offered against that party. As a result, the hearsay is admissible as a party opponent statement.

III) The statement of the Custodian is inadmissible hearsay.

The first hurdle for this evidence will be the admissibility for relevance. The requirements for relevance are given above. This statement will be considered relevant because it makes it less likely that the defendant reasonably believes that force is immediately necessary. As this is directly related to the defense of the case it is legally relevant. It is logically relevant due to the inferences that would be drawn from it. Most importantly, that the custodian heard no screaming or loud noises before the gunshot and that the custodian was in a position to hear any potential screaming or loud noises before the gunshot. As a result, it makes it less likely that the defendant acted in self-defense.

However, the statement is hearsay because it is an out of court statement offered for its truth. Therefore it must fit within an exception. Present sense impressions are statements made during or right after an event. It happens too long after the shooting to be considered a present sense impression because 20 minutes lapse from the shooting to the time that the statement is made. The best exception for the statement is potentially an excited utterance. An excited utterance is a statement made while still under the influence of a startling event. However, just hearing a gunshot and screaming would probably not be sufficient to establish that this was a startling event for the custodian. The police

reports fails to mention any action of the man that would show that he is under the influence of this probably unstartling event. As a result, this should not come in as an excited utterance. Another potential exception would be prior testimony. Prior testimony is allowed when it is sworn, subject to cross, and the declarant is unavailable. In this case, the declarant is unavailable but the statement is not while under oath and is not subject to cross. There is no valid hearsay exception for the statement. As a result, the statement is inadmissible hearsay and is not to be admitted for its truth.

ANSWER TO MEE 5

1. The issue is how should the court rule on the admissibility of the statement from the husband that was stated to the woman.

Under the rules of evidence, evidence is only admissible if it is relevant. Evidence is relevant if it makes a fact more or less probable than without that evidence and that fact is a fact of consequences to the litigation. A common issue that arises with the admissibility of testimony at trial is the hearsay rule. Under the general rule, hearsay is not admissible in a trial due to the possibility of manipulation and since the statement has not been tested by cross examination. The definition of hearsay is an out of court statement used to prove the truth of the matter asserted. Out of court is defined as a statement that was made for the first time not in front of the jury. A statement is defined as an oral assertion or any other conduct which was intended as an assertion. Further, use to prove the truth of the matter asserted is defined as using that statement to prove the truth of its content. Even though hearsay is not admissible, there are numerous exceptions and exclusions to the hearsay rule. There are also certain statements that by themselves are not hearsay because they are not being offered to prove the truth of the matter asserted. When a statement has independent legal significance, that is, the statement itself gives rise to a claim or defense; the statement can be introduced to show knowledge, intent, motive, or notice of information.

A court would more than likely conclude that the man's statement would be admissible. First, the statement is relevant because it shows the woman's state of mind and whether the self-defense defense should be applicable. Further, this is a consequence of the litigation because it can directly negate the criminal charge. The only true issue is whether this statement is hearsay. If this statement was used to prove the truth of the matter asserted it would be hearsay because the defendant is not an opponent and; thus, not a statement by a party opponent. However, the defense here is not going to use it to prove the truth of the matter asserted, but rather to show the defendant's knowledge and notice that the defendant may attempt to harm here, which supports the self-defense defense. This statement shows that the woman had knowledge that the man intended to

attack her and gave her notice that such might occur. The statement would not be being used to prove that the man actually did attack her.

Therefore, a court would more than likely conclude that the man's statement is admissible.

2. The issue is how should the court rule on the statement made by the woman.

The *Miranda* rules provide that before a suspect has been subjected to custodial interrogation they must be provided with their *Miranda* rights. The right to receive *Miranda* rights is only applicable when the person has been subject to custodial interrogation. Custody has been defined as confining of the person where the person would objectively believe that they are not free to go. Further, interrogation has been defined as questioning by an officer, which a reasonable person would conclude that the purpose of such statements are to illicit an incriminating response. If there is custodial interrogation, the person must be told that they have the right to remain silent and the right to an attorney. However, for both such rights after they have been given, the person must invoke both rights. If a statement is made in violation of *Miranda* the exclusionary rule is applied, whereby the statement cannot be introduced against the defendant. However, there are numerous exceptions to the *Miranda* rule, including the public safety exceptions. If the police ask a person a question, when that person is subject to custodial interrogation, but the purpose of that question is to deal with an on-going emergency, the fact that the person was not given *Miranda* will not result in an exclusion of their testimony. Furthermore, another issue often arises with statements in trial. *See* rules *supra* question 1 (hearsay). There is an additional exception to the hearsay rule known as the statement by party opponent. Under such exception, a statement made by a party to the litigation can be offered into evidence by the opposing party as exclusion to the hearsay rule.

A court would more than likely conclude that this statement is admissible. First, the statement is relevant because it goes to the fact of whether the woman was carrying any dangerous weapons, which is a fact of the consequence of the litigation. Second, the statement is permissible under *Miranda*. At the time the police questioned the woman she was subject to custodial interrogation. First, it was custodial because the police blocked her from the office and a reasonable person would not believe they were free to go. Further, it was an interrogation because a reasonable person would presume that the question by the officer was to elicit an incriminating response. Thus, the officer's should have provided her with *Miranda* warnings. Generally, the failure to do so would result in the application of the exclusionary rule. However, the public safety exception applies. The police needed to be sure prior to arresting the woman that she did not have any other weapons on her, which could cause them injury. Further, the questions asked were only to deal with the ongoing emergency and as soon as the police realized that she did not have any other weapons, the questioning stopped as the emergency ended. Second, the

statement is also admissible under an exception to the hearsay rule. This statement would be admissible by the prosecution as a statement by party opponent. However, it must be noted that if the defendant wished to introduce that statement it would be hearsay and not admissible as a self-serving statement.

Therefore, a court is more than likely to conclude that statement by the woman would be admissible.

3. The issue is whether the custodian's statement would be admissible.

See rules *supra* (hearsay). The most common issue of hearsay arises when the declarant is not available to testify at trial. There are certain hearsay exceptions that are only admissible if the declarant is unavailable.

However, no matter if the declarant is available or unavailable; a hearsay exception must be satisfied to admit the evidence. The two most common hearsay exceptions are the excited utterance and the present sense impression. An excited utterance is a statement by a declarant, which is made while the declarant is still under the stress of the event that she perceived. This exception is premised on the fact that the stress of the event made it less likely that the declarant would fabricate. A present sense impression is a statement made by a declarant while observing an event or immediate thereafter. There is a shorter time limit between the observation and the statement for a present sense impression rather than an excited utterance. The excited utterance must just be made while the declarant is still under the stress of the event, while the present sense impression must be made while observing or immediately thereafter.

A court would more than likely conclude that the custodian's testimony is inadmissible. First, his statement is relevant because he shows that he heard the gun shot and what time and where that shot occurred. However, the statement would be inadmissible as hearsay. First, the statement is hearsay because it is an out of court statement being used to prove the truth of the matter asserted. It is being used to prove the truth of the matter asserted because it is being used to prove that the gun shot occurred in the office and what time the gun shot occurred. Thus, the statement is hearsay. Further, the custodian is unavailable to testify at trial so a hearsay exception must be established to admit the police officers' statement of the custodian's statement. The only two exceptions that are remotely applicable are the present sense impression or an excited utterance. First, the present sense impression is not applicable because the statement was made 10 minutes after perceiving the event. In order for the statement to qualify as a present sense impression it must be made at or directly after the event. Here, that is not present. Further, the excited utterance exception also does not apply. There is nothing to indicate that the custodian was under the stress of the event at the time of the statement. Further, if it is argued that he was under the stress of the event, such argument should fail because the custodian did not even see the event, he only heard. Thus, the hearsay exceptions are not applicable.

Therefore, a court would more than likely conclude that the custodian's statement is not admissible.

ANSWER TO MEE 6

1. The issue is whether the court should consider the woman's motion to dismiss for insufficient service of process.

A party may amend a pleading as a matter of right in order to add or amend a claim within 21 days of service of the pleading if the pleading does not require a response. Generally, certain claims or defenses must be raised in a pre-answer motion or an answer (whichever is first) or else they are waived. Such claims or defenses include affirmative defenses, and motions to dismiss for lack of personal jurisdiction, venue, or insufficient service of process. A motion to dismiss on the basis of lack of subject matter jurisdiction may be invoked at any time by any party or the court *sua sponte*.

Here, the woman filed a pre-answer motion to dismiss under Rule 12(b) (6), and then requested to amend the motion within 2 days after filing the motion to dismiss. Here, the woman likely had a right to amend her pre-answer motion as a matter of right, as it was made only two days after filing the motion to dismiss and before Taxes had responded.

Additionally, even if the woman did not have the ability to amend as of right, a court should freely grant leave to amend when it is in the interests of justice. As the woman immediately filed her amended motion to dismiss, and Taxes had not responded to the original motion, this will likely qualify as well.

2. The issue is whether the court should grant the woman's motion to dismiss for insufficient service of process if it considers the motion.

The Due Process clause requires that a party be given notice reasonably calculated under the circumstances to give actual notice of the action. Under the Federal Rules of Civil Procedure, notice on an individual can be given through personal service of process or by service on an individual of suitable age at the defendant's place of abode.

Here, the summons and complaint were delivered to the home of the woman's parents in State A. Prior to the summons and complaint being delivered however, the woman "oved out of her parents' home in State A...and moved into an apartment she rented in Plymouth, State B." As a result of moving, the woman no longer had a domicile or usual place of abode at her parents' home, which she had since she had graduated college. Thus, because the woman was not personally served with the summons and the

complaint, nor was the complaint left on a personal of suitable age at the woman's usual place of abode, there was insufficient service of process.

3. The issue is which state's choice-of-law approach should the court follow.

A federal district court sitting in diversity is required to apply the substantive law of the state in which it sits. Substantive law of a state also includes the choice-of-law rules of the forum state. The Due Process Clause allows a state to apply its laws to a cause of action so long as there is sufficient contacts or sufficient aggregation of contacts such that is fair to apply its laws.

Here, Taxes sued the woman in federal district court for State A, properly invoking the court's diversity jurisdiction. As such, the federal district will look to the choice-of-law approach that would be taken under State A law. State A follows the Restatement Second of Conflict of Laws. Additionally, as discussed further below, there is a multitude of contacts that the parties have with State A such that it is fair for State A to apply its own laws, including its choice of law laws, to this case.

4. The issue is what state law should the court apply to determine the enforceability of the non-compete covenant.

Under the Second Restatement approach, the court would be guided primarily by the seven policy factors in determining which state's law to apply. The court will look to the interests of the party and the center of gravity of their relationship, it will also look to policy considerations of certainty, uniformity, predictability, and seek to protect the expectations of the parties. Additionally, under the Second Restatement of Conflicts of laws, special rules will apply depending on the cause of action (e.g. contract or tort). Where the parties contracted, where the contract was executed, and where the contract was to be performed are all considered. Ultimately though, the Second Restatement approach will typically honor the choice of law if it is invoked in the contract itself.

In order for a court to honor the choice of law provision in a contract, the contract must be valid, it must be applicable to the contract, and it must not offend the public policy or other laws of the forum state or another state interest in the contract. Here, the choice of law provision stated it was "governed by State A law." The contract appears to be valid (not subject to defenses of fraud or duress), it is applicable to claim, and lastly State A has upheld non-compete covenants identical to the covenant at issue, so it does not offend the public policy of State A. The strongest argument that the woman could make is that she now resides in State B and the contract will be enforced against her in State B, which has a public policy against such non-competes. However, because additionally, the parties executed the contract in State A, and the contract was to be performed in State A (an employment contract), so generally under a contract approach the Second Restatement would further emphasize that State A law applies. The parties to the

transaction both were originally centered in State A (as that is where taxes were incorporated and the woman lived there).

Thus, based first on the choice of law provision likely being enforceable, and additionally the significant-relationship of the parties primarily being in State A and that too being where the contract is largely centered, it is likely that the choice of law approach to be applied will be State A's and will result in it being enforceable.

ANSWER TO MEE 6

1. The Court should consider the woman's motion to dismiss for insufficient service of process.

The Court should consider the woman's motion to dismiss for insufficient service of process. The issue is whether the woman waived her right to raise a motion to dismiss for insufficient service of process.

Under the Federal Rules of Civil Procedure (FRCP), a defendant must raise Rule 12(b) defenses in her first motion or answer in response to Plaintiff's complaint, if the defense is based on lack of personal jurisdiction, improper venue, insufficient process, or insufficient service of process. If the defendant fails to raise one of these four defenses in her first motion, she has waived them. However, a defendant also has the right to amend her initial motion or answer within 21 days of serving her initial motion or answer, without Court approval. A proper amendment in which the defense is properly included does not constitute a waiver.

Here, the woman's first motion in response to Taxes' complaint did not raise a Rule 12(b) claim to dismiss based on insufficient service of process. Thus, the woman would have waived her right to dismiss on insufficient service grounds. However, the woman properly and timely amended her motion to dismiss within two days after filing her first motion, including her defense to dismiss on insufficient service grounds. Therefore, the woman did not waive her right to raise a Rule 12(b)(4) defense for insufficient service of process, and the Court should consider her motion.

2. The Court should grant the woman's motion to dismiss for insufficient service of process.

The Court should grant the woman's motion to dismiss for insufficient service of process. The issue is whether the woman's parents' home in State A can be considered her usual abode.

Under the FRCP, process may be properly served on an individual: 1) personally, 2) through substituted process, 3) through the individual's agent, or 4) through any state permitted method under state law, provided it is reasonably calculated to give notice under the Due Process clause. Substituted process involves serving process on someone other than the defendant at her usual place of abode, with someone of suitable age and discretion. The Courts will look to physical presence and intent to remain in determining the usual abode (domicile).

Here, Taxes served process (summons and complaint) to the home of the woman's parents in State A, where she had been living since her college graduation and where she had listed as her home address when working for Taxes. Thus, Taxes did not serve the woman personally or through any agent of the woman. Moreover, State A, does not provide any additional methods of process beyond the FRCP. However, Taxes left process with the woman's father, who is of suitable age and discretion. Nothing in the facts suggest otherwise. However, the woman had moved out of her parent's home in State A and rented an apartment in State B. Although the woman merely rented an apartment, as opposed to buy buying a home, she did open a new tax preparation business in State B. Therefore, the Court will likely find that her domicile had changed to State B, that her usual abode was her apartment in State B, and that Taxes' service of process on her parents' home in State A was insufficient. Hence, the Court should grant the motion to dismiss.

3. In ruling on the woman's motion to dismiss for failure to state a claim, the Court should apply State A's choice-of-law approach.

In ruling on the woman's motion to dismiss for failure to state a claim, the Court should apply State A's choice-of-law approach. The issue is which choice-of-law approach a federal court adopts in a diversity action.

In a diversity action, the federal court will apply the choice-of-law approach of the forum in which the court sits. Since the forum court is a State A federal district court, the Court will apply State A's choice-of-law approach, which is the "most significant relationship" approach under the Second Restatement. (Moreover, since the motion to dismiss is an arguably procedural issue under the FRCP, and the State A court has a high interest in applying its own laws with respect to issues of procedure, the Court will likely choose State A's law in ruling on the motion to dismiss.)

4. The Court should apply State A law to determine the enforceability of the non-compete covenant.

The Court should apply State A law to determine the enforceability of the non-compete covenant. The issue is which state, State A or State B, has the most significant relationship with respect to the enforceability of the non-compete covenant.

As stated above, the Court will apply State A's choice-of-law approach, the most significant relationship approach. Under the most significant relationship approach, the Court will look to relevant contacts and controlling principles to determine which state has the most significant relationship with the present action. Under contract law, relevant contacts include: the place of negotiating, contracting, and performing; the parties' domiciles or where they are subject to personal jurisdiction; and the subject matter of the contract. Moreover, relevant controlling principles include the relevant states' interests and policies underlying their laws; certainty, uniformity, and predictability of result; protection of justified expectations; and ease of applying the chosen law.

In a contract case, however, prior to engaging in the most significant relationship approach, the Court will first look to whether the parties have a valid and enforceable choice-of-law provision. If the matter that the parties contracted to is a matter that is given full freedom of contract, then the Court will enforce the choice-of-law provision. If, however, the matter that the parties contracted to is not an area in which parties are given full freedom of contract, the Court will still enforce the choice-of-law provision, provided that the chosen law belongs to a state has relevant contacts with the parties or the chosen law does not violate the forum's fundamental public policy.

In this case, a non-compete provision is not a matter in which parties have full freedom of contract. As evidenced by the conflicting State A and State B laws, covenants not to compete must fall within reasonable terms of geographic scope and duration. Thus, the Court will only enforce the non-compete provision between the woman and Taxes if State A has a relevant interest and State A's law does not violate public policy of State B. Here, State A clearly has a relevant interest: Taxes is incorporated in State A, its corporate headquarters is in State A, and Taxes operates three of its offices in State A. Moreover, the woman used to work in State A, and formerly lived in State A. Lastly, State A was the place of negotiating, contracting, and performing between the woman and Taxes. However, State B has a statute that provides that choice-of-law clauses in employment contracts are unenforceable. Thus, to enforce State A law would violate State B's public policy. Thus, the woman and Taxes' choice-of-law provision as stated in the contract does not apply.

Hence, the Court should turn to the relevant contacts. As stated above, many of the relevant contacts are located in State A. However, the woman has established domicile in State B. Moreover, the subject matter of the contract, the covenant not to compete, was violated in State B, by the opening of the woman's tax preparation practice. Since both State A and State B have relevant contacts, the Court will turn to controlling principles.

In upholding non-compete covenants, State A seeks to protect its businesses and citizens from unfair competition, and protect the freedom to contract with respect to employment. Since Taxes is a State A corporation, State A likely seeks to protect Taxes from unfair competition, as part of its underlying policy in its non-compete law. However, State B,

in holding that non-compete covenants exceeding 18 months in duration are unreasonable and unenforceable as a matter of law, seeks to promote fair competition across various states as well as provide its citizens with free markets. Since the woman is now domiciled in State B, State B likely wants to promote free competition to citizens such as the woman. Therefore, both State A and State B have valid interests in their underlying policies, and a true conflict is present.

When there is a conflict, the most significant relationship will usually use a presumption in favor of the Vested Rights Approach, which in contract law, is the place of contracting or performance. State B, similarly, follows the *lex loci contractus*, i.e. place of contracting law. Therefore, since the contract took place in State A, and there are more relevant contacts in State A, the Court will likely apply State A law in determining the enforceability of the non-compete covenant. Thus, the Court will likely uphold the covenant not to compete.

ANSWER TO MPT 1

ROBINSON & HOUSE LLC

OFFICE MEMORANDUM

TO: Jean Robinson
FROM: Examinee
DATE: July 25, 2017
RE: *Peek et al. v. Doris Stern and Allied Behavioral Health Services*; Argument Section

You asked me to prepare the argument section of our brief in support of our position that Doris Stern and Allied Behavioral Health Services are acting under color of state law and are subject to suit under 42 U.S.C. § 1983. Please find it below.

Body of the Argument

Probationer Rita Peek has waited more than 13 months to receive the mental health counseling mandated by the Union County District Court as a condition of her probation. As a result of this denial, Ms. Peek is at risk of having her probation period extended, or her suspended jail term reinstated. This injustice is the result of Allied Behavioral Health Services' ("Allied") plan of services, which disproportionately denies probation services to female probationers: 90% of female probationers in Union County do not begin counseling during their probation term, while 75% of male probationers receive and complete counseling within their probation term. This discriminatory plan violates the

due process clause of the United States Constitution and the Civil Rights Act. 42 USC § 1983 creates "a cause of action against persons acting under color of state law who have violated rights guaranteed by the United States Constitution." *Buckley v. City of Redding*.

Allied will claim that because it is a nonprofit, it is a private actor not subject to the protections of the Constitution. It is true that the Constitution applies only to state actors and not private entities; however, private actors are subject to suit for constitutional violations "when it is fair to say that the state is responsible for the offending conduct." *Lake v. Mega Lottery Group*. To demonstrate that a private actor is a state actor for purposes of a § 1983 civil rights claim, Franklin courts consider many factors to determine the key question of whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*. Two tests are relevant to Ms. Peek's claims: first, "state action exists where the private actor was engaged in a public function delegated by the state," and second, "a private actor engages in state action when the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state." *Mega Lottery*. Under either test, the claimant must also demonstrate that there is such a "close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself." *Brentwood*.

I. Allied Behavioral Health Services provides probation services, a traditionally exclusive public function, and thus engages in state action, subjecting it to 42 USC § 1983.

Imprisonment and, by association, probation, has traditionally been an exclusive "public or sovereign function," meaning that Allied is "not free from constitutional limits when performing that function." *Mega Lottery*. Franklin courts have narrowly construed what constitutes a "public function," requiring "that the action be one that is exclusively within the state's powers." *Mega Lottery*. Public functions constituting state action include "operating a local primary election, operating a post office, and providing for public safety through fire protection and animal control," but not the operation of hospitals, privately owned public utilities, schools, foster care services, or a lottery, as these are "not traditionally the *exclusive* prerogative of the state." *Mega Lottery*. No one except the state has the authority to arrest, sentence, and thus make someone a probationer, therefore the provision of required probationary services is a public function. James Simmons, director of the Probation Services Unit at Allied, said himself that "[p]robationers have to comply with conditions of probation, they must meet with [Allied] in person each month, they cannot leave the state, and so on."

Two cases align closely with the facts here, demonstrating that Allied is providing an exclusive public function. First, in *West v. Atkins*, a court held that because "[t]he state is required to provide medical care to those it imprisons," "a privately employed doctor was a state actor when he was employed to provide medical care to inmates in a state prison."

Similarly, under § 35-211(b)(2)(iv) of the Franklin Criminal Code, a private entity may provide probation services for a Franklin county only so long as it provides "drug and alcohol counseling, anger management counseling, vocational and mental health counseling, and referral to educational programs." Although Allied is a private actor, it became a state actor when it agreed to be the exclusive provider of counseling services for those on probation for misdemeanors in Union County. Second, in *Camp v. Airport Festival*, a private nonprofit was found to be a state actor when it "accepted the authority to instruct the police regarding arrests" because "[o]nly the state has the power to deprive persons of their freedom by arresting them." Similarly, only Franklin courts have the authority to put someone on probation. Under § 35-210 of the Franklin Criminal Code, a court "may suspend [a] jail sentence and place the person on probation," as well as "determine the conditions of probation." Probation is a deprivation of liberty that, like imprisonment or arrest, only the state has the power to enforce. Mr. Simmons agreed that he believes that only the State of Franklin has the power to sentence someone to probation, set the conditions of probation, revoke probation, or send someone to jail. Mr. Simmons also agreed in his deposition that the sentencing court determines the counseling services provided by Allied to probationers, and stated that "[w]e carry out whatever the judge orders." Allied is exercising no authority or decision-making independently of the requirements set forth by the Union County court. Moreover, Franklin has been placing criminals on probations for hundreds of years, and only decided in 2013 to contract with private entities for probation services. Thus, Allied is occupying a traditionally exclusive public function.

Allied may argue that other private entities provide similar services, thus its counseling services for probationers cannot be considered a public function. In *Mega Lottery*, the court considered whether a lottery was a traditional public function. The State of Franklin created a state-operated lottery in 1985, and contracted with a private entity to operate it in 2005. The court held that "[o]perating a lottery is not a traditional function of state government," not least because "[m]any private entities operate similar activities through racetracks, casinos, sweepstakes, and other activities." Allied will point to the fact that it has provided counseling services since 1975, and that other private entities-- such as individual therapists, doctors' office, and the nonprofits—also provide counseling for clients who may be probationers. This, however, misses the point: no other private entities operate the mandated counseling for probationers. Under Ms. Peek's sentencing order, she is required to "report to Allied Behavioral Health Services . . . for those services ordered by this Court," "[m]eet monthly with a counselor assigned by Allied . . . to review compliance with this Order," "[b]e evaluated for and undergo mental health counseling by Allied," and "[p]ay to Allied . . . a fee of \$50 a month." Ms. Peek has no choice in the matter; she cannot seek "similar activities" from other private actors. The state has ordered her to engage with Allied, making Allied a public actor subject to the requirements of the United States Constitution.

II. The State of Franklin extensively regulates and approves the funding and actions of Allied Behavioral Health Services, making Allied an agent of the state, thereby also subjecting it to 42 USC § 1983.

Even were Allied to be found not to be an exclusive public function, "a state normally can be held responsible for a private decision . . . when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." *Rendell-Baker v. Kohn*.

In *Mega Lottery*, the court rejected that extensive regulation alone makes a private entity an "agent of the state." This is because the Supreme Court held in *Rendell-Baker* that government regulation of education "did not regulate, encourage, or compel the private board of trustees to fire . . . employees." *Mega Lottery* explained that a complainant must demonstrate that the State of Franklin "required, recommended, or even knew about" the problematic behavior. Two cases illustrate the type of behavior rising to the level of "pervasive entanglement." In *Brentwood*, the Supreme Court held that an athletic association was a state actor due to its pervasive entanglement with the state: the association's board of directors was primarily public school representatives, the board operated the state's public high school sports program, and the State Department of Education adopted the association's rules as the official rules for public school sports programs. Similarly, in *Camp*, the city allows the nonprofit to use public grounds for free, city personnel extensively worked on the planning of the event on city time and at city expense, the city promoted the event, and the city's airport personnel controlled access to airplanes during the event.

Here, the state of Franklin is heavily entwined with the activities of Allied. According to Mr. Simmons, two of its board members are public officials (a county judge and the county director of public health services), Allied must carry out court orders, and must follow the minimum qualifications for employees of entities like Allied. Additionally, under Franklin Criminal Code §35-211, Allied must receive approval from the County Probation Officer, a public county employee, of its annual plan of services, quarterly reports, and annual report. Allied receives one hundred percent of its funding for the probation program from the county and the probationers. Allied will argue that because only two of its eleven board members are public officials and the board requires a majority to act, there is no pervasive entanglement. Further, Allied will note that its board of directors is the one with the authority determines policies, approves contracts, and sets policies, including personnel policies. However, Mr. Simmons admitted that Allied must follow the minimum employment requirements of Franklin Criminal Code § 35-211(3), which requires that "each individual providing such [probation] services possess at least a bachelor's degree in the relevant professional field or its equivalent as determined by the County Probation Officer." Additionally, Allied will point to the fact that it does not deal with the county on a day to day basis. However, under the Franklin Criminal Code, the county will already have determined how Allied's daily business is conducted because

Allied's plan of services is required to include "(i) oversight of those on probation; (ii) monthly meetings with those on probation unless otherwise ordered; (iii) drug and alcohol testing; and (iv)" the counseling services mentioned above. There is not a lot of leeway in those county-imposed requirements. Moreover, Mr. Simmons confirmed in his deposition that each calendar quarter, the County Probation Officer has received, reviewed, and approved Allied's quarterly reports, required by the Franklin Criminal Code. Where state approval is required, pervasive entanglement occurs.

Allied will cite *Mega Lottery* for the proposition that Franklin state contracts with private entities "do not constitute the sort of pervasive entanglement necessary to constitute state action." It is true that Allied was retained by Union County pursuant to § 35-211(b) of the Franklin Criminal Code, which allows counties to "elect to provide probation services for those convicted of misdemeanors by contracting with a private entity." However, unlike the contracts discussed in *Mega Lottery*, where the private contractor was left alone to execute the contract, Union County is heavily involved in the governance and day-to-day operations of Allied's probationary services. The Criminal Code sets forth five detailed requirements for private entities like Allied that it cannot disobey. Thus, Allied's argument should fail and pervasive entanglement should be found.

III. The State of Franklin approves Allied Behavioral Health Services' counseling waiting list, creating a nexus between the state of Franklin and the discriminatory conduct.

Finally, whether Allied is found to be occupying an exclusive public function or pervasively entangled with the state, a nexus also exists between the state action and the discriminatory conduct. In *Mega Lottery*, the court required the complainant to show that "the offending conduct . . . was somehow connected to the state's influence over Mega." Where the state and the private actor "have acted in concert to engage in denial of a party's civil rights," this required nexus will exist.

Here, the offending conduct is the disproportionate and discriminatory provision of mental health counseling services to female probationers in Union County. Each calendar quarter, Allied submits its counseling waiting list to the County Probation Officer. During the last three quarters, the County Probation Officer has reviewed and approved reports showing that 90% of female probationers never start their mandated counseling, while 75% of male probationers receive and complete their mandated counseling. Mr. Simmons confirmed in his deposition that the County Probation Officer has received, reviewed, and approved these reports. Thus, each quarter, Allied involves Union County in its discrimination against women.

We respectfully request that relief be granted for the constitutional violations of Allied against Ms. Peek and the other class members.

ANSWER TO MPT 1

Peek et al. v. Doris Stern and Allied Behavioral Health Services

Statement of the Case [omitted]

Statement of Facts [omitted]

Argument

I. Allied Behavioral Health Services and its executive director, Doris Stern, are unquestionably acting under color of state law in providing probation services to Union County probationers convicted of misdemeanors.

Because Allied Behavioral Health Services ("Allied") and its executive director, Doris Stern, are acting under color of state law in providing probation services to Union County probationers convicted of misdemeanors, they are state actors and thus subject to 42 U.S.C. § 1983. Section 1983 provides a cause of action against persons acting under color of state law who have violated rights protected under the United States Constitution [*Lake v. Mega Lottery Group*, (15th Cir. 2009)]. Constitutional provisions are implicated only by state actors, not private actors; however, in some instances, a court will find a private actor is not free from suit where the private actor was a state actor [*Lake*]. No one factor is dispositive in determining whether a private actor is a state actor, and the court must consider a range of circumstances when characterizing a private actor as such [*Lake*]. However, each factual situation must be assessed in light of the critical question of whether "the State is responsible for the specific conduct of which the plaintiff complains." [*Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001)].

There are two relevant tests, and a further requirement applicable under both tests, that are pertinent to the court's analysis in this case. First, the court will find state action exists where the private actor was engaged in a public function delegated by the state [*Lake*]. Second, a private actor engages in state action when the state exercises its coercive or influential power over the private actor, or when there are pervasive entanglements between the private actor and the state [*Id.*]. Finally, and required under both tests, there must be such a "close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself [*Brentwood*].

Allied is engaged in a public function delegated by the state, the state exercises significant influential power over Allied and there are pervasive entanglements between the state and Allied. Finally, there is a close nexus between the state and Allied's conduct here--that is, failing to provide counseling services to Rita Peek and other women probationers--such that this court should find Allied to be a state actor.

A. Allied is engaged in a public function by providing probation services to Union County probationers.

Allied is engaged in a public function by providing counseling-related services to probationers in Union County. A private actor will not be free from the limits imposed by the Constitution where it engages in a function that has been a traditionally public or sovereign function [*Lake*]. Offering probation services; specifically, counseling services to probationers is such a function.

Examples of activities courts have found to be public functions constituting state action include operating a local primary election, operating a post office, and providing for public safety [*Lake*]. Further, in *West v. Atkins*, 487 U.S. 42 (1988), a privately employed doctor was found to be a state actor when employed to provide medical care to inmates in a state prison. There, the state was required to provide medical care to its inmates, and when the doctor was employed to provide that care, he became a state actor [*West*]. Additionally, in *Camp v. Airport Festival* (15th Cir. 2001), organizers of a private festival run by a private nonprofit entity were found to be state actors when they accepted the authority to instruct the police regarding arrests. Ultimately, the critical question is whether the function is one traditionally within the "exclusive prerogative" of the state [*Lake*]. If the state only sometimes performs a certain function, it likely will not be found to constitute a public function [*Id.*].

Here, it is clear that Allied is engaging in a traditionally public or sovereign function, by offering probation services to Union probationers. First, under to the Franklin Criminal Code ("FCC"), the state--via the courts and the County Probation Officer--has the exclusive authority to impose a jail sentence, to suspend the jail sentence and place the person on probation, and to set the terms of probation [FCC § 35-210, 211]. More specifically, under §35-211 of the Code, each county is required to appoint a County Probation Officer ("CPO") who is an employee of the county (that is, a state actor), and is required to provide probation services as required by the Criminal Code, either directly or through other entities as provided by law. In short, only the State of Franklin has the power to sentence someone to probation, set conditions of probation, revoke probation, and send someone to jail. Criminal law is an area traditionally within the states' police powers. This power is exclusive, and is undoubtedly a traditionally public or sovereign function. Unlike operating a lottery, which is quite clearly *not* a public function and found not to be one in *Lake*, exercising police powers including the power to incarcerate criminals convicted in state courts is undoubtedly a traditional public function. Setting terms of probation and providing probation services are well within that authority. Although the State may contract with other entities to provide such services, that does not mean the function of providing probation services is not a public one. Traditionally, imposing sentences and setting the terms of probation have been exclusively within the state's powers, even if now, the state of Franklin contracts with other entities to provide certain aspects of those services. For example, the state might contract with a private

entity to provide the facilities for and otherwise run a local primary election. Although the state is fulfilling its public function with the help of a private entity, that does not make running a local primary election no longer a public function. Similarly, here, like the doctor in *West*, Allied and its employees are providing a service which is required under the Franklin Criminal Code. Just as the state there was required to provide medical services to its inmate, here too, the state is required to set the conditions for probation and provide probation services [§ 3-211 Probation Services]. For these reasons, it is clear that Allied is engaging in a traditionally public or sovereign function by providing probation services--here, counseling services--to Union probationers.

B. Allied is properly understood to be a state actor because the state coerces or influences Allied to act, and there are pervasive entanglements between Allied and the State of Franklin.

The evidence in this case clearly shows that Allied is coerced or influenced by the state to act, and that there are pervasive entanglements between Allied and the State of Franklin. Under this second test, the state's exercise of coercive power or influence must be such that the private choice can be said to be that of the state [*Lake*]. In determining whether this is the case, the court may consider whether the state required, recommended, or even knew about the conduct in question [*See id.*]. As the U.S. Supreme Court stated in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." In *Rendell-Baker*, the plaintiffs argued that the state's extensive regulation of education made a private school a state actor. However, the Court rejected the argument because the state had not regulated, encouraged, or compelled the private board of trustees of the school to fire the employee in question [*Rendell-Baker*].

Unlike in *Lake*, where the plaintiff failed to show any evidence that the State of Franklin required, recommended, or even knew about the hiring and firing of employees at a privately-owned and run lottery, here, there is ample evidence that the State actively requires, recommends, and if nothing else, knows about the conduct engaged in by Allied with respect to the offering of counseling services to men and women probationers. In his deposition dated June 26, 2017, James Simmons, the director of Allied's Probation Services Unit, made several statements to support this contention, which are further bolstered by the requirements set out in the FCC. In particular, Simmons stated that Allied must set out an annual plan for providing probation services and have it approved by the CPO. Further, as a part of the quarterly report which Allied is required to provide the CPO, the waiting list for counseling services is included. This would include the fact that Ms. Peek has been waiting on a list for counseling services, which are part of her probation conditions, still 13 months after she was sentenced to probation. Not only does the CPO review these reports and thus has direct knowledge of the facts regarding the waiting list and the fact that less women are being provided counseling services than

men, but the CPO must actually *approve* these quarterly reports. In some of those reports, there are statistics indicating that 90% of female probationers served by Allied do not even start, let alone complete, counseling within the probation term. Further, there are numbers in those reports to show that 70% of female probationers are given an extension of their probation term in order to complete counseling. In contrast, 75% of male probationers receive and complete counseling within the period of their probation. These striking statistics regarding Allied's conduct in providing for probation services are reported directly to the CPO, a state actor, each quarter and that the CPO approved the reports that had this troubling numbers. Thus, even if the CPO did not recommend or require that Allied prefer men over women with respect to their offering of counseling services, the CPO was aware of the conduct and thus influences Allied's actions.

Further, in his deposition, Mr. Simmons made several more statements regarding the extent to which Allied is influenced or coerced by the State of Franklin in the provision of its probation services. In particular, Mr. Simmons noted that all details with respect to the services provided to probationers are set by the sentencing court. The judge is the one who determines the conditions of the probation, and Allied carries out precisely what the judge orders. This includes court-ordered mental health counseling, like the counseling the court ordered for Ms. Peek, which she has yet to receive over a year later. Because the CPO personally, and directly reviews the annual and quarterly reports from Allied, which include facts about to whom Allied is providing its probationary services, and Allied is directly coerced or influenced by the court itself in the terms and conditions it sets for the probationers to whom Allied provides its services, it is clear that the first prong of this second test has been met.

However, even if the court were to find that Allied is neither coerced nor influenced by the State in its conduct with respect to providing probationary services, it should find that there are pervasive entanglements between Allied and the State of Franklin. In *Brentwood*, the U.S. Supreme Court held the "nominally private character" of an entity could not overcome pervasive entanglement with public institutions. In *Lake*, the plaintiff argued the state was sufficiently entangled with a privately run lottery because of the state's extensive regulation of the lottery. However, there, the court found that the relationship there was primarily one of contract, nothing more. The court noted that the State of Franklin contracts with private entities to, among other things, build its buildings and deliver food to its prisoners.

Stern and Allied will likely argue that their relationship with the State cannot be properly understood to be anything more than a contract, like the state contracting for the delivery of food to its inmates. However, this argument should fail. The State here does more than just regulate Allied with respect to its provision of probationary services. Rather, the state is so involved with the services through its rules and regulations related to the services, and its oversight in the form of the CPO who must approve reports from Allied as mentioned above. It is true that unlike the board of directors in *Brentwood*, which was

primarily made up of representatives of public schools (i.e., state actors), here, the board of directors of Allied consists of only two public officials, out of eleven board members. However, this fact does not change the outcome here. Despite not having a majority control over Allied's board, the state is still sufficiently entangled with Allied's provision of probationary services. This case is more like *Camp*, where although the festival was organized by a nonprofit entity, the city's personnel were so extensively involved through its tourism bureau, among other facts, such that the festival was sufficiently entangled with the state so that there was state action. Again, the CPO provides significant oversight responsibilities to Allied, which are mandated specifically by the FCC. Further, as Mr. Simmons indicated in his deposition, if a probationer were to violate a condition of probation, Allied would report the violation to the court. Unlike a hands-off regulatory approach as in *Lake* involving the regulated lottery, here, there are state employees directly engaged with Allied and ensuring in every step along the way that it meets its obligations under the Criminal Code. For these reasons, this Court should find that there are pervasive entanglements between the State of Franklin and Allied.

C. After applying both tests, this Court should find that there is a nexus, i.e., a connection, between the State of Franklin and the challenged action in this case--that is, the provision of mental health counseling services to men and women probationers.

The evidence in this case shows a clear nexus between the State and the challenged action at issue. In *Lake*, the court found the plaintiff failed to show such a nexus where the evidence implicated that the private lottery had fired her like any other private corporation would fire an employee. In that case, there was no evidence that the state played a role in the particular discharge of the plaintiff. Thus, there was no sufficient nexus. Unlike *Lake*, here, there is clear evidence that the State of Franklin (via the CPO) and Allied have acted in concert to engage in denial of a party's civil rights. Unlike a mere contract, here CPO played a direct oversight role over Allied's conduct with respect to its provision of probationary services. As discussed earlier, the CPO reviews and *approves* each year and each quarter, reports that include statistics specifically pertaining to waiting lists and the provision of services to men versus women. As indicated in Mr. Simmon's deposition, Ms. Peek was on such a waiting list for mental health counseling services, which were a condition of her probation imposed by the court, and that waiting list was directly reviewed and approved by the CPO (a state actor). Therefore, as to this specific conduct--that is, the denial of mental house counseling services to women like Ms. Peek--there was a direct nexus between the State (through the CPO) and Allied.

Conclusion

For the foregoing reasons, this Court should find that Allied is a state actor and thus subject to 42 U.S.C. § 1983. Allied is engaged in activities traditionally within the exclusive control of the state, the state influences or coerces Allied in its providing probation services, there are pervasive entanglements between the State of Franklin and

Allied, and there is a clear nexus between the challenged conduct in this case and the State.

ANSWER TO MPT 2

To: Carl Burns
From: Applicant
Re: Complaints about Zimmer Farm

You have asked me to investigate whether the bird rescue operation and festivals on the Zimmer's farm are permitted under the county ordinance and whether the Franklin Right to Farm Act (FRFA) affects the county's ability to enforce its zoning regulations with respect to the Zimmer's activities.

Is the Zimmer's bird rescue operation permitted under the county zoning ordinance•

No, the Zimmer's bird rescue operation is not permitted under the county zoning ordinance. The Zimmer's property is zoned in Agricultural A-1 in Hartford County. The Hartford County Zoning Code Title 15 § 22(a) states that within an A-1 district, "any agricultural use" is permitted, which is defined as "any activities conducted for the purpose of producing an income or livelihood from one or more of the following agricultural products" including livestock or poultry. (County Zoning Code § 22(b)). Furthermore, any "incidental processing, packaging, storage, transportation, distribution, sale or agricultural accessory use intended to add value to agricultural products produced on the premises or to ready such products for market" is permitted. (§22(a)). Agricultural accessory use is defined in the Hartford Code to include a seasonal farm stand or special events. (§22(b)(3)).

In this case, the bird rescue operation would not fall under the definition of either "any agricultural use" or "agricultural accessory use" that is permitted under the Hartford Zoning Code. Traditionally, when interpreting statutes or in this case a zoning regulation, the courts will give words their natural and ordinary meaning and if the statutory language is clear and unambiguous, the court must apply the statute's plain language and not "venture beyond the text to add words not there." (*Kosher v. Presley's Fruit* (2010)).

In this case, the zoning ordinance is clear upon plain reading of the natural and ordinary meaning of the words. The permitted "agricultural uses" in the Zoning Code include activities to produce and income or livelihood from crops, livestock, beehives, poultry, or nursery plants, sod, or Christmas trees. A plain reading of the permitted uses would not permit the activity of rescuing injured birds as a permitted agricultural use. Furthermore, the activity of conducting a bird rescue operation is clearly not a "seasonal farm stand" or

a "special event...related to the sale or marketing of one or more agricultural products produced on the premises," the permitted agricultural accessory uses under Zoning Code § 22(b)(3).

Rather, the bird rescue operation is simply a hobby that Edward Zimmer engages in. His goal is to care for the birds, and he does not sell the birds, does not make a profit or livelihood from the bird operation, and he does not intend to do so. This is not an agricultural operation, but rather a fulfillment of Edward's passion for caring for injured birds. While the Zimmers might argue that the bird operation would fall under an "agricultural use" and they might argue that bird rescue could fall under the permitted use of selling "poultry" because some birds are listed there, the fact remains that this is not an operation to sell birds, but rather an operation to cure them. The essential component of an agricultural use under the zoning law, --"for the purpose of producing an income or livelihood" is lacking. Additionally, the Zimmers are would be hard pressed to argue that rescuing injured birds is akin to operating a farm stand or that rescuing the birds is in and of itself a special event (not considering the festivals).

Because the bird operation is neither an agricultural use nor an agricultural accessory use because the birds are rescued as part of Edward's hobby and passion rather than a sale of the birds for a livelihood (and even if the birds were sold, they arguably would not be considered poultry pursuant to the zoning ordinance), the bird rescue operation is not permitted under the zoning ordinance.

Are the Zimmer's festivals permitted under the county zoning ordinance•

The number of festivals that the Zimmers are holding is currently in violation of the county zoning ordinance, but the festivals themselves are likely within the bounds of permitted activity pursuant to the zoning ordinance as they are directly related to the sale of apples and strawberries. Pursuant to section 22 of the County Ordinance, a permitted "agricultural accessory use" is a special event provided that there are three or fewer per year and those special events are directly related to the sale and marketing of one or more of the agricultural products produced on the premises.

In this case, the Zimmers are engaging in permitted agricultural activity of growing apples and strawberries for sale. The Zimmers have held four weekend festivals in 2016 at which they have sold their apples or strawberries, taking advantage of "agrotourism," which uses entertainment and public educational activities to market and sell agricultural products. The zoning ordinance requires only that the special events are "directly related to the sale or marketing of one or more agricultural products produced on the premises." The ordinance does not make mention of whether additional purposes for having a festival (such as promoting bird rescue) are forbidden.

The Zimmers will likely successfully argue that the festivals held at their farm are in fact directly related to the sale and marketing of their apples and strawberries. The Zimmers can argue that they have been holding an apple festival since 1988, and have simply expanded the scope and frequency of their festivals to the current situation. While the festival is entitled "Fall Bird Festival" and raised money for the bird operation through the sale of bird related souvenirs and donations, the Zimmers also sell apples or strawberries at the festivals, the flyer advertises buying apples and discovering recipes for baking with fruit, and the activities at the festival include a local chef offering two hour sessions on cooking and baking with fruit, with Edward only speaking about birds for one hour on each day of the festival.

However, the Zimmers are currently in violation of the County Ordinance because of the frequency of their festivals. Pursuant to the Ordinance, "special events" such as festivals must occur three or fewer times per year. The fact that the Zimmers have held four festivals in 2016 and are planning more puts them in violation of the statute. Arguably, the county board could attempt to establish that these festivals are not directly related to the sale of the fruit from the Zimmer's farm, and this is simply a pretext for raising money for the bird rescue operation. This argument would be supported by the name of the festival, the sale of bird souvenirs, and the donations to support birds. However, because the ordinance states only that the special events must be directly related to the agricultural activities of the farm, and the Zimmers have a longstanding tradition of apple festivals, include "buy apples" on their flyers, and sell apples and strawberries along with cooking lessons at the festivals, this argument will likely fail due to a plain reading of the ordinance.

While the Zimmers violated the ordinance with the number of festivals in 2016, the festivals themselves are likely permissible under the zoning ordinance.

How does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and festivals•

If the zoning ordinance did prohibit the festivals as it does the bird rescue operation, the FRFA must also be considered. The FRFA will likely preempt the county's attempt to regulate the festivals because they are a protected farm activity or operation that was in existence before the developments next door existed, but will likely not affect the county's ability to regulate the bird rescue because there is no conflict between the county ordinance and the FRFA. The FRFA dictates that a farm or farm operation "shall not be found to be a public or private nuisance...if the farm or farm operation existed before a change in the land use or occupancy of land that borders the farmland, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance. (FRFA). Additionally, a farm or farm operation protected under FRFA should not be found a public or private nuisance as a result of a change in ownership, temporary interruption or cessation of farming, enrollment in a government program, or adoption of

new technology. Id. The FRFA defines "farm" as land, plants, animals, buildings, structures, machinery, equipment, or other appurtenance used in the commercial operation of farm products and "farm operation" as the operation and management of a farm or activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products. (FRFA).

The legislative history for the FRFA suggests that the statute was enacted to implement the state's policy to conserve, protect, and encourage the development and improvement of agricultural land for the commercial production of food and other agricultural products by limiting the circumstances under which a farming operation is a nuisance. (Report from Franklin Senate Committee). The legislation is "intended to protect those who farm for a living" by ensuring that one who "comes to a nuisance" by moving in next to an existing farming operation is not able to succeed in a nuisance action against a farmer. The Zimmers have already asserted that the bird rescue operation and the festivals are immune from a nuisance suit under FRFA. On the other hand, the residents of Country Manors and Orchard Estates, two adjoining subdivisions to the Zimmer farm are upset by the effects of the bird rescue operation including noise and smells and the festivals including crowded streets, festival guests littering on their properties, and loud noises and want the Zimmer's activities relating to the bird rescue and the festivals stopped.

First, it must be considered whether the FRFA will preempt the county zoning ordinance. State law can preempt a municipal ordinance either when a statute completely occupies the field that the ordinance attempts to regulate or when an ordinance conflicts with a state statute and undermines its purpose. (*Shelby v. Beck* (2005)). In *Shelby*, the court found that Section 4 of FRFA provides that a local ordinance is preempted when it conflicts with FRFA. The *Shelby* court analyzed whether there was a conflict between the definition of "farm" in FRFA and a size requirement for farms in a local ordinance. The court found that there was a direct conflict, and thus FRFA preempts the local ordinance. In this case regarding the bird rescue, unlike the where a conflict existed in *Shelby*, the definition of "farm" or "farm operation" in FRFA does not conflict with the definitions of agricultural use or agricultural accessory use in the Zoning Code. The Zimmer's activity or bird rescuing here is not a permitted use under either of the two regulations--neither under the Zoning Code nor under one of the protected "farm or farm operation" provisions of the FRFA. Unlike in *Shelby*, where the court found that the local ordinance was the kind of enforcement action that the FRFA was designed to prevent, here, there is no such conflict that exists. Therefore, with regards to the bird operation, the FRFA does not preempt the local ordinance in terms of the statute itself. However, if the festivals were found to be prohibited under the zoning ordinance, there likely would be a conflict with FRFA. FRFA protects "operation of a farm activity that occurs on a farm in connection with the commercial production of farm products." This could be interpreted to protect a festival that is operated in connection with the sale of apples and strawberries, a farm product. Furthermore, the Ordinance's imposition of the 3 times per year maximum for festivals would likely be found to conflict with the FRFA, which imposes

no limitations on farming operations. Like the conflict that existed in Shelby where there was preempted regulation regarding farm sizes, the ordinance regulation regarding the number of farm related festivals per year would likely be preempted by the FRFA. Therefore, this would likely be a conflict and FRFA would prevail and protect the festivals.

Additionally, the Zimmers may argue that FRFA protects the expanded festival scope and frequency as well as the bird rescue program under the FRFA provision that continues to protect a farm operation when it expands or changes its operation, and that the residents who are complaining "came to the nuisance." In *Wilson v. Monaco farms*, the court found that section 3(b) of FRFA is dispositive regarding the date at which it should be measured whether a nuisance exists--namely the date when the neighboring land changed. The court found that where complaining resident moved in next to an operating dairy farm, he knew he was moving into a dairy farm at that date and that despite the expansion of the dairy operation, it was protected by the act. Similarly, the Zimmer's farm has been operating since 1951 and it has been holding apple festivals since 1988. The court will likely find as in *Monaco farms*, that the neighbors who moved into the adjoining developments in the 1990s were well aware of the farming operations next door, including the annual apple festivals. As in *Monaco farms*, a court will find that the use was preexisting when the neighbors moved in, and that they should have been aware that the farming operations, including the festivals could increase in scope and frequency. Therefore, the festivals will likely be protected under FRFA. However, the bird rescue, even if found to be a "farm operation" or farm activity began after the developments were established, beginning only in 2015 when Edward began his healing operation. Therefore, provision of FRFA for being the type of nuisance that would not have existed before the change in land use.

One additional argument is that both the bird rescue and the festivals are not "farm activities" or operations. Persuasive authority from the Columbia Court of Appeal (2010) in *Koster v. Presley's Fruit* found that manufacturing activity involving wooden pallets used for peach harvesting were not farm activities within the definition of the CRFA because "wood" did not fall under the definition of "farm product" in the relevant statute. The court further argued that if the farm were no longer allowed to produce wooden pallets, the land would remain agricultural and the defendants would be able to purchase wood pallets from elsewhere such that the prohibition would not threaten their livelihood from the farming of the land. The *Koster* court stated that first the ordinary meaning of a statute should be considered in statute interpretation, and if "the statutory language is unclear, the court may refer to the purpose of the legislation and the legislative history of the statute."

In this case, it is clear that bird rescuing does not fall within the plain meaning of the statute under either the definition of "farm" or farm operation" of the FRFA. Like the production of wooden pallets in *Koster*, bird rescue is not integral to farming operations,

do not match the definitions of farm or farm operation under the Act and they are not like any of the farm products defined by the statute. However, the festivals are arguably permitted under the "farm operation" provision of the Act, but even if the plain meaning is unclear, the legislative history would suggest that the festivals are protected. The purpose of the FRFA is to "conserve, protect, and encourage the development and improvement of Franklin's agricultural land for the commercial production of food and other agricultural products, by limiting the circumstances under which a farming operation may be deemed to be a nuisance." (Monaco Farms citing Senate Report 1983). Here, the legislative history does not support protection for bird rescuing. The bird rescue is merely a hobby of Edwards and a product of his veterinary assistant training, it is not involved with the agricultural activities of the farm. In contrast, the festivals that the Zimmers hold which are used to promote the agricultural products of the farm and used to encourage the development of their agricultural business (as indicated by the agritourism industry model) is likely protected by the FRFA.

Because the FRFA likely preempts the regulations regarding festivals and agricultural festivals are the type of activity that FRFA is designed to protect, the FRFA will likely preclude the county's ability to regulate the festivals but not the bird rescue.

Conclusion

The county ordinance prohibits the bird rescue and the number of festivals that the Zimmers are holding. However, the FRFA will likely preempt the county's regulations regarding the festivals, but not the bird rescue.