



July 2015 MEE Questions and Analyses



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National Conference of Bar Examiners

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Preface

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

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

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Civil Procedure question on the July 2015 MEE tested the following areas from the Civil Procedure outline: I.A., B.; III.D. Jurisdiction and venue—Federal subject matter jurisdiction (federal question, diversity, supplemental, and removal), Personal jurisdiction; and Pretrial procedures—Joinder of parties and claims (including class actions).

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

Description of the MEE

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

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

Instructions

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

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

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

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

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

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

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

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

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

July 2015

MEE Questions

Torts

Civil Procedure

Contracts

Corporations

Criminal Law and Procedure

Trusts

TORTS QUESTION

A boy lives in a northern state where three to four feet of snow typically blankets the ground throughout the winter, creating excellent conditions for snowmobiling. The boy is an experienced snowmobiler and a member of a club that maintains local snowmobile trails by clearing them of rocks, stumps, and fallen tree limbs that could cause an accident when buried under the snow. In January, the boy received a snowmobile as a present on his 12th birthday. The following Sunday, the boy took his friend, age 10, out on the boy's new snowmobile, which was capable of speeds up to 60 miles per hour. The friend had never been snowmobiling before.

The boy and his friend went snowmobiling on a designated and marked snowmobile trail that follows the perimeter of a rocky, forested state park near the friend's home. The trail adjoins forested property owned by a private landowner. Neither the boy nor his friend had previously used this trail.

The landowner's property is crossed by a private logging trail that intersects the snowmobile trail. The logging trail is not marked or maintained for snowmobiling, and access to it is blocked by a chain approximately 30 inches above ground level on which a "No Trespassing" sign is displayed. However, on the day in question, both the chain and the sign were covered by snow.

On impulse, the friend, who was driving the snowmobile, turned the snowmobile off the designated snowmobile trail and onto the logging trail. The snowmobile immediately struck the submerged chain and crashed. Both the boy and the friend were thrown from the snowmobile and injured. As a result of the accident, the snowmobile was inoperable.

About an hour after the accident, a woman saw the boy and his friend as she was snowmobiling on the snowmobile trail. After the woman returned to her car, she called 911, reported the accident and its location, and then went home. Emergency personnel did not reach the boy and his friend for two hours after the woman's departure. No one other than the woman passed the accident site before emergency personnel arrived.

As a result of the accident, the boy suffered several broken bones and also suffered injuries from frostbite. These frostbite injuries could have been avoided had the boy been rescued earlier.

The boy has brought a tort action against the friend, the landowner, and the woman.

1. Could a jury properly find the friend liable to the boy for his injuries? Explain.
2. Could a jury properly find the landowner liable to the boy for his injuries? Explain.
3. Could a jury properly find the woman liable to the boy for his injuries? Explain.

CIVIL PROCEDURE QUESTION

A woman attended a corporation's sales presentation in State A. At this presentation, the corporation's salespeople spoke to prospective buyers about purchasing so-called "super solar panels," rooftop solar panels that the corporation's salespeople said were 100 times as efficient as traditional solar panels. The salespeople distributed brochures that purported to show that the solar panels had performed successfully in multiple rigorous tests. The brochures had been prepared by an independent engineer pursuant to a consulting contract with the corporation.

Based on what she was told at this presentation and the brochure she received, the woman decided to purchase solar panels from the corporation for \$20,000. The corporation shipped the panels to the woman from its manufacturing facility in State B. The woman had the panels installed on the roof of her house in State A. The panels failed to work as promised, even though they were properly installed.

A federal statute prohibits "material misstatements or omissions of fact in connection with the sale or purchase of solar panels" and provides an exclusive civil remedy for individuals harmed by such statements. This remedy preempts all state-law claims that would otherwise apply to this purchase.

Relying on this federal statute, the woman has sued the corporation and the independent engineer in the U.S. District Court for the district of State A. She alleges that the statements made by the engineer in the brochure and the statements made by the corporation's salespeople at the presentation were false and misleading with respect to the solar panels' performance and value. She seeks damages of \$30,000 (the cost of the solar panels plus the expense of installing them).

The woman is a State A resident. The corporation is incorporated in State B and has its principal place of business in State B. The engineer, who has never been in State A, is a State B resident with his principal place of business in State B. He prepared the brochures in State B and delivered them to the corporation there. He knew that the brochures would be distributed to prospective buyers at sales presentations around the country.

The federal statute has no provision on personal jurisdiction. State A's long-arm statute has been interpreted to extend personal jurisdiction as far as the U.S. Constitution allows.

The engineer has timely moved to dismiss the complaint against him for lack of subject-matter and personal jurisdiction. The engineer has also filed an answer (subject to his motion to dismiss) denying the claims against him and asserting a cross-claim against the corporation. The engineer's cross-claim alleges that the corporation must indemnify the engineer for any damages he may have to pay the woman. The indemnity claim is based on the terms of the consulting contract between the corporation and the engineer.

The corporation has filed timely motions to dismiss the woman's complaint for lack of subject-matter and personal jurisdiction and to dismiss the engineer's cross-claim for lack of subject-matter jurisdiction.

1. Does the State A federal district court have personal jurisdiction over
 - (a) the corporation? Explain.
 - (b) the engineer? Explain.

2. Assuming that there is personal jurisdiction over both defendants, does the State A federal district court have subject-matter jurisdiction over
 - (a) the woman's claim against the corporation and the engineer? Explain.
 - (b) the engineer's cross-claim against the corporation? Explain.

CONTRACTS QUESTION

A seller and a buyer both collect antique dolls as a hobby. Both live in the same small city and are avid readers of magazines about antique dolls. The seller placed an advertisement in an antique doll magazine seeking to sell for \$12,000 an antique doll manufactured in 1820.

On May 1, the buyer saw the advertisement and telephoned the seller to discuss buying the doll. During this conversation, the seller and the buyer agreed to a sale of the doll to the buyer for \$12,000 and also agreed that the seller would deliver the doll to the buyer's house on May 4, at which time the buyer would pay the purchase price.

The next day, May 2, the buyer changed his mind and decided not to buy the doll. He signed and mailed a letter to the seller, which stated in relevant part:

I have decided not to buy the 1820 doll that we agreed yesterday you would sell to me.

The seller received the letter on May 3, immediately telephoned the buyer, and said, "I consider your letter of May 2 to be the final end to our deal. I will sell the doll to someone else and will hold you responsible for any loss."

On May 4, the seller received a telephone call from another antique doll collector. The collector had seen the seller's advertisement for the doll and expressed interest in buying it. After some discussion, the seller and the collector agreed to a sale of the doll to the collector for \$11,000. Because the collector lived in a distant part of the state, the agreement provided that the seller, at her expense, would arrange for delivery of the doll by an express delivery service. The express delivery service that they selected charges \$150 for deliveries of this type. The sale, the method of delivery, and the fee were all commercially reasonable. The seller acted in good faith in entering into this agreement with the collector.

On May 5, the buyer telephoned the seller and said, "I made a mistake when I sent the letter, and I will buy the doll from you on the terms we agreed to. Come to my house tomorrow—I'll have the \$12,000 for you." The seller replied, "You're too late. I've already sold the doll to someone else." The seller then took the doll to the delivery service and paid the \$150 delivery fee. The delivery service delivered the doll to the collector, who immediately wired the \$11,000 payment to the seller. Two weeks later, the seller sued the buyer for breach of contract.

1. Is there a contract for the sale of the doll that is enforceable against the buyer? Explain.
2. Assuming that there is a contract enforceable against the buyer, did the buyer breach that contract? Explain.
3. Assuming that there is a contract enforceable against the buyer and that the buyer breached that contract, how much can the seller recover in damages? Explain.

CORPORATIONS QUESTION

The board of directors of a commercial real estate development corporation consists of the corporation's chief executive officer (CEO) and three other directors, who are executives at various other firms.

The corporation owns a commercial office tower, the value of which is approximately 10 percent of the corporation's total holdings. The corporation uses one floor of the tower as its corporate headquarters, but it wants to vacate that floor as soon as it locates suitable replacement space.

Two years ago, the board obtained an independent appraisal of the tower, which indicated a fair market value of between \$12 and \$15 million. After considering that appraisal, the board authorized the corporation's CEO to seek a purchaser for the tower.

The CEO immediately showed the tower to several sophisticated real estate investors and received offers ranging from \$8 million to \$13 million. The CEO decided that these offers were insufficient, and after he reported back to the board, no further action to sell the tower was taken.

Two months ago, the CEO and the other three directors of the corporation formed a limited liability company (LLC) in which each holds a 25 percent ownership interest.

One month ago, the corporation's board unanimously authorized the corporation's sale of the tower to LLC for \$12 million. The minutes of the board's meeting at which the tower sale was authorized reflect that the meeting lasted for 10 minutes and that the only document reviewed by the corporation's directors was the two-year-old appraisal of the tower.

The minutes of the board's meeting further state that the transaction was to be carried out with "a friendly company so that the corporation will have time to relocate to a new headquarters" and that the board "authorized the transaction because the \$12 million price is toward the high end of the range of offers received in the past from sophisticated real estate investors and is within the range of fair market values listed in the appraisal."

After the board's authorization of the tower sale, the corporation entered into a contract to sell the tower to LLC. The board did not seek shareholder approval of the transaction.

A non-director shareholder of the corporation is upset with the board's decision authorizing the sale of the tower to LLC. The shareholder believes that the corporation could have obtained a higher price for the tower.

1. Does the business judgment rule apply to the board's decision to have the corporation sell the tower to LLC? Explain.
2. Did the directors breach their fiduciary duties by authorizing the tower sale? Explain.

CRIMINAL LAW AND PROCEDURE QUESTION

On his way to work one morning, a man stopped his car at a designated street corner where drivers can pick up passengers in order to drive in the highway's HOV (high-occupancy vehicle) lanes. When the man, who was driving alone, opened his car door and announced his destination, a woman (a stranger) jumped into the front seat.

As soon as the man drove his car onto the busy highway, the woman took a knife from her backpack and held it against the man's throat. She said to him, "I am being followed by photographers from another planet where I am a celebrity. Pictures of me are worth a fortune, so I never give them away for free. Forget the speed limit and get me out of here fast, or else."

With the woman holding the knife at his neck, the man sped up to 85 miles per hour (30 mph over the posted speed limit of 55 mph), weaving in and out of traffic to avoid other cars, while the woman urged him to drive faster. While attempting to pass a motorcycle at a curve in the highway, the man lost control of the car, which struck and killed the motorcyclist before crashing into a railing.

A police car arrived at the scene a few minutes later. The man and the woman were treated for minor injuries at the scene and then arrested and taken to the police station.

While in custody, the woman was examined by two psychiatrists. Both psychiatrists submitted written reports stating that the woman suffers from schizophrenia and that, at the time of the accident, her delusions about alien photographers were caused by her schizophrenia.

The State A prosecutor has charged the woman with felony murder for the motorcyclist's death based on her kidnapping of the man, but is not sure whether to charge the man with any crime.

In State A, the rules governing crimes and affirmative defenses follow common law principles. However, in State A the Not Guilty by Reason of Insanity ("NGRI") defense is defined by statute as follows:

To establish the defense of NGRI, the defendant must show that, at the time of the charged conduct, he or she suffered from a severe mental disease or defect and, as a result of that mental disease or defect, he or she did not know that his or her conduct was wrong. The defendant has the burden to prove all elements of the defense by a preponderance of the evidence.

Assume that the two psychiatric reports will be admitted into evidence.

1. Can the woman establish an NGRI defense? Explain.
2. With what crimes, if any, can the man be charged as a result of the motorcyclist's death? Explain.
3. What defenses, if any, will be available to the man if he is charged with a crime related to the motorcyclist's death? Explain.

TRUSTS QUESTION

In 1995, a man and his friend created a corporation. The man owned 55% of the stock, and the friend owned 45% of the stock. When the man died in 2005, he left all of his stock in the corporation to his wife.

In 2009, the wife died. Under her duly probated will, the wife bequeathed the stock her husband had left her to a testamentary trust and named her husband's friend as trustee. Under the wife's will, the trustee was required to distribute all trust income to the wife's son "for so long as he shall live or until such time as he shall marry" and, upon the son's death or marriage, to distribute the trust principal to a designated charity. The stock, valued at \$500,000 at the wife's death, comprised the only asset of this trust.

In 2013, after the stock's value had risen to \$1.5 million, the trustee's lawyer properly advised the trustee to sell the stock in order to comply with the state's prudent investor act. Because of this advice, the trustee decided to sell the stock. However, instead of testing the market for potential buyers, the trustee purchased the stock himself for \$1.2 million. Thereafter, on behalf of the trust, the trustee invested the \$1.2 million sales proceeds in a balanced portfolio of five mutual funds (including both stocks and bonds) with strong growth and current income potential.

Recently, both the son and the charity discovered the trustee's sale of the stock to himself and his reinvestment of the proceeds from the stock's sale. They learned that, due to general economic conditions, the stock in the corporation that had been purchased by the trustee for \$1.2 million had declined in value to \$450,000 and the value of the trust's mutual-fund portfolio had declined from \$1.2 million to \$1 million. Both the son and the charity have threatened to sue the trustee.

The son has also decided that he wants to get married and has notified the trustee that he believes the trust provision terminating his income interest upon marriage is invalid.

1. Would the son's interest in the trust terminate upon the son's marriage? Explain.
2. Did the trustee breach any duties by buying the trust's stock and, if yes, what remedies are available to the trust beneficiaries if they sue the trustee? Explain.
3. Did the trustee breach any duties in acquiring and retaining the portfolio of mutual funds and, if yes, what remedies are available to the trust beneficiaries if they sue the trustee? Explain.

July 2015 MEE Analyses

Torts

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TORTS ANALYSIS

(Torts II.A., B.1., E.2., G.1.; IV.A.)

ANALYSIS

Legal Problems:

- (1) Could a jury properly find that the friend, a 10-year-old child with no snowmobiling experience, was negligent?
- (2) Did the landowner have a duty to reveal hidden dangers and, if yes, could a jury properly find that there was a breach of that duty?
- (3) Did the woman owe the boy a duty of care?
- (4) Could a jury properly find that the boy was negligent and, if yes, what impact will his negligence have on his claim?

DISCUSSION

Summary

Because snowmobiling involves motorized vehicles traveling at high speeds, it is an adult activity. When a minor engages in an adult activity, he can be found negligent if he fails to exercise the same degree of care that a prudent adult would exercise in the same circumstances. A jury could thus properly find that the friend failed to exercise reasonable care by operating a snowmobile on an unmarked trail in a rocky, forested area where there was a risk of hitting hidden objects.

In most jurisdictions, a jury could properly conclude that the landowner owed the boy a duty to reveal hidden dangers such as a chain obscured by snow only if the boy is categorized as a licensee or, alternatively, if the boy is categorized as a trespasser and the landowner is found to have created an attractive nuisance. It is unclear whether the boy could establish that he was a licensee on these facts. If he is classified as a trespasser, rather than a licensee, it is unclear whether the landowner owed him a duty of care based on the attractive-nuisance doctrine because the boy was engaged in an adult activity.

The woman owed no duty of care to the boy because she did not increase the risk of harm by calling 911 and did not induce detrimental reliance.

A jury could properly find that the boy was negligent in entrusting his snowmobile to a 10-year-old who had never been snowmobiling before. In comparative negligence jurisdictions, a finding that the boy was negligent could reduce his damages; in contributory negligence jurisdictions (AL, DC, MD, NC, and VA), a finding that the boy was negligent precludes any recovery.

Point One (25%)

A jury could properly find that the friend is liable to the boy based on a finding that the friend was engaged in an adult activity and that he was negligent in turning off a designated snowmobile trail onto an unmarked logging trail.

Torts Analysis

Unless a child is engaged in an adult activity, his conduct is to be measured against that of a child of like age, intelligence, and experience. *See* RESTATEMENT (SECOND) OF TORTS § 283A. Under this standard, it is doubtful that a jury could find the friend negligent: he was only 10 years old, and he had not previously engaged in snowmobiling.

However, when a minor engages in a hazardous activity which is “normally undertaken only by adults, and for which adult qualifications are required . . . , he may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity.” *Id.* at cmt. c. Driving a motorized vehicle like a snowmobile is a classic example of an adult activity. Indeed, the Restatement (Third) of Torts provides as examples of dangerous adult activities, “driving a car, a tractor, and a motorcycle, and operating other motorized vehicles such as minibikes, motorscooters, dirt bikes, and snowmobiles.” RESTATEMENT (THIRD) OF TORTS § 10 cmt. f.

A reasonably prudent adult snowmobiler operating a snowmobile in a rocky, forested area would perceive that turning off a marked and designated snowmobiling trail onto a trail not designated for snowmobiling presents a foreseeable risk of injury. An unmarked trail is unlikely to have been prepared for snowmobiling. As the facts make clear, trails in this area often contain hidden hazards—for example, rocks, fallen tree limbs, and stumps—that pose the risk of a collision and that may not be readily visible under the snow on which a snowmobile travels. Thus, a jury could find that the friend was negligent in turning off a marked and designated snowmobile trail onto a logging trail unmarked for snowmobiling.

[NOTE: An examinee may appropriately note that, if the jury finds that the friend was negligent, it should also find that his negligence was the cause-in-fact and proximate cause of the boy’s injuries; the accident would not have happened but for the friend’s action in turning onto the unmarked trail, and hitting a hidden object is an immediate, foreseeable risk of such an action. These conclusions as to cause-in-fact and proximate cause are so obvious that an examinee should not be penalized for failing to note them.]

Point Two (35%)

A jury could find the landowner liable to the boy if he is classified as a licensee to whom a limited duty of care is owed. If the boy is found to be a trespasser rather than a licensee, the jury could find that the landowner is liable only if the attractive-nuisance doctrine applies.

In most states, the landowner’s duty to the boy depends on whether the boy is classified as a trespasser or a licensee. A trespasser is one who enters or remains upon land owned or possessed by another without a privilege to do so. *See* RESTATEMENT (SECOND) OF TORTS § 329. Because the boy and his friend had no privilege to enter the landowner’s property, they may be classified as trespassers.

However, if “in light of all the surrounding circumstances, a reasonable person would interpret the possessor’s words or conduct as manifesting that he is in fact willing for another to enter . . . upon his land,” then the entrant is a licensee, not a trespasser. EDWARD J. KIONKA, TORTS IN A NUTSHELL 250 (5th ed. 2010). The presence of a path may manifest consent. *Id.*

Although posting a “no trespassing” sign would normally negate an implication of consent, the landowner’s “no trespassing” sign was not visible, and thus the boy could be classified as a licensee if the trier of fact concludes that it was reasonably foreseeable to the landowner that snow would obscure the sign and chain during the winter.

If the boy is classified as a licensee, in most jurisdictions the landowner would owe him a duty to reveal hidden dangers of which the landowner “knows or has reason to know” and which the boy was not likely to discover. RESTATEMENT (SECOND) OF TORTS § 342. Here, because the landowner’s property is typically covered with three to four feet of snow during the snowmobiling season, a jury could properly conclude that the landowner knew or had reason to know of the hazard posed by a chain and a “no trespassing” sign only 30 inches above the ground and that he should have posted a higher and more visible warning.

If, however, the boy is classified as a trespasser, in most jurisdictions the landowner would owe him no duty of care to make the premises reasonably safe or to warn of hidden dangers (*see id.* § 333) unless the court finds that the landowner has created an “attractive nuisance.” Under the attractive-nuisance doctrine, a possessor of land is subject to liability for physical harm to a trespassing child when that harm is caused by an artificial condition on the land and

- (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
- (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
- (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
- (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Id. § 339.

Here, the landowner likely had reason to know that a logging trail intersecting a snowmobile trail would offer a tempting detour to young snowmobilers and that the landowner should have foreseen that a chain and sign only 30 inches above the ground could easily become obscured by snow, posing a serious risk of accident and injury to a snowmobile that deviated onto the logging trail. There is no question that the boy and his friend did not discover the dangerous condition (i.e., the hidden chain); the friend, the driver, clearly did not appreciate the risk and the boy, his passenger, had no opportunity to avoid it. The burden of eliminating the risk is small; all that would be necessary is posting a sign warning of the hazard at a sufficient height to ensure that it remains snow-free. Thus, had the boy and his friend not been engaged in an adult activity, the boy’s claim against the landowner would be strong.

However, the attractive-nuisance doctrine is almost invariably applied when the trespassing child is engaged in an activity appropriate for children; indeed, most of the cases involve “rather young children, usually under 12.” KIONKA, *supra*, at 243. The landowner’s duty “is only to exercise reasonable care to keep the part of the land upon which he should recognize the likelihood of children’s trespassing free from those conditions which . . . are likely not to be observed by children, or which . . . are beyond the imperfect realization of children.” RESTATEMENT (SECOND) OF TORTS § 339 cmt. j. Here, the risk inherent in the hidden chain was a risk only to snowmobilers. The landowner could argue that, because snowmobiling is an adult activity, the attractive-nuisance doctrine would not apply. *See Gaines v. General Motors Corp.*, 789 F. Supp. 38 (D. Mass. 1991) (refusing to apply attractive-nuisance doctrine to minor engaged in unforeseeable adult criminal activity).

Because of the difficulties inherent in classifying entrants onto real property, about half of the states have modified the classifications so as to establish a general duty of reasonable care under the circumstances. But only a handful of states have fully abolished the categories; most have retained the trespasser status and the rules that go with it. *See KIONKA, supra*, at 258–59.

Thus, if the boy is classified as a licensee, a jury may find that the landowner violated his duty of care. If the boy is classified as a trespasser, a jury may find that the landowner violated his duty of care only if it applies the attractive-nuisance doctrine, and a fact-finder may choose not to apply that doctrine given that the boy and his friend were engaged in an adult activity. In a state that has abolished these classifications, the boy may recover if the fact-finder finds that the chain posed a foreseeable risk to foreseeable entrants.

[NOTE: An examinee’s conclusions on trespasser/licensee categorization and whether the attractive-nuisance doctrine is available are less important than a demonstrated understanding of the relevant legal categories. As in Point One, an examinee who concludes that the boy can recover might also appropriately note that the fact-finder should also find that the landowner’s actions were the cause-in-fact and proximate cause of the boy’s injuries. Again, however, these conclusions are so obvious that an examinee should not be penalized for failing to discuss them.]

Point Three (25%)

A jury could not properly find that the woman had a duty to the boy because she did not increase the risk of harm to him beyond that which existed before she called 911, and the boy did not rely on the woman’s exercise of reasonable care to his detriment.

Generally, there is no duty to come to the aid of another. *See KIONKA, supra*, at 121. An actor who undertakes to render services designed to reduce the risk of harm to another does acquire a duty of reasonable care toward the other *if*

- a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
- b) the person to whom the services are rendered or another relies on the actor’s exercising reasonable care in the undertaking.

RESTATEMENT (THIRD) OF TORTS § 42.

Here, the woman did not increase the risk of harm beyond that which existed without the undertaking to call for help. Although the time that elapsed between the accident and the boy's rescue caused frostbite injuries, the woman caused no delay; indeed, if she had not called 911, aid would likely have arrived even later than it did. Nor did any individual rely on the woman. She told the 911 dispatcher that she was leaving the scene, and her call did not prevent the boy or anyone else from reporting the accident or taking steps to avoid the harm. *See* RESTATEMENT (SECOND) OF TORTS § 324 (“One who . . . takes charge of another who is helpless . . . is subject to liability to the other for any bodily harm caused to him by . . . the actor's discontinuing his aid . . . , if by so doing he leaves the other in a worse position than when the actor took charge of him.”).

Point Four (15%)

A jury could properly find that the boy was negligent in entrusting a snowmobile to an inexperienced 10-year-old. A finding of negligence would reduce the boy's damages award but, in almost all jurisdictions, would not deprive him of his claim.

Because the boy was an experienced snowmobiler who should have been aware of the risks of driving a snowmobile without any training or experience, a jury could find that the boy was negligent in allowing his friend to drive the snowmobile even if it applied the standard of care applicable to children. *See* Point One.

At common law, if the jury found that the plaintiff's negligence was a cause in fact and proximate cause of his injuries, the plaintiff was precluded from recovering damages from the defendant. In other words, if the plaintiff's negligence contributed to the plaintiff's injuries, the plaintiff could not recover from the defendant even though the defendant was also negligent. This contributory-negligence doctrine applies in Alabama, the District of Columbia, Maryland, North Carolina, and Virginia. All other states, however, have abandoned the contributory-negligence doctrine in favor of a comparative-negligence doctrine.

Under the modern “comparative negligence” approach, if the jury finds that two or more parties are negligent, it may apportion fault among them. The amount of damages apportioned to the plaintiff because of the plaintiff's negligence is subtracted from the total damages awarded by the jury. Thus, a finding that the boy was negligent should not deprive him of his cause of action. There are some comparative-negligence jurisdictions in which apportionment is not available unless the jury concludes that the plaintiff is less than 50 percent at fault; in those jurisdictions, if the jury concludes that the boy was 50 percent or more at fault, he cannot recover.

CIVIL PROCEDURE ANALYSIS

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

ANALYSIS

Legal Problems:

- (1)(a) Does a court have personal jurisdiction to hear a claim against a nonresident corporation when the corporation engaged in significant activity in the state related to the transaction that is the subject matter of the plaintiff's cause of action?
- (1)(b) Does a court have personal jurisdiction to hear a claim against a nonresident individual when the individual produced a brochure for a business, where the brochure is related to the transaction that is the subject matter of the plaintiff's cause of action, and the individual had knowledge that the business would circulate the brochure to consumers in other states in an effort to influence their purchasing decisions?
- (2)(a) Does a federal district court have subject-matter jurisdiction over a complaint that seeks damages from a defendant for making false or misleading statements committed in violation of a federal statute?
- (2)(b) Can a federal district court assert supplemental jurisdiction over a cross-claim asserted by one defendant against another defendant when the claim is part of the same case or controversy as the plaintiff's claim but the cross-claim is based on state law and the defendants are not diverse from each other?

DISCUSSION

Summary

The court has personal jurisdiction over the corporation. The corporation sent representatives to State A where those representatives made a presentation on the corporation's behalf. That presentation, which the woman alleges contained statements that were false, is the basis of the woman's claim. By performing activities in State A, the corporation purposely availed itself of the benefit and protection of State A law, and opened itself to being sued in State A on any claim that might arise from its activities.

Whether the court can assert personal jurisdiction over the consulting engineer is a much closer question. On the one hand, the engineer provided materials to the corporation that he knew would be distributed to prospective buyers across the country. He could reasonably foresee that buyers in other states (including State A) might rely on the brochures in making their purchasing decisions. On the other hand, the engineer's activities (preparing brochures for the corporation) occurred entirely within State B. The engineer was never in State A and did not take any action of his own directed at that state in particular. In the absence of any action by the engineer that was purposefully directed at State A, a court is likely to deny personal jurisdiction over the engineer.

The woman's cause of action is based on federal law. The court therefore has federal-question jurisdiction over the claim. *See* 28 U.S.C. § 1331.

The court also has subject-matter jurisdiction over the engineer's cross-claim. The cross-claim is part of the same case or controversy as the woman's claim, and the court can therefore exercise supplemental jurisdiction over it. *See* 28 U.S.C. § 1367. In some cases a court can decline to take supplemental jurisdiction over a claim over which it would not otherwise have jurisdiction, but no grounds for declining jurisdiction are present here.

Point One(a) (25%)

The corporation has sufficient connection with State A to permit a court to exercise jurisdiction over it with respect to a claim arising out of those contacts.

Federal district courts may exercise personal jurisdiction to the same extent as the courts of general jurisdiction of the state in which the district court sits. *See* FED. R. CIV. P. 4(k)(1)(A). Here, State A's long-arm statute authorizes its courts to exercise jurisdiction as far as the U.S. Constitution allows. So the question is whether the defendants have sufficient contacts with State A such that a State A court could constitutionally exercise jurisdiction over them.

The due process clause of the Fourteenth Amendment permits states to assert personal jurisdiction over nonresident defendants who have established minimum contacts with the state such that the exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This test may be met even if a nonresident defendant has only a few contacts with the state, so long as the contacts relate directly to the causes of action asserted. This is referred to as specific jurisdiction. *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984). Under the test for specific jurisdiction, a nonresident defendant is subject to specific jurisdiction when its contacts with the forum state demonstrate purposeful availment of the benefits of the forum state, and the cause of action is related to those contacts. *Id. See also Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In this case, the corporation sent salespeople to State A to solicit the woman to purchase its product. During this visit, the corporation presented information aimed at inducing the woman to buy the super solar panels, and its sales presentation succeeded. It also shipped its product to the woman in State A. By these actions, the corporation purposefully availed itself of the privilege of doing business in State A and received the benefits that State A generally provides to businesses operating in the state—for example, roads, transportation facilities, and police protection. The woman's claim arises directly out of the corporation's contacts with the state, and the corporation could certainly foresee that it might be haled into a State A court if its conduct during its sales presentations in State A was wrongful. Here, the corporation had sufficient contacts with State A to warrant a court in exercising jurisdiction over the corporation.

Even when a nonresident defendant has the necessary minimum contacts with the forum state, the exercise of personal jurisdiction over the defendant may offend due process if it is inconsistent with traditional notions of fair play and substantial justice. The burden is on the defendant to make a compelling case that the fairness considerations outweigh the existence of minimum contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). *See also Asahi*

Metal Indus. Co. Ltd. v. Superior Court of California, 480 U.S. 102 (1987). Here, there are good reasons for the litigation to be in State A rather than anywhere else (e.g., the woman lives there, the defendant engaged in the tortious activity there, and the panels were installed there), and there is nothing to suggest that litigating in State A would impose a particularly onerous burden on the corporation. The court has jurisdiction over the corporation.

Point One(b) (15%)

The engineer is probably not subject to jurisdiction in State A, given that his activities were confined to State B and he did not purposefully avail himself of the benefits or protections of State A law.

The engineer has never been physically present in State A, and there is no evidence that the engineer does business in State A. There is also no evidence that the engineer's activities specifically targeted State A in any way. On the other hand, the engineer did prepare material designed to induce people to purchase super solar panels, with the knowledge that the material would be distributed to potential buyers at sales presentations throughout the country. Furthermore, it was reasonably foreseeable to the engineer that a prospective buyer in another state, including State A, might rely on the accuracy of the information in the brochure when making a purchase decision. The engineer has, in effect, placed the brochure in the stream of commerce and thus reached out across state lines to communicate with and affect the decisions of State A purchasers.

In *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S.Ct. 2780 (2011), the Supreme Court rejected the so-called "stream of commerce" theory of personal jurisdiction and held that merely placing a product in the stream of commerce with awareness that it might reach a particular state was not a sufficient basis to exercise jurisdiction over the manufacturer of the product. "[T]he exercise of judicial power is not lawful," said the four-justice plurality, "unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State . . .'" *Id.* at 2785. In particular, according to the plurality, the transmission of goods (e.g., the brochure) to the forum is a sufficient basis for jurisdiction "only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* at 2788. Two concurring justices agreed with the rejection of the "stream of commerce" theory, although they felt that a flexible approach needed to be taken with regard to what additional facts might warrant jurisdiction in a particular case.

Here, the only connection between the engineer and State A is that the engineer put the brochure into the stream of commerce with awareness that it might be relied upon in other states (including, perhaps, State A). Under the decision in *Nicaastro*, that connection is simply not enough. In the absence of any facts to suggest that the engineer targeted State A when he prepared the brochure and supplied it to the corporation for distribution, or that the engineer has other connections with State A, the State A court should dismiss the action against the engineer for lack of personal jurisdiction.

Point Two(a) (20%)

The federal district court has subject-matter jurisdiction over the woman's claim because it arises under a federal statute.

Pursuant to 28 U.S.C. § 1331, federal courts have “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.” This provision gives a federal court subject-matter jurisdiction over any case in which a plaintiff's well-pleaded complaint alleges a cause of action based on federal law. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

In this case, the woman's claim is based on allegations that the defendants made false representations in violation of the federal statute. Whether the woman has a claim on these facts, and whether the defendants' alleged actions did, indeed, violate the federal statute, are questions of federal law central to her claim. Because the claim the woman is asserting is created by federal statutory law, it lies squarely within the district court's original federal-question jurisdiction under § 1331.

[NOTE: The court does not have diversity jurisdiction over the case because the woman is seeking only \$30,000, well below the \$75,000 amount-in-controversy requirement that applies to diversity actions. *See* 28 U.S.C. § 1332(a).]

Point Two(b) (40%)

The federal court has supplemental jurisdiction over the engineer's cross-claim, and there is no reason for it to decline to exercise that jurisdiction.

There is no basis on which a federal court could hear the engineer's cross-claim if it had been brought as an independent action. The claim is an ordinary contract claim based on state law, so there is no federal-question jurisdiction. Furthermore, because the engineer is a resident of State B and the corporation is incorporated and has its principal place of business in State B, they are both considered citizens of that state, so the court would have no diversity jurisdiction. Even if they were diverse, the amount in controversy (a \$30,000 claim for indemnity) is inadequate for diversity jurisdiction.

However, once a court has original jurisdiction over some claims in the action, it may also exercise supplemental jurisdiction over additional claims that are part of the same case or controversy. 28 U.S.C. § 1367(a). *See also United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). As noted, in the present problem the federal court could exercise federal-question jurisdiction over the woman's claims against the two defendants. The question, therefore, is whether the engineer's cross-claim is sufficiently related to the woman's claim to be part of the same case or controversy. There are significantly overlapping facts indicating that the two claims really are part of a single case. The engineer alleges that the corporation owes him indemnity based on the terms of contract between the corporation and the engineer pursuant to which the engineer prepared the very material that the woman alleges was false. The material in question, and its accuracy or inaccuracy, is central to the woman's claim, and the contract between the

engineer and the corporation for the production of that material will probably be relevant to an assessment of her allegations against each party. Second, the two claims are legally linked. For the corporation to be liable to the engineer under the contract, the engineer must first be found liable to (or must settle with) the plaintiff.

Assuming that the court finds that the § 1367(a) standard is met, then the court must consider whether there are any discretionary reasons to decline to exercise jurisdiction, as set forth in § 1367(c). The discretionary grounds for declining jurisdiction include the presence of novel or complex issues of state law in the case (*see* § 1367(c)(1)), state law claims that predominate over the federal claim in the case (§ 1367(c)(2)), or the district court's dismissal of all the claims over which it had original jurisdiction (§ 1367(c)(3)). In the present case, none of the identified grounds for refusing jurisdiction are applicable, and there are no exceptional circumstances that provide a compelling reason for declining jurisdiction.

CONTRACTS ANALYSIS

(Contracts II.G.; IV.; V.A., B.)

ANALYSIS

Legal Problems:

- (1) Is an oral contract for the sale of goods for a price of \$500 or more enforceable against a buyer who later sends a signed letter that indicates that the contract exists?
- (2) If a party sends a letter stating a clear intention not to perform in accordance with a contract, but later tries to withdraw that statement, may the other party bring an action for breach of contract?
- (3) What is the measure of damages if a buyer breaches a contract for the sale of goods and the seller resells the goods?

DISCUSSION

Summary

The parties' agreement created a contract for the sale of goods governed by Article 2 of the Uniform Commercial Code (UCC). Under the statute-of-frauds provision in Article 2 of the UCC, a contract for the sale of goods for a price of \$500 or more is not enforceable unless there is a writing signed by the party against whom enforcement is sought that is sufficient to indicate that a contract for the sale of goods has been made between the parties. Although the writing need not state all the terms of the contract, the quantity must be stated.

The buyer's signed letter to the seller, indicating that he would not buy in accordance with the agreement between them, is sufficient to indicate that a contract for the sale of goods was made, and the letter clearly indicates that the agreement was for only one doll, so the quantity requirement is satisfied. As a result, the contract is enforceable against the buyer.

The buyer's letter was also a repudiation of the contract. When a party repudiates, the other party may await performance or immediately resort to any remedy for breach. While a repudiating party may sometimes "retract" its repudiation, the buyer's attempt to do so here was unsuccessful because the seller had materially changed her position in reliance on the repudiation and had indicated that she considered the repudiation to be final.

Because the seller resold the doll to the collector for \$1,000 less than the contract price with the buyer, the seller is entitled to that \$1,000 difference plus the additional delivery costs of \$150 incurred by the seller.

Point One (30%)

The parties entered into a contract for the sale of goods governed by Article 2 of the Uniform Commercial Code. Because the contract price was \$500 or more, the contract would not be enforceable against the buyer unless the buyer signed a writing sufficient to indicate that a contract for the sale of goods had been made (or an exception to that rule was applicable). The buyer's letter stating his intention not to perform the contract is sufficient to indicate that a contract was made. Therefore, the contract is enforceable against the buyer.

Contracts Analysis

Article 2 of the Uniform Commercial Code applies to transactions in goods. UCC § 2-102. “Goods” are “things moveable” at the time of identification to the contract. UCC § 2-105(1). The doll was clearly moveable at the time of identification, so the transaction is governed by Article 2.

Under UCC Article 2, a contract may be formed in any manner sufficient to show agreement. UCC § 2-204(1). The telephone conversation between the seller and the buyer clearly satisfies this requirement and created a contract to sell the doll to the buyer.

However, a contract for the sale of goods for a price of \$500 or more is not enforceable against a party unless there is a writing signed by that party sufficient to indicate that a contract for sale has been made (or an exception to this rule applies). UCC § 2-201(1). Here, the contract price for the doll was \$12,000, so this writing requirement is applicable. The writing need not contain all the terms of the contract, but the contract is not enforceable against the party beyond the quantity of the goods shown in writing. *Id.* (This rule is generally interpreted as indicating that a writing does not suffice unless it contains a quantity term. *See* UCC § 2-201, comment 1 paragraph 3.)

Although the contract was oral, the letter the buyer sent to the seller on May 2 was signed by the buyer and is sufficient to indicate that a contract for sale was made between them. After all, it states that the parties “agreed” to the sale of the doll. As to the quantity requirement, the letter refers to “the” 1820 doll, clearly indicating that the contract was for the sale of only one doll. Hence, the buyer’s letter to the seller is sufficient to satisfy the requirements of the Article 2 statute of frauds. Accordingly, the contract is enforceable by the seller against the buyer.

Point Two (40%)

The buyer repudiated the contract, and his attempt to retract that repudiation was unsuccessful. Therefore, the seller has a cause of action against the buyer for breach of the contract.

UCC § 2-610 provides that if “either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other” the aggrieved party may for a reasonable time await performance by the repudiating party or resort to any remedy for breach. Although Article 2 does not define “repudiation,” Comment 1 to UCC § 2-610 states that repudiation “centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.”

Here, the buyer’s letter said: “I have decided not to buy the 1820 doll that we agreed yesterday you would sell to me.” That positive and unequivocal statement that the buyer will not perform “demonstrates a clear determination not to continue with performance.” In addition, the buyer’s failure to buy the doll would clearly “substantially impair the value of the contract” to the seller. Thus, the buyer’s action constituted repudiation and would entitle the seller to pursue remedies for breach.

A repudiating party may, under some circumstances, retract its repudiation. UCC § 2-611(1). On May 5, the buyer indicated that he would perform when he said, “I made a mistake when I sent the letter, and I will buy the doll from you on the terms we agreed to.” But the power

to retract a repudiation terminates when the aggrieved party has done any of the following: (1) cancelled, (2) materially changed his position, or (3) otherwise indicated that he considers the repudiation to be final. UCC § 2-611(1).

Here, the seller materially changed her position in reliance on the buyer's repudiation when she agreed to resell the doll to the collector, because the seller committed herself to a substitute transaction inconsistent with performing the contract with the buyer. Moreover, the seller clearly indicated to the buyer on May 3 that she considered the buyer's letter to be "the final end" to their deal. Therefore, the buyer lost the ability to retract the repudiation no later than May 3, the day before the buyer attempted to retract his repudiation. Hence, the buyer's attempted retraction of his repudiation was ineffective.

Point Three (30%)

The seller resold the doll and, accordingly, is entitled to damages equal to the \$1,000 difference between the contract price and the resale price plus incidental damages of \$150.

The purpose of remedies under the UCC is to put the aggrieved party "in as good a position as if the other party had fully performed." UCC § 1-305(a). This is another way of stating the "expectation" principle of contract remedies. Here, if the buyer had performed, the seller would have sold the doll to the buyer for \$12,000 and would have incurred no additional delivery costs (other than the negligible costs of driving to the buyer's home in the same city). After the buyer's breach, the seller sold the doll for only \$11,000 and incurred an additional cost of \$150 to transport the doll to the collector.

Under UCC Article 2, when a buyer breaches or repudiates, the seller has several remedies, including the remedy of reselling the goods. UCC § 2-703(d). If the resale is made in good faith and in a commercially reasonable manner, the seller can recover the difference between the contract price and the resale price plus incidental and consequential damages. UCC § 2-706(1). If the resale is by private sale (as opposed to, say, by a public auction), this remedy is available only if the seller gives the buyer reasonable notification of the seller's intention to resell. UCC § 2-706(3). Here, the facts indicate that when the seller sold the doll to the collector, the seller acted in good faith and in a commercially reasonable manner. Moreover, the seller told the buyer on May 3 that she intended to resell the doll and hold the buyer responsible for any damages, thus providing the buyer with notice of the seller's intention to resell the goods.

Accordingly, the seller is entitled to recover the \$1,000 difference between the contract price (\$12,000) and the resale price (\$11,000). The seller is also entitled to recover "incidental damages," which include "any commercially reasonable charges [or] expenses . . . incurred . . . in connection with return or resale of the goods." UCC § 2-710. Here, the seller incurred \$150 in commercially reasonable transportation costs in connection with the resale of the doll to the collector, and as a result, the seller's incidental damages would be \$150. There are no facts indicating that the seller suffered any consequential damages. Hence, the seller's total damages would be \$1,000 + \$150, for a total of \$1,150.

CORPORATIONS ANALYSIS

(Corporations VI.A.)

ANALYSIS

Legal Problems:

- (1) Was the corporation's sale of the tower a "director's conflicting interest transaction"?
- (2) Was the board's authorization of the sale of the tower protected by the business judgment rule?
- (3) Did the corporation's directors breach their fiduciary duty of loyalty by authorizing the sale?
- (4) Did the corporation's directors breach their fiduciary duty of care in the way they authorized the sale?

DISCUSSION

Summary

The sale of the tower is subject to judicial scrutiny as a "director's conflicting interest transaction" because it was a transaction between the corporation and an entity in which the corporation's directors had a material financial interest. The business judgment rule does not protect the board's authorization of the sale because all the directors who authorized the transaction had a material financial interest in the sale, by virtue of their interest in LLC. Nor was there any shareholder approval.

The directors likely breached their duty of loyalty. Because this was a self-dealing transaction, the directors bear the burden of demonstrating that the sale was substantively and procedurally fair to the corporation. It is unlikely that they can demonstrate substantive fairness because nothing in the facts presented would support a finding that the price of the tower at the time of the sale was fair. It is also unlikely that the directors can demonstrate procedural fairness given their failure to obtain an up-to-date independent appraisal or to undertake another "market test" of the property's value.

The directors also likely breached their duty of care by failing to diligently and adequately consider the transaction's fairness to the corporation. The directors exhibited gross negligence in not inquiring about the continuing validity of the dated appraisal and by not considering other means to ensure the fairness of the transaction to the corporation.

[NOTE: The analysis of this question tracks the analysis specified by Subchapter F of the Model Business Corporation Act (MBCA). Similar analysis would apply in a jurisdiction that has not adopted Subchapter F, but either has an interested-director provision modeled on former MBCA § 8.31 (1984) or relies on modern common law principles applicable to director self-dealing transactions.]

Point One (20%)

The sale of the tower was a “director’s conflicting interest transaction” (or director self-dealing) because the directors of the corporation had adverse financial interests as owners of LLC.

The corporation’s directors were on both sides of the transaction, both authorizing it for the corporation and standing to gain from it as owners of LLC. The MBCA defines a “director’s conflicting interest transaction” as one effected by the corporation “respecting which . . . the director had knowledge and a material financial interest.” MBCA § 8.60(1)(ii). The sale of the tower meets this definition of director self-dealing and is subject to special scrutiny.

The directors’ financial interest in the transaction is clearly “material.” Each director’s one-fourth ownership of LLC is likely to have impaired his or her objectivity in considering the transaction. *See* Official Comment 4 to MBCA § 8.60 (materiality of financial interest measured under objective standard). In addition, all the directors were aware that the transaction was with their LLC.

In a jurisdiction with an “interested director” statute, the sale of the tower would qualify as a “director’s conflicting interest transaction” given that it was a transaction with the corporation and one in which the directors had a direct or indirect interest. *See* former MBCA § 8.31; Del. GCL § 144 (“transaction between a corporation . . . and any other corporation . . . in which one or more of its directors . . . have a financial interest”). The conflict of interest is indirect because the directors of the corporation have a “material financial interest” in the other party, here the new LLC. *See* MBCA § 8.31(a).

[NOTE: In jurisdictions without an “interested director” statute, the common law would treat the transaction as one involving classic director self-dealing. *See Cookies Food Products, Inc. v. Lakes Warehouse Distributing, Inc.*, 430 N.W.2d 447 (Iowa 1988) (duty of loyalty “derives from ‘the prohibition against self-dealing that inheres in the fiduciary relationship’”).]

Point Two (30%)

The board’s authorization of the sale of the tower is not protected by the business judgment rule because the transaction was not authorized by a majority of informed, disinterested directors.

A “director’s conflicting interest transaction” (that is, a director self-dealing transaction) is not absolutely prohibited. Instead, modern corporate law permits such transactions—with the consequence that the business judgment rule applies if, after full disclosure of all relevant facts, qualified directors authorized the transaction. *See* MBCA § 8.61(b) (safe harbor); Del. GCL § 144. *See also Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114 (Del. 2006) (holding that § 144 creates safe harbor for interested director transactions, resulting in application of business judgment rule, provided material facts are disclosed or known to board, and majority of disinterested directors in good faith authorize transaction). If, however, the self-dealing transaction is not shown to have been properly authorized, the business judgment rule does not apply and the transaction must be shown to have been fair to the corporation.

Here, the MBCA safe harbor for proper board authorization does not apply. There was no authorization of the sale of the tower by qualified directors—that is, by directors who did not have an interest in the transaction. *See* MBCA § 1.43(a)(3)(i) (defining “qualified director” for purposes of director-authorization safe harbor as not including “director as to whom the transaction is a director’s conflicting interest transaction”). As elaborated in Point One, the only directors who authorized the transaction were those who had a conflict of interest. Thus, the presumption of the business judgment rule that the directors were informed and acted in good faith is not available because each of the directors had a material conflicting interest in the sale of the tower. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (presumption that in making business decisions, the directors acted on informed basis, in good faith, and in best interests of corporation not available to interested directors).

[NOTE: Approval or ratification of the transaction by qualified shareholders, after full disclosure of all relevant facts, would in some jurisdictions remove the transaction from further judicial review and in others subject it only to review for waste. But here there was no such approval or ratification.]

Point Three (30%)

The directors likely breached their duty of loyalty because it is unlikely they could show that the transaction was substantively and procedurally fair to the corporation.

Even if the sale of the tower was not properly authorized, the directors can satisfy their fiduciary duty of loyalty by showing that “the transaction, judged according to the circumstances at the relevant time, was fair to the corporation.” *See* MBCA § 8.61(b)(3); *see also Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987).

The directors have the burden to show that the transaction as a whole was fair in terms of “fair price” and “fair dealing.” This means courts will inquire into (1) whether the transaction price was comparable to what might have been obtained in an arm’s-length transaction, given the consideration received by the corporation, and (2) whether the process followed by the directors in reaching their decision was appropriate. *See* Official Comment 6 to MBCA § 8.60. A breach of the directors’ duty to deal fairly with the corporation can result in personal liability. *See* MBCA § 8.31(a)(2)(v) (receipt of financial benefit to which director not entitled under applicable law).

Here, the directors may argue that the \$12 million price paid by LLC for the tower made the transaction substantively fair because the price was within the range of offers (\$8 to \$13 million) received by the corporation when the tower was offered for sale two years before. *See HMG/ Courtland Properties Inc. v. Gray*, 749 A.2d 94 (Del. Ch. 1999) (price within range of offers is fair). The directors may point out that the sales price was also within the range of values of the appraisal (\$12 to \$15 million). Additionally, the directors may argue that even if the sale was not at the highest valuation received by the corporation for the tower, the sale gave the corporation non-economic advantages by enabling it to “have time to relocate to a new headquarters.” Finally, the directors may argue that the transaction was procedurally fair because information about the value of the tower was already known to them and there was no reason to make further inquiries.

It is unlikely, however, that the directors’ arguments would meet their burden to show the transaction’s fairness. As to substantive fairness, the offers and appraisal relied on by the directors

occurred two years before the sale to LLC, and the \$12 million sales price is less than the \$13 million offer that the CEO had rejected as insufficient. As to procedural fairness, the directors did not conduct a new market test or seek other purchasers. The process of the board's decision was flawed: the meeting was conducted in 10 minutes, there was no discussion of whether market circumstances had changed since the two-year-old appraisal or whether to seek another appraisal, and there was no consideration of looking for other purchasers or conducting another market test. Finally, the directors did not consider whether another buyer other than LLC would be willing to accommodate the corporation's need for time to locate and move to new headquarters.

Point Four (20%)

The directors likely breached their fiduciary duty of care in authorizing the sale of the tower because they did not become adequately informed prior to their decision.

Under the MBCA, a director is called on to exercise “the care that a person in a like position would reasonably believe appropriate under similar circumstances” in “becoming informed in connection with their decision-making function.” MBCA § 8.30(b). A director may be liable for harm to the corporation from a board decision where it is proven that the director was “not informed to an extent the director reasonably believed appropriate in the circumstances.” MBCA § 8.31(a)(2)(ii)(B); *see also Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (directors breach duty of care when grossly negligent in informing themselves about board decision).

Normally, “the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one.” *Smith v. Van Gorkom*, 488 A.2d at 872; *see also* MBCA § 8.31(a)(2)(ii) (to similar effect). But here the presumption of the business judgment rule does not apply, given that the directors were each financially interested in the transaction (*see* Point Two).

A strong case can be made that the directors were grossly negligent in informing themselves about the sale of the tower to LLC, and thus that they breached their fiduciary duty of care. As discussed in Point Three, the directors decided to sell the tower at a board meeting that lasted 10 minutes; the only document they reviewed was a two-year-old appraisal; they did not discuss whether market circumstances had changed since the appraisal; they did not seek another appraisal; they did not consider looking for other purchasers, including an accommodating purchaser, or conducting another market test; and they did not discuss how the CEO had conducted the earlier market test. *See Smith v. Van Gorkom*, 488 A.2d 858 (finding directors were grossly negligent for authorizing cash-out merger in reliance on 20-minute oral presentation by corporation's chief executive officer without written summary of merger terms or documentation to support price adequacy).

[NOTE: For the shareholder to recover money damages based on a claim that the directors breached their duty of care, the shareholder would have to prove that the corporation was harmed by a sales price that was below market and that the sales price was proximately caused by the directors' failure to become adequately informed. *See* MBCA § 8.31(b)(1). These showings, however, are not elements of whether the directors breached their duty of care.]

CRIMINAL LAW AND PROCEDURE ANALYSIS

(Criminal Law and Procedure I.B.2., B.3.; IV.C.1., E.)

ANALYSIS

Legal Problems:

- (1) Can the woman establish the affirmative defense of not guilty by reason of insanity by showing that, under the State A statute, at the time of the charged crime (a) she suffered from a severe mental disease or defect and (b) as a result of that mental disease or defect, she did not know that her actions were wrong?
- (2) Do the facts support charging the man with manslaughter based on proof that (a) he caused the death of another person, (b) he should have been aware of a substantial risk that another human being could be killed by his conduct, (c) his actions were a gross deviation from the standard of care that a reasonable person would have exercised in the same situation, and (d) his actions were in violation of traffic laws?
- (3) If the man is charged with manslaughter, do the facts support the affirmative defense of duress?

DISCUSSION

Summary

The defense of not guilty by reason of insanity (“NGRI”) is not supported by the evidence and likely cannot be established by the woman. Under State A’s NGRI statute, the woman must show that (1) she suffered from a severe mental disease or defect at the time of the charged crime and (2) as a result of that mental disease or defect, she did not know that her conduct was wrong. The two psychiatric reports support a finding that the woman suffered from a severe mental disease (schizophrenia) that caused her to experience delusional beliefs regarding alien photographers. But the evidence does not support a finding that the woman’s delusions prevented her from knowing that it was wrong to kidnap the man and force him at knifepoint to drive 85 mph on a busy highway just to avoid having her picture taken without compensation.

The facts support charging the man with some form of involuntary manslaughter (e.g., criminal-negligence manslaughter or unlawful-act manslaughter). First, the man’s actions caused the death of the motorcyclist. Second, anyone who drives 85 mph on a busy highway and tries to pass a motorcyclist (a relatively exposed and vulnerable highway user) on a curve while weaving in and out of traffic should be aware of a substantial and unjustifiable risk that another human being could be killed as a result of his conduct. Third, the man’s actions were a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. Fourth, the man’s speeding and reckless driving were serious traffic violations sufficient to make the man criminally accountable for the resulting death in many jurisdictions.

However, if the man is charged with manslaughter, he will almost certainly raise the affirmative defense of duress. Here, the facts support a legal finding of duress. The man’s conduct was

caused by his reasonable belief that obeying the woman's demand to drive faster was the only way for him to avoid imminent death or serious bodily injury. Moreover, because he was already driving the car on a busy highway when the woman pulled out the knife and placed it against his neck, he had no opportunity to extricate himself from the threatening situation. Finally, although duress generally cannot excuse a charge of intentional homicide, here the facts do not support a finding that the man's killing of the motorcyclist was intentional.

Point One (40%)

Even with the admission of the two psychiatric reports, the evidence does not support the affirmative defense of not guilty by reason of insanity.

State A, like most states that provide a not guilty by reason of insanity ("NGRI") defense, limits the defense to a defendant who can show that, at the time of the charged crime, she suffered from a "severe mental disease or defect," and that, as a result of that mental disease or defect, "she did not know that her conduct was wrong." See generally WAYNE R. LAFAVE, CRIMINAL LAW, CHAPTER 7: INSANITY DEFENSE (5th ed. 2010). This is essentially the *M'Naghten* version of the NGRI defense, derived from the opinion in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

Although there is no universal definition of mental illness that satisfies the legal requirement of a "severe mental disease or defect," a serious mental disease like schizophrenia should qualify, especially when accompanied by delusions or other significant impairments of a defendant's capacity to recognize reality. See, e.g., *Billiot v. State*, 515 So. 2d 1234, 1237 (Miss. 1987) (finding that a schizophrenic individual with a delusional thought process had a severe mental disease). Thus, if the jury finds that the woman was suffering from schizophrenia accompanied by delusional beliefs at the time of the charged crime, this finding should establish that she suffered from the type of severe mental disease or defect contemplated by the State A NGRI statute. See RICHARD J. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY JR. 28–31 (3d ed. 2008) (discussing this famous case involving an insanity defense premised on evidence that the defendant suffered from schizophrenia). See also *State v. Becker*, 2011 WL 3925431 (Iowa Ct. App. 2011) (unpublished) (noting that expert testimony that defendant suffered from paranoid schizophrenia had been introduced to support his insanity defense).

However, a finding that the woman was suffering from a "severe mental disease or defect" at the time of the charged crime is necessary but insufficient to establish her NGRI defense. The jury must also find that, as a result of that mental disease or defect, the woman did not know that her conduct was "wrong." See, e.g., *State v. Milton*, 142 So. 3d 157 (La. Ct. App. 2014) (rejecting defendant's defense (under a similar NGRI statute) because the defendant had failed to prove that his mental disease left him unable to distinguish right from wrong and noting that a propensity to commit wrong acts does not necessarily entail an inability to differentiate right from wrong); *People v. Stoffel*, 794 N.Y.S.2d 230 (N.Y. App. Div. 2005) (affirming defendant's conviction, despite substantial defense proof that at the time of the charged crime he suffered from paranoid schizophrenia and delusional beliefs, because his delusions did not prevent him from knowing right from wrong).

States differ as to the definition of “wrong” for NGRI purposes. Some states provide the defense only if the defendant’s severe mental disease or defect prevented her from knowing that her acts were criminal. Other states provide the defense even if the defendant knew that her actions were legally wrong (i.e., against the law) but did not know that her actions were morally wrong (i.e., the type of acts that society would condemn). Finally, other states have not explained whether they define “wrong” as legally or morally wrong. *See* LAFAVE, *supra*, § 7.2(b) at 406–07.

Here, there is no evidence that the woman’s schizophrenia prevented her from knowing that it was legally wrong to kidnap the man and force him at knifepoint to drive well above the speed limit on a busy highway. As the woman explained, her actions were motivated by her concern that alien photographers might take her picture for profit without providing her with compensation. Moreover, the fact that she told the man to “forget the speed limit” provides evidence that she was aware that the speeding was illegal.

There is also no evidence that the woman’s schizophrenia prevented her from knowing that her actions were morally wrong. The lack of evidence on this point is significant because, in some jurisdictions, a defendant can be found NGRI—even if she knows that her actions are illegal—if she does not know that they are morally wrong. *See, e.g., State v. Castillo*, 713 S.E.2d 190, 194–95 (N.C. Ct. App. 2011) (noting that North Carolina applies a version of *M’Naghten* under which a defendant can be exonerated if he did not think that his acts were morally wrong). Here, there is no evidence that the woman’s schizophrenic delusion that celebrity-stalking aliens should pay for her photograph prevented her from recognizing the immorality of her decision to kidnap the man and force him at knifepoint to speed on a busy highway. *See id.*; *see also State v. Potter*, 842 P.2d 481, 486–87 (Wash. Ct. App. 1992) (rejecting defendant’s defense (under a similar NGRI statute) that a defendant can be adjudged insane who has cognitive ability (the ability to know an act is wrong, legally and morally), but lacks volitional control (the ability to control one’s behavior despite cognitive ability)).

[NOTE: Some jurisdictions provide that the insanity defense is available to a defendant who, as a result of a severe mental disease or defect, “lacks substantial capacity” to “appreciate” the wrongfulness of the behavior. *See* LAFAVE, *supra*, § 7.5(a) at 420, fn. 2. This test is not the rule in State A, and an examinee should receive no credit for analyzing it. This test is generally understood to broaden the insanity defense to cover cases where a mental disease results in a significant affective or emotional impairment. In these jurisdictions, unlike in State A, a defendant who knew that her behavior was wrong might still be found NGRI, if the defense proved that her mental disease prevented her from emotionally appreciating the wrongfulness of her conduct. In such a jurisdiction, the woman would have a somewhat higher likelihood of establishing the insanity defense on the facts of this problem, although she still might be unsuccessful.]

Point Two (40%)

The facts support charging the man with manslaughter.

In most jurisdictions, a person who recklessly causes the death of another can be charged with so-called “depraved-heart” murder if the person acted with “extreme indifference to the value of human life.” MODEL PENAL CODE § 210.2(1)(b). Generally, however, reckless driving alone would not lead to a charge of depraved-heart murder. Such a charge would be appropriate only if the reckless driving was combined with intoxication or other aggravating factors. *See, e.g., Cook v. Commonwealth*, 129 S.W.3d 351 (Ky, 2004) (defendant was intoxicated and driving at an excessive speed); *State v. Woodall*, 744 P.2d 732 (Ariz. Ct. App. 1987) (intoxicated, driving almost 70 mph on a 40-mph double curve). Here, there are no additional aggravating factors, so it is unlikely that the man would be charged with depraved-heart murder.

A manslaughter charge, on the other hand, is quite possible. In most jurisdictions, a defendant whose conduct causes the death of another human being can be charged with manslaughter if the defendant acted with criminal negligence, which can include the criminally negligent operation of a motor vehicle. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 15.4 (5th ed. 2010).

The man likely satisfied the *actus reus* of criminally negligent manslaughter. He engaged in the act of driving his car in a manner that violated the traffic laws and his high speed and weaving through traffic created a substantial risk of an accident and serious injury to others. *See, e.g., McGuire v. State*, No. 01-11-01089-CR, 2012 WL 344952, at *2 (Tex. App. Houston (1st Dist.), Feb. 2, 2012) (unpublished) (citing cases in which courts found that driving automobiles in violation of traffic laws satisfied the *actus reus* requirement of negligent homicide). His conduct also was both the actual (“but for”) and proximate cause of the motorcyclist’s death. The death was the direct result of the man striking the motorcyclist with his car, and there were no unforeseeable superseding causes. *See, e.g., People v. Prue*, 779 N.Y.S.2d 271 (N.Y.A.D. 3 Dept. 2004) (finding that the defendant was the direct cause of the victim’s death because the victim was alive before the accident and would not have died but for the accident).

The only question is whether the man acted with the requisite *mens rea* required for manslaughter. In some states, criminal negligence is present whenever a person’s conduct creates a substantial risk of death and the defendant’s actions were a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. In other states, it is also necessary to prove that the defendant was aware of the fact that the conduct created a substantial risk of death. *See* LAFAVE, *supra*, § 15.4(a).

Here, the man was driving at the excessive speed of 85 mph on a busy highway, was weaving in and out of traffic, and tried to pass a motorcycle on a curve. Based on these facts, a fact-finder could conclude that the man had the requisite *mens rea* for criminal-negligence manslaughter. An ordinary person would have been aware that this kind of driving created a substantial and unjustifiable risk that a driver would lose control of the car, hit the motorcyclist or others on the highway, and cause death. The man’s actions were also a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. Courts have upheld jury verdicts finding that defendants acted with criminal negligence under similar circumstances. *See, e.g., State v. Donato*, No. IN89-06-0858, 1990 WL 140073, at *2 (Del. Super. Aug. 15,

1990) (denying defendant's motion for a judgment of acquittal when the jury found him guilty of negligent homicide after he struck and killed the victim while going 20 mph over the speed limit and not paying attention to the road). If State A requires actual awareness of a substantial risk of death, a manslaughter charge would still be warranted because the man must have been aware that his driving could easily cause a fatal accident.

In some states, manslaughter is also committed when a death occurs as a result of a defendant's commission of an unlawful act. Here, the man's excessive speeding and dangerous weaving through traffic were both serious traffic violations sufficient to serve as predicate offenses for a charge of unlawful-act manslaughter. *See* LAFAVE, *supra*, § 15.5.

Point Three (20%)

The facts support the affirmative defense of duress because the man's conduct was caused by his reasonable belief that obeying the woman's instructions to drive faster was the only way to avoid imminent death or serious bodily injury.

The typical affirmative defense of duress excuses defendants from criminal liability if their conduct was committed "under the pressure of an unlawful threat from another human being to harm" the defendant. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 9.7(a) (5th ed. 2010). The unlawful threat must cause the defendant to reasonably believe that "the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law." *Id.* § 9.7. The defendant must also prove that he engaged in the criminal behavior *because* of the threat and not for some other reason. The rationale for the duress defense is that "even though he has done the act the crime requires and has the mental state which the crime requires, his conduct violating the literal language of the criminal law is excused because he 'lacked a fair opportunity to avoid acting unlawfully.'" *Id.* § 9.7(a) at 520 (internal citation omitted).

Here, the man almost certainly will succeed with an affirmative defense of duress. His physical conduct (driving at an excessive rate of speed and in a reckless manner) was in response to the woman's direct threat of death or serious bodily harm. Under the circumstances, it was reasonable for him to fear for his life because his assailant was holding a knife to his throat in a car, and her behavior indicated that she was mentally unbalanced, making it more likely that she would carry out her threat. Because the man was already driving the car on a busy highway when the woman pulled out the knife and placed it against his neck, he had no opportunity to extricate himself from the threatening situation. *See United States v. Johnson*, 416 F.3d 464 (6th Cir. 2005).

The Model Penal Code defines the affirmative defense of duress as a threat such that a person of reasonable firmness would be unable to resist it. *See* MODEL PENAL CODE § 2.09(1). This standard, which is followed in several jurisdictions, is also satisfied here. A person of reasonable firmness of character would very likely be unable to resist the threat posed by the woman under these circumstances. At the common law, and in most jurisdictions today, duress is not available as a defense to any kind of intentional homicide. LAFAVE, *supra*, § 9.7(b). In this case, however, the man had no intention of killing the motorcyclist. Thus, there is no bar to his asserting the defense against a charge of negligent homicide.

TRUSTS ANALYSIS

(Trusts I.H., I.)

ANALYSIS

Legal Problems:

- (1) Is the trust condition providing for the termination of an income interest upon marriage invalid as a matter of public policy?
- (2) Did the trustee violate his duty of loyalty by purchasing the stock of the closely held corporation from the trust and, if so, what damages or other remedies are the trust beneficiaries likely to obtain?
- (3) Did the trustee violate the prudent investor rule by investing trust principal in a balanced portfolio of mutual funds with potential for growth and current income and retaining those investments after they declined in value?

DISCUSSION

Summary

A trust condition that provides for the termination of a beneficiary's interest upon marriage is void as against public policy, except when the beneficiary is the trust creator's spouse. Thus, the son's interest would not terminate upon his marriage.

A trustee's purchase of trust assets is an act of self-dealing and a breach of the duty of loyalty. The trust beneficiaries can either rescind the transaction or seek damages. Where, as here, the value of the asset has substantially declined, the beneficiaries are more likely to seek money damages (here, \$300,000) for the breach.

Neither the investment of trust assets in a balanced portfolio of mutual funds with potential for growth and current income nor the retention of those assets during a period of general economic decline violates the prudent investor rule. Thus, neither the son nor the charity is entitled to damages here.

Point One (30%)

The son's income interest in the trust would not terminate upon his marriage because the condition against marriage is void as a matter of public policy.

Provisions of trusts that violate public policy are void. RESTATEMENT (THIRD) OF TRUSTS § 29. Trust provisions that restrain a first marriage have generally been held to violate public policy. *Id.* Comment j; RESTATEMENT (SECOND) OF PROPERTY § 6.1 (a provision restraining any first marriage is invalid and the transfer takes effect "as though the restriction had not been imposed."). In his hornbook, Professor Bogert states: "[T]he common law has a well-defined interest in preserving *freedom of marriage* . . . and in the preservation of the family relation Hence provisions in a trust instrument which provide that a beneficiary shall have no interest under the trust unless he *obeys the instructions of the settlor regarding marriage* . . .

Trusts Analysis

may be held illegal as against public policy.” Although courts have upheld some restrictions on marriage—for example, remarriage—none have upheld a complete restraint on a first marriage. GEORGE G. BOGERT, TRUSTS § 48 (6th ed. 1987) (footnote omitted; emphasis added). *See also* RESTATEMENT (FIRST) OF PROPERTY § 424–426 (1944). Thus, because the son’s income interest would terminate upon his marriage, no matter what the circumstances of that marriage, the provision is void and the son’s income interest continues.

A restraint on marriage might be upheld if the trustee’s motive was merely to provide support for a beneficiary while the beneficiary is single. Here, there are no facts to support that motive. In fact, because this is a mandatory income payout trust, the trust income is payable to the son without regard to his support needs.

Point Two (35%)

The trustee breached his duty of loyalty by purchasing stock from the trust, an act of self-dealing. In such a case, trust beneficiaries may obtain an order setting aside the transaction or seek damages based on the difference between the purchased assets’ fair market value at the time of purchase and the sales price paid by the trustee.

A trustee owes a fiduciary duty of loyalty to a trust; self-dealing, such as a purchase of trust assets by the trustee in his individual capacity, violates this obligation. RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959); UNIF. TRUST CODE § 802. Under the “no further inquiry” rule, there is no need to inquire into the motivation for the self-dealing transaction or even its fairness. *See* MCGOVERN, KURTZ & ENGLISH, PRINCIPLES OF WILLS, TRUSTS, AND ESTATES (2d. ed. 2012) at 560.

Any trust beneficiary can cause a self-dealing purchase by a trustee to be set aside or obtain a damages award. *See* UNIF. TRUST CODE § 802. If a beneficiary elects to set aside the transaction, the trust property purchased by the trustee is returned to the trust and the amount the trustee paid for the property is refunded by the trust. If a beneficiary seeks damages, those damages are based on the difference in the fair market value of the trust assets at the time of the self-dealing transaction and the amount paid by the trustee. *Id.* Where, as here, the assets purchased by the trustee have declined in value since the self-dealing transaction, trust beneficiaries are likely to seek damages instead of setting aside the transaction.

Here, the beneficiaries should elect to seek damages from the trustee, not rescission. First, with rescission, the trustee would return the shares to the trust, and the trust would have to refund the purchase price to the trustee. This would leave the trust with assets worth only \$450,000. Furthermore, because of the market declines, the trust assets are currently worth only \$1,000,000; thus the trust doesn’t have sufficient assets to refund the purchase price. On the other hand, by seeking damages, the trust would collect \$300,000, representing the difference between the value of the shares when purchased by the trustee (\$1,500,000) and the purchase price (\$1,200,000), leaving the trust with \$1,300,000 in assets.

The trustee also breached his duty of care when selling the stock because of his failure to test the market.

Point Three (35%)

A trustee has a duty to invest trust assets in a prudent manner. Here, there are no facts suggesting that the trustee breached any prudent investment duty with respect to the selection and management of the investments he made.

A trustee shall administer “the trust as a prudent person would . . . [using] reasonable care, skill, and caution.” *See* UNIF. TRUST CODE § 804. *See also* UNIF. PRUDENT INVESTOR ACT § 2(a) (1995); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 (1992); RESTATEMENT (THIRD) OF TRUSTS § 90 (2007). One of the hallmarks of prudent investing is diversification. A balanced portfolio reduces aggregate risk by investing in different investment categories. Diversification thus is strong evidence of prudent investing. Indeed, failure to diversify is likely the reason why the trustee in this case was advised to sell the closely held corporate stock. *See* MCGOVERN, KURTZ & ENGLISH, *supra*, at 575–77.

“A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” UNIF. PRUDENT INVESTOR ACT § 2(b); *accord*, RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227(a). The trustee should consider the purposes, terms, distribution requirements, and other circumstances affecting the trust. UNIF. PRUDENT INVESTOR ACT § 2(a). The prudent investor rule applies to both investment and management decisions. Management includes monitoring; thus, the trustee has a duty to monitor investments prudently made to assure that retention of those investments remains prudent. If retention is not prudent, the trustee should sell the imprudent investments and reinvest the proceeds in prudent investments. A trustee, however, is not liable for declines in value due to a downturn resulting from general economic conditions. *See generally*, UNIF. PRUDENT INVESTOR ACT § 2, cmt.

Here, the trustee’s investment of the sale proceeds seems to satisfy the diversification requirement. The trustee selected a balanced group of mutual funds; the portfolio included both stock and bond funds; it contained both growth and income funds. The trustee also appears to have considered the needs of both the income beneficiary and remainderman; growth funds are aimed at achieving principal appreciation and income funds at producing current income. The funds’ decline in value during a period of general economic decline—when most types of investments may well have fallen in value—does not evidence lack of prudence, and there are no facts to show any failure to monitor the portfolio.



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