



July 2017 MEE Questions and Analyses



www.ncbex.org

National Conference of Bar Examiners

302 South Bedford Street | Madison, WI 53703-3622

Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275

e-mail: contact@ncbex.org

Contents

| | |
|------------------------------|-----|
| Preface..... | ii |
| Description of the MEE | ii |
| Instructions..... | iii |

July 2017 Questions

| | |
|--|---|
| Torts Question..... | 3 |
| Constitutional Law Question | 4 |
| Secured Transactions Question..... | 5 |
| Decedents' Estates/Trusts & Future Interests Question..... | 6 |
| Evidence/Criminal Law & Procedure Question | 7 |
| Civil Procedure/Conflict of Laws Question..... | 9 |

July 2017 Analyses

| | |
|---|----|
| Torts Analysis..... | 13 |
| Constitutional Law Analysis..... | 19 |
| Secured Transactions Analysis | 22 |
| Decedents' Estates/Trusts & Future Interests Analysis | 25 |
| Evidence/Criminal Law & Procedure Analysis..... | 29 |
| Civil Procedure/Conflict of Laws Analysis | 33 |

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 2017 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

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

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Constitutional Law question on the July 2017 MEE tested the following areas from the Constitutional Law outline: I.B.2. The nature of judicial review—Jurisdiction—The Eleventh Amendment and state sovereign immunity; III.B.1. The relation of nation and states in a federal system—Federalism-based limits on state authority—Negative implications of the commerce clause.

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 (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Article 9 (Secured Transactions) of the Uniform Commercial Code. 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.

Examinees testing in UBE jurisdictions must answer questions according to generally accepted fundamental legal principles. Examinees in non-UBE jurisdictions should answer according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

July 2017
MEE Questions

Torts

Constitutional Law

Secured Transactions

Decedents' Estates/Trusts & Future Interests

Evidence/Criminal Law & Procedure

Civil Procedure/Conflict of Laws

TORTS QUESTION

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

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

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

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

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

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

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

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

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

CONSTITUTIONAL LAW QUESTION

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

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

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

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

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

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

SECURED TRANSACTIONS QUESTION

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

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

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

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

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

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

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

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

DECEDENTS' ESTATES/TRUSTS & FUTURE INTERESTS QUESTION

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

A. I give \$50,000 to my cousin, Bob;

B. I give my household goods to those persons mentioned in a memorandum I will write addressed to my executor; and

C. I leave the balance of my estate to Bank, as trustee, to hold in trust to pay the income to my child, Sam, for life and, when Sam dies, to distribute the trust principal in equal shares to his children who attain age 21.

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

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

In 2015, Testator saw an attorney about a new will because he wanted to change the age at which Sam's children would take the trust principal from 21 to 25. The attorney told Testator that he could avoid the expense of a new will by executing a codicil that would republish the earlier will and provide that, when Sam died, the trust principal would pass to Sam's children who attain age 25. The attorney then prepared a codicil to that effect, which was properly executed and witnessed by two individuals unrelated to Testator.

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

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

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

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

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

EVIDENCE/CRIMINAL LAW & PROCEDURE QUESTION

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

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

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

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

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

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

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

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

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

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

Evidence/Criminal Law & Procedure Question

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

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

CIVIL PROCEDURE/CONFLICT OF LAWS QUESTION

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

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

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

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

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

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

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

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

Rather than file an answer to Taxes’s complaint, the woman filed a motion pursuant to Rule 12(b)(6) to dismiss the action for failure to state a claim upon which relief can be granted. The woman’s motion argued that the noncompete covenant is invalid and unenforceable as a matter of law. Two days after filing the motion to dismiss, and before Taxes had responded to

Civil Procedure/Conflict of Laws Question

the motion, the woman filed an “amended motion to dismiss.” The amended motion sought dismissal on the same basis as the original motion (failure to state a claim), but also asked the court to dismiss the action for insufficient service of process.

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

July 2017 MEE Analyses

Torts

Constitutional Law

Secured Transactions

Decedents' Estates/Trusts & Future Interests

Evidence/Criminal Law & Procedure

Civil Procedure/Conflict of Laws

TORTS ANALYSIS

TOR II.E.1., F.2.; III.

ANALYSIS

Legal Problems:

- (1) Is a public fireworks display an abnormally dangerous activity subject to strict liability?
- (2) Based on the evidence submitted by the woman and her husband, could a reasonable jury find that the conduct of the fireworks company was negligent?
- (3) When is an actor's creation of a dangerous situation the proximate cause of injuries suffered by a person who was rushing to respond to the danger?
- (4) When is a person liable for the acts or omissions of an independent contractor employed by that person?

DISCUSSION

Summary

It is unclear whether the trial judge erred in ruling that a public fireworks display is not an abnormally dangerous activity subject to strict liability. Such a display is not a matter of common usage, as traditionally defined, and it presents substantial risks that cannot be eliminated with the exercise of reasonable care. However, some courts, relying on the Second Restatement of Torts factors, have found that public fireworks displays are not abnormally dangerous because of their value to the community.

The judge erred in directing a verdict for the defendants on the negligence claim because adherence to a statutory standard does not insulate a defendant from liability for negligence, and the evidence showed a foreseeable risk of harm and precautions that would have eliminated the risk without undue burden.

Because danger invites rescue, the trial judge erred in concluding that the misfiring mortar was not the proximate cause of the husband's injuries. The judge also erred in concluding that the homeowners association could not be held liable for the acts of the fireworks company, because one who employs an independent contractor is subject to liability for the contractor's failure to take reasonable precautions when there is a special danger inherent in the work, and the harm that occurred here was the result of a special danger inherent in fireworks displays.

Point One (40%)

The trial court's finding that a public fireworks display is not an abnormally dangerous activity subject to strict liability may or may not have been correct. A public fireworks display is not a matter of common usage and has substantial risks that cannot be eliminated. But some courts, relying on the Second Restatement of Torts factors, have found that public fireworks are nonetheless not abnormally dangerous because of their value to the community.

Torts Analysis

The modern doctrine of strict liability for abnormally dangerous activities derives from *Fletcher v. Rylands*, 159 Eng. Rep. 737 (1865), *rev'd*, 1 L.R.-Ex. 265, [1866] All E.R. 1, 6, *aff'd sub nom. Rylands v. Fletcher*, 3 L.R.-H.L. 330, [1868] All E.R. 1, 12, in which the defendant's reservoir flooded mine shafts on the plaintiff's adjoining land. *Rylands* has come to stand for the rule that "the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." W. Page Keeton et al., *Prosser and Keeton on Torts* § 78, at 547–48 (5th ed. 1984).

Today, the determination of whether an activity is unduly dangerous, and thus subject to strict liability, is generally governed by factors outlined in the Restatement of Torts. Under the First Restatement, strict liability applied to an "ultra-hazardous" activity. Under the Second and Third Restatements, strict liability applies to an "abnormally dangerous activity." Section 520 of the Restatement (Second) lists six factors that are to be considered in determining whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977). Comments to the Restatement explain that "several [factors are] ordinarily . . . required for strict liability [but] . . . it is not necessary that each of them be present. . . . The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care." *Id.*, comment f. The Second Restatement continued to define "common usage" narrowly. To be a matter of common usage, an activity must be carried on "by the great mass of mankind or by many people in the community." *Id.* at comment i (identical to comment e in the Restatement (First)).

As in the First Restatement, under the relatively new Third Restatement, the strict liability determination is based on only two factors. An activity is abnormally dangerous if (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage. Restatement of Torts (Third) § 20(b). However, the Third Restatement employs a much broader definition of "common usage" than that of the First and Second Restatements. Under the Third Restatement,

“activities can be in common use even if they are engaged in by only a limited number of actors”:

Consider the company that transmits electricity through wires. . . . The activity itself is engaged in by only one party. Even so, electric wires . . . are pervasive within the community. Moreover, most people, though not themselves engaging in the activity, are connected to the activity. . . . The concept of common usage can be extended further to activities that, though not pervasive, are nevertheless common and familiar within the community. If in this sense the activity is normal, it is difficult to regard the activity as exceptional or abnormally dangerous.

Id., comment j.

On the other hand, § 20 comment k specifies that “the value that the defendant or others derive from the activity is not a direct factor in determining whether the activity is abnormally dangerous.” *Id.*, comment k. It is thus unclear whether, under the Third Restatement, more or fewer activities would be classified as abnormally dangerous than under the Second Restatement.

The classic example of an abnormally dangerous activity is blasting. Courts in virtually all jurisdictions have held that this activity is subject to strict liability, citing its potential for extensive harm, the fact that it is not a matter of common usage, and the actors’ inability to eliminate risk. *See, e.g., Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969).

Courts have divided as to whether legal fireworks displays should be classified as abnormally dangerous and thus subject to strict liability. *Compare Miller v. Westcor Ltd. Partnership*, 831 P.2d 386 (Ariz. Ct. App. 1992), and *Klein v. Pyrodyne Corp.*, 810 P.2d 917 (Wash. 1991) (imposing strict liability), with *Litzmann v. Humboldt County*, 273 P.2d 82, 88 (Cal. Dist. Ct. App. 1954); *Cadena v. Chicago Fireworks Mfg. Co.*, 697 N.E.2d 802 (Ill. App. Ct. 1998); and *Haddon v. Lotito*, 161 A.2d 160 (Pa. 1960) (finding no strict liability).

Courts that have classified fireworks displays as abnormally dangerous have tended to focus on the fact that fireworks are much like blasting in that “[a]nytime a person ignites aerial shells or rockets with the intention of sending them aloft to explode in the presence of large crowds of people, a high risk of serious personal injury or property damage is created. . . . Furthermore, no matter how much care pyro-technicians exercise, they cannot entirely eliminate the high risk inherent in setting off powerful explosives such as fireworks near crowds.” *Klein, supra*. Courts that have declined to classify legal fireworks displays as abnormally dangerous have tended to focus on their value to the community. *See Lipka v. DiLungo*, No. CV-407399, 2000 WL 295355 (Conn. Super. Ct. Mar. 8, 2000).

Under the limited factors of the First and Third Restatements, the case for holding that public fireworks displays are abnormally dangerous is very strong. This activity is not one carried on by the “mass of men” given that it is legally performed only by trained, licensed personnel. Its risks, given the large number of people who watch such displays, cannot be eliminated.

Torts Analysis

Using the multiple-factor approach of the Second Restatement, one can justify a finding that fireworks displays are not abnormally dangerous based on their popularity and value to the community and relatively low risk to any particular individual. Under the Third Restatement, the value of fireworks to the community would be irrelevant, but it might be characterized as a matter of common usage given that fireworks, like electrical wires, are pervasive, at least on certain holidays.

Thus, it is unclear whether the trial court erred in finding that public fireworks displays are not an abnormally dangerous activity. However, if the court relied on the Second Restatement, other courts have reached the same conclusion. The court's conclusion could also be justified under the Third Restatement given its novel definition of common usage.

[NOTE: An examinee's conclusion is less important than his or her reasoning on whether a public fireworks display is an abnormally dangerous activity. A good answer need not analyze each theory discussed above.]

Point Two (25%)

The trial judge incorrectly directed a verdict for the fireworks company on the negligence claim. Adherence to a statutory standard does not insulate a defendant from liability for negligence, and the evidence showed a foreseeable risk of harm that precautions would have reduced without undue burden.

Although the unexcused violation of a statutory standard of care is negligence per se, the converse is not true: an actor who has complied with all statutory standards may still be found negligent if his conduct is not reasonable under the circumstances. In judging whether an actor's conduct is reasonable, the trier of fact will consider the burden of taking precautions as compared to the risks inherent in the actor's conduct and the probability that those risks will materialize. See Richard A. Epstein, *Torts* § 6.5 (1999).

Here, all the fireworks company's employees were state-certified fireworks technicians, and the company followed all governmental fireworks regulations. However, the plaintiffs' evidence established that there was a foreseeable risk of a misfiring mortar even when the fireworks display was performed with due care; the risk of misfire cannot be eliminated. The evidence also established that a misfiring mortar can cause death or serious injury to a bystander. Nationally, accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. About 15% of fireworks accidents are caused by mortars misfiring in the course of professional fireworks displays, and some of these accidents occur despite compliance with governmental fireworks regulations.

In recognition of the risks associated with the discharge of fireworks, a state statute imposes a 500-foot safety zone for fireworks displays on land. Although the statute does not refer to fireworks displays on water, it arguably provides a reasonable standard for determining a safety zone for a fireworks display on water. The evidence also showed that a 500-foot safety zone

would not have hindered spectators at the lake fireworks display to any significant extent, as only four potential viewing spots lie within this area. Because the fireworks company's employees were all state-certified fireworks technicians, a reasonable jury could have concluded that both the risk of injury and the utility of a 500-foot safety zone were known to the fireworks company. It could also have concluded that the fireworks company or the homeowners association, with very little cost or inconvenience, could have identified the four viewing spots within the 500-foot safety zone and warned potential spectators of the hazard of watching from those locations.

Thus, the court erred in directing a verdict for the fireworks company on the negligence issue: adherence to a statutory standard does not insulate an actor from liability, and there was evidence on which a jury could have based a negligence finding.

Point Three (15%)

The trial court incorrectly found that the misfiring mortar was not the proximate cause of the husband's injuries because danger invites rescue.

Liability typically extends only to individuals within the zone of risk. If an actor's conduct "creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured." Restatement (Second) of Torts § 281, comment c. Liability also typically extends only to foreseeable hazards. The actor whose conduct is responsible for an altogether unexpected type of injury usually escapes liability. *See Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928).

Here, because the husband was inside his house, he was probably outside the area in which risks from a fireworks display were to be anticipated. He also suffered a different injury (fracture) from that which one would usually anticipate (burns, impact harm) from fireworks exposure.

However, courts have long held that injuries sustained when running from danger are foreseeable. *See, e.g., Tuttle v. Atlantic City R.R.*, 49 A. 450 (N.J. 1901). They have also held that "danger invites rescue." *Wagner v. International Ry. Co.*, 133 N.E. 437 (N.Y. 1921). "The wrong that imperils life is a wrong . . . to his rescuer." *Id.* Thus, because the husband was a rescuer and his injuries are typical of those an individual rushing from (or to) a dangerous situation would sustain, the trial court erred in concluding that the acts and omissions of the homeowners association and the fireworks company were not the proximate cause of his injuries.

Point Four (20%)

The trial court incorrectly found that the homeowners association could not be held liable for the fireworks company's acts or omissions. One who employs an independent contractor is subject to liability for the contractor's failure to take reasonable precautions as to danger inherent in the work.

An independent contractor is one who, by virtue of his contract, possesses independence in the manner and method of performing the work he has contracted to perform for the other party to

Torts Analysis

the contract. Independent contractors are usually paid by the job instead of receiving ongoing salaries; the individual who hires an independent contractor typically does not supervise the contractor's activities or retain a right to control his activities. *See Epstein, supra*, § 9.11. The fireworks company is an independent contractor: it was hired by the homeowners association for a specific job, to plan and manage the fireworks display. The homeowners association did not supervise the fireworks company's work or have any control over its operations.

Typically, one who employs an independent contractor is not vicariously liable for the contractor's acts or omissions. But when an actor "employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work . . . [he] is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Restatement (Second) of Torts § 427.

Here, the homeowners association had reason to know that fireworks are inherently risky; thousands of fireworks injuries occur each year, and the risk cannot be eliminated even when fireworks are used by experts. Thus, the trial court's conclusion that the association could not be held liable for the fireworks company's acts was erroneous.

CONSTITUTIONAL LAW ANALYSIS

CNL I.B.2.; III.B.1.

ANALYSIS

Legal Problems:

- (1) Can a private company maintain a suit against a state in federal court seeking damages based upon a claim that the state injured its business by enforcing an unconstitutional law?
- (2) Can a private company maintain a suit against a state official in federal court to enjoin that official from enforcing an allegedly unconstitutional law?
- (3) Does a state law that requires a multistate business to adopt expensive security measures as a condition of providing certain services in the state impose an unconstitutional burden on interstate commerce?

DISCUSSION

Summary

The bank cannot maintain a suit against State A for damages in federal court. The Eleventh Amendment precludes the federal court from exercising jurisdiction over a suit by a private party seeking to recover damages from a state.

The court can hear the bank's claim against the Superintendent of Banking because the bank has sued the superintendent in her official capacity and is seeking injunctive relief only.

Although the statute does not discriminate against interstate commerce, it does impose a significant burden on interstate commerce. A court could conclude that the law unconstitutionally burdens interstate commerce if the court finds that the burden imposed is clearly excessive in relation to the purported benefits. A balancing of benefits and burdens would require the court to evaluate the extent of the actual burden the statute imposes on the bank and whether the statute has substantial fraud-protection benefits.

Point One (30%)

Because states are immune under the Eleventh Amendment from suits for damages in federal court, a federal court would dismiss the bank's damages claim against State A if State A made a claim of sovereign immunity.

The Eleventh Amendment provides that "the Judicial power of the United States" does not extend to "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State" U.S. Const. amend. XI. As "one of the United States," State A is immune from suit unless it agrees to be sued. While this immunity of States from suits has been described as an "anachronistic survival of monarchical privilege," it is nonetheless firmly established. *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 580 (1946)

(Frankfurter, J., dissenting). While a state may waive its immunity, *see Clark v. Barnard*, 108 U.S. 436, 447 (1883), there is no evidence that State A has done so in this case. Here, the bank, a resident of State B, is suing State A for damages in federal court; this is barred by the Eleventh Amendment.

[NOTE: A state's Eleventh Amendment immunity may be abrogated in certain circumstances by congressional action under Congress's enforcement powers in the Fourteenth Amendment. There is no such action by Congress in this case, so the exception is not germane.]

Point Two (30%)

Pursuant to the doctrine of *Ex parte Young*, a suit against State A's Superintendent of Banking to enjoin the enforcement of an allegedly unconstitutional statute is not barred by the Eleventh Amendment.

"Official-capacity actions [against state officials] for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985), *citing Ex parte Young*, 209 U.S. 123 (1908). Thus, even when a damages claim against the state is barred under the Eleventh Amendment, a suit against public officials in their official capacity seeking an injunction may be maintained.

Here, the bank could maintain an action in federal court against State A's Superintendent of Banking in her official capacity to enjoin enforcement of an allegedly unconstitutional law.

[NOTE: An examinee might also point out that the federal court would have jurisdiction over this suit because the bank's claim raises a federal question.]

Point Three (40%)

Although the statute does not discriminate against interstate commerce, it does impose a significant burden on interstate commerce. A court could conclude that the law unconstitutionally burdens interstate commerce if the court determines that the burden imposed is clearly excessive in relation to the purported benefits.

The Supreme Court of the United States has long held that the Constitution's grant to Congress of the power to regulate interstate commerce also limits, by implication, the right of state or local governments to adopt laws that regulate interstate commerce. *See* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 8.1 (8th ed. 2010). This is often referred to as "dormant commerce clause" analysis. A state law that discriminates against interstate commerce in a way "that operates as . . . a tariff or trade barrier against out-of-state interests" is subject to strict review and is virtually per se unconstitutional. *Id. See, e.g., C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994). A nondiscriminatory state law that imposes an "incidental" burden on interstate commerce will nonetheless be unconstitutional if the burden it imposes is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The State A law in this case is facially nondiscriminatory. It applies equally to local banks and to banks from other states. There are also no facts to suggest that it operates in a discriminatory fashion or that it imposes a heavier burden on out-of-state banks offering services to State A businesses than it imposes on in-state banks.

Because the law “regulates evenhandedly,” the question is whether it “effectuate[s] a legitimate local public interest” and whether the burden, if any, is “clearly excessive in relation to the putative local benefits.” *Id.*

State A plainly has a “legitimate local public interest” in protecting local businesses from the significant losses that can result from electronic funds transfer fraud. State A’s law seeks to reduce such fraud by requiring banks to adopt certain security measures that the legislature believes will reduce the risk of such fraud. The legislature’s judgment that biometric identification is superior to other anti-fraud techniques is not a judgment that a court will normally second-guess. State A adopted its law in response to lobbying by a local business that stands to benefit from the law. But that does not mean that the law does not serve a legitimate state interest. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (court accepts judgment of Minnesota legislature that a ban on plastic nonreturnable milk containers serves environmental goals despite contrary evidence suggesting that such a ban would cause continued use of “ecologically undesirable paperboard milk containers.”). However, it is unclear whether the security measures required by State A produce real and substantial benefits.

The benefits of the law must be weighed against the burden it imposes. The law burdens interstate commerce by increasing the expenses of out-of-state banks that wish to offer certain electronic banking services to State A businesses. Compliance with the law would require the bank to make substantial changes to its entire electronic banking system at a cost of \$50 million. This cost is substantial enough to deter the bank from offering certain services in State A at all. A court could find that this is a real and substantial burden placed on interstate commerce.

In sum, if the benefits of the security measures required by State A are substantial enough to justify the burdens, the statute is constitutional. Otherwise, it is not.

SECURED TRANSACTIONS ANALYSIS

SEC I.B.; II.A., D.; III.B.; IV.A., B., F., J.

ANALYSIS

Legal Problems:

- (1)(a) What are the rights of a buyer of accounts (i.e., the finance company) that has not filed a financing statement?
- (1)(b) What are the rights of a party (i.e., the bank) to whom a security interest in accounts has been granted if that secured party has filed a financing statement?
- (1)(c) If a buyer of accounts has not filed a financing statement, what are that buyer's rights against a party to whom a security interest in those accounts has been subsequently granted and who has filed a financing statement?
- (2) May an account debtor discharge its obligation on an account that has been assigned by paying the assignor even after the account debtor learns that the account has been assigned?

DISCUSSION

Summary

The sale of payment rights from the manufacturer to the finance company is a sale of accounts governed by Article 9 of the Uniform Commercial Code. Because the finance company did not file a financing statement, it has an unperfected security interest in the accounts. By contrast, the bank subsequently was granted a security interest in the same accounts, and that security interest was perfected. Accordingly, the perfected security interest of the bank has priority over the finance company's unperfected interest in the accounts.

The retail stores are incorrect that they have no obligations to the bank. Because the retail stores received an authenticated (signed) notification of the assignment of their accounts to the bank, they can discharge their obligations *only* by paying the bank.

Point One(a) (30%)

The sale by the manufacturer to the finance company of the right to be paid by the retail stores for items of clothing is a sale of accounts governed by Article 9 of the UCC, and the finance company is said to have a "security interest." Because the finance company did not file a financing statement, this security interest is unperfected.

The sale by the manufacturer to the finance company of the right to be paid by the retail stores is a sale of "accounts" as that term is defined in Article 9 of the Uniform Commercial Code. UCC § 9-102(a)(2). A sale of accounts is governed by UCC Article 9 even though the transaction is not one in which property secures an obligation. UCC § 9-109(a)(3). (There are a few exceptions to Article 9's coverage of sales of accounts, but they are not germane to this problem. *See generally* UCC § 9-109(c)–(d).) Because Article 9 governs a sale of accounts, Article 9

vocabulary is applied to the sale, so that the rights of the buyer of the accounts are referred to as a “security interest,” the sold accounts are “collateral,” the seller (the garment manufacturer in this problem) is the “debtor,” and the buyer (the finance company in this problem) is the “secured party.” *See* UCC §§ 1-201(b)(35) and 9-102(a)(12), (28), and (73). Moreover, because the agreement of sale is “an agreement that creates or provides for a security interest,” it is a security agreement. UCC § 9-102(a)(74).

The finance company’s security interest is enforceable and has attached because the three criteria in UCC § 9-203(b) are satisfied: (i) “value” has been given inasmuch as the finance company has paid the purchase price (*see* UCC § 1-204), (ii) the debtor (the manufacturer) had rights in the collateral (the accounts sold), and (iii) the debtor “authenticated” (signed or its electronic equivalent, *see* UCC § 9-102(a)(7)) a security agreement containing a description of the collateral. The finance company’s security interest, however, is not “perfected” because no financing statement has been filed with respect to the transaction. *See* UCC §§ 9-308, 9-310.

Accordingly, the finance company has an unperfected security interest in the rights to be paid by the retail stores.

Point One(b) (30%)

The manufacturer granted to the bank an enforceable and attached security interest in the right to be paid by the retail stores. Because the bank filed a financing statement with respect to this security interest, the bank’s security interest is perfected.

The bank also has an enforceable and attached security interest in the right to be paid by the retail stores that bought clothing from the manufacturer on credit. First, value has been given because the bank loaned money to the manufacturer. *See* UCC § 9-203(b)(1). Second, the debtor (the manufacturer) still had rights in the collateral. *See* UCC § 9-203(b)(2). This is the case because even though the manufacturer had already sold the accounts to the finance company, the finance company’s interest was unperfected. *See* UCC § 9-318(b). Third, the manufacturer authenticated (signed, in this case) a security agreement containing a description of the collateral (the accounts). *See* UCC § 9-203(b)(3)(A).

Unlike the finance company’s security interest, the bank’s security interest is perfected because the bank filed a properly completed financing statement. *See* UCC §§ 9-308, 9-310(a).

[NOTE: An examinee might mistakenly assert that the bank does not have an enforceable security interest in the pre-February 1 accounts because one of the three elements of an enforceable and attached security interest (that the debtor had rights in the collateral) is not satisfied inasmuch as the garment manufacturer had previously sold those accounts to the finance company. This assertion would be accurate if the finance company had perfected its interest, but, as indicated in UCC § 9-318(b) and noted in Point One(b) of the analysis, if a buyer of accounts does not perfect its interest, the seller is treated as continuing to have rights in those accounts. Thus, in this case, the manufacturer continues to have sufficient rights in the pre-February 1 accounts for the bank’s security interest to attach.

Nonetheless, an examinee who makes that mistaken assertion should receive some credit for recognizing that a debtor must have rights in the collateral for a creditor to have an enforceable security interest in that collateral. Such an examinee should also conclude that, because the bank has obtained no rights in the pre-February 1 accounts from the garment manufacturer, the retail stores would have no obligation to pay the bank amounts due on those accounts even after receiving the notifications of assignment from the bank. *See* Point Two. An examinee who reaches that conclusion based on the mistaken assertion should receive full credit if the examinee also correctly notes that the bank has a right to collect from the retailers on the post-February 1 accounts (which were not sold to the finance company). Conversely, an examinee who asserts, in answer to the first question, that the bank does not have an enforceable security interest but nonetheless concludes, in answer to the second question, that the retail stores must pay the bank to discharge their payment obligation on the pre-February 1 accounts, should not receive credit for that conclusion inasmuch as, under UCC § 9-406(a), the bank would not be an assignee and its notice to the retail stores would have no effect.]

Point One(c) (20%)

The finance company's unperfected security interest in the rights to be paid by the retail stores is subordinate to the bank's perfected security interest in those rights.

An unperfected security interest is subordinate to a perfected security interest in the same property (*see* UCC §§ 9-317(a)(1) and 9-322(a)(2)). Therefore, because the finance company's security interest in the rights to be paid by the retail stores is unperfected while the bank's security interest in those rights is perfected, the finance company's interest in those rights is subordinate to the bank's security interest in them. This is the case even though the sale of the rights to the finance company occurred before the bank was granted a security interest in them.

Point Two (20%)

Because the retail stores received authenticated (signed) notifications of the assignment of their accounts to the bank and directions to pay the bank, they can discharge their obligations on the accounts only by paying the bank, the assignee.

The retail stores are "account debtors" on the accounts. UCC § 9-102(a)(3). Under UCC § 9-406(a), an account debtor with respect to assigned accounts is entitled to discharge its obligation by paying the assignor only until the account debtor receives notice of the assignment to the assignee, authenticated by either the assignor or the assignee, directing the account debtor to make payment to the assignee. Once such a notice has been received, the account debtor is entitled to discharge only by paying the assignee. The retail stores have received a notice of the assignment authenticated (signed) by the assignee (the bank) directing them to pay the assignee. Accordingly, under UCC § 9-406(a), the retail stores can discharge their obligations on the accounts only by paying the bank (the assignee).

[NOTE: When an account debtor receives notification of an assignment, the account debtor may request reasonable proof that the assignment has been made and, until such proof is furnished, may still discharge its obligation by paying the assignor. *See* UCC § 9-406(c). Under these facts, there is no indication that any of the retail stores (the account debtors) requested such proof.]

DECEDENTS' ESTATES/TRUSTS & FUTURE INTERESTS ANALYSIS

DEC II.A.4., A.5., C. / TRU II.F.

ANALYSIS

Legal Problems:

- (1) Was Testator's will validly executed?
- (2) Is Bob, an interested witness, entitled to take the \$50,000 bequest because Testator's codicil stated that he republished his will?
- (3) Is the handwritten memorandum signed by Testator disposing of his household goods valid to distribute that property to his aunt?
- (4) Under this jurisdiction's statute, is Testator's bequest of the balance of his estate to Sam's children who attain age 25 valid, or does it pass to Testator's heirs?

DISCUSSION

Summary

Testator's will was validly executed because it was executed in a manner that satisfies the statute of wills in every state: Testator declared the document to be his will to the witnesses, the witnesses acted at his request, Testator signed it at the end, in the presence of the witnesses, and they signed in his presence and in the presence of each other.

Although, at common law, a will was invalid if witnessed by an interested witness (a witness taking a bequest under the will), that is not the law in any state today. Instead, if a will is witnessed by an interested witness, it is valid, but the bequest to the interested witness is either unaffected or, in many states, is forfeited unless the will was also witnessed by two disinterested witnesses. However, even in the latter states, the bequest to Bob would be saved because the codicil, which was witnessed by two disinterested witnesses, republished the will in its entirety. Thus, the original will is deemed to have been witnessed by the witnesses to the codicil and not by Bob and the neighbor.

Many states statutorily validate the bequest of tangibles even though contained in an unwitnessed holographic writing signed after the will was executed. However, without such a statute, the memorandum would not be valid under the incorporation-by-reference doctrine to dispose of Testator's household goods because it was not in existence when the will or the codicil was signed.

The bequest to the grandchildren is valid under the common law Rule Against Perpetuities. Because Sam predeceased Testator, the grandchildren are the validating measuring lives under the Rule Against Perpetuities. Thus, the residue of Testator's estate passes to Sam's children who reach 25, or if none, to Testator's heirs.

Point One (30%)

Testator's will was validly executed.

Every statute of wills has formalities that must be met for a will to be validly executed. These invariably include a writing, a signature of the testator, and at least two witnesses. All of these requirements were met here. Additional requirements may apply, including a requirement that the will be declared as such to the witnesses, that the testator request the witnesses to sign, and that the testator sign the will at the end. These requirements were met here, too. Thus, the will complies with every statute of wills. *See generally* William M. McGovern, Sheldon F. Kurtz & David M. English, *Wills, Trusts, and Estates* 197–200 (4th ed. 2010).

Under the common law, Testator's will would be invalid because one of the witnesses was an interested witness (i.e., a witness to whom a bequest was made under the will). *Id.* at 206. Today, however, no state applies that harsh rule. *See, e.g.*, Unif. Prob. Code § 2-505(b) (“The signing of a will by an interested witness does not invalidate the will or any provision of it.”).

[NOTE: The fact that the will was handwritten does not alter this analysis because the will was signed and witnessed. Therefore, it is not governed by the laws relating to holographic wills.]

Point Two (30%)

The bequest to Bob, an interested witness, was not forfeited. In some states, this is because Testator's will was republished by a codicil that was witnessed by two disinterested witnesses. In other states, this is because bequests to interested witnesses are never forfeited.

Some states provide by statute that a bequest to an interested witness is void unless the will is witnessed by two disinterested witnesses. *See, e.g.*, Iowa Code § 633.281; NY EPTL § 3-3.2. The policy underlying these interested-witness statutes is to discourage fraud or undue influence.

However, under the republication-by-codicil doctrine, defects in a previously validly executed will can be cured if the will is “republished” in the properly executed codicil. *See* McGovern et al., *supra*, at 295. The doctrine effectively treats the portions of the original valid will that are not inconsistent with the terms of the codicil as recited in the codicil and witnessed by the witnesses to the codicil. Curing an interested witness problem by codicil is a classic example of the republication-by-codicil doctrine. *See, e.g., King v. Smith*, 302 A.2d 144 (N.J. Super. 1973). Thus, in states that require disinterested witnesses, the bequest to Bob would nonetheless be valid because the will which he witnessed was later republished by a codicil, which itself was witnessed by two disinterested witnesses.

Some states follow the Uniform Probate Code approach and simply permit interested witnesses to take their bequests. *See* UPC § 2-505(b). In those states, Bob's bequest was valid even though he was a witness to the will and republication was not necessary to save that.

Point Three (30%)

In some states, the aunt is not entitled to the furniture because a will may not incorporate an unattested document written after the execution of the will. In many states, however, a testator may dispose of tangible personal property in an unattested memorandum signed after his will was executed if the will includes language evidencing an intent to give effect to the writing.

At common law, the aunt would not take the furniture under the unattested memorandum because it was executed after both the will and the codicil were signed, and thus it was not incorporated by reference into either of those documents. Under the incorporation-by-reference doctrine, only documents in existence when the will was signed can be incorporated by reference. *See generally* McGovern et al., *supra*, 294–295.

Many states, however, have enacted statutes allowing a testator to dispose of tangible personal property by a memorandum signed *after the execution of the will* if the will evidences an intent to dispose of the tangibles in that manner. *See, e.g.*, Unif. Prob. Code § 2-513 (which is fairly typical). The writing here meets the requirements of such a statute in that (1) it was signed, and (2) it described the gifted items with sufficient particularity so that the gifted items are readily identifiable. In such states, the aunt is entitled to the furniture.

Point Four (10%)

Testator's bequest to Sam's children who attain age 25 is valid and does not violate the common law Rule Against Perpetuities (RAP) or the statute because the gift vests or fails to vest within their own lifetimes.

Under the common law RAP, “no interest is good unless it must vest, if at all, within 21 years of some life in being at its creation.” *Gray's Rule Against Perpetuities* (1891). With respect to wills, the beneficiary's interests are created at the testator's death—not at the time the will is executed—because wills are “ambulatory” and can be revoked or changed at any time up to the testator's death. *See generally* McGovern et al., *supra*, 495.

In his will (as amended by the codicil), Testator bequeathed the balance of his estate to Sam for life, with a remainder to Sam's children who attain age 25. Because Sam predeceased Testator, the intended life estate never became effective, leaving the class gift to Sam's children who attain age 25. Because neither child has reached 25 at Testator's death, the children's interest will remain in trust until they reach the applicable age.

A class gift will vest for purposes of the RAP when the class is closed and all members of the class have met any conditions precedent. Here, the class of “Sam's children” closed when Sam died, leaving his two surviving children as the only potential beneficiaries of the gift. As a result, the two children are “lives in being” for purposes of the RAP, and the only question left is whether they will satisfy the age contingency. *Id.*, at 498. This event is certain to be resolved within their lifetimes because either they will satisfy the contingency and take the gift or they will die before reaching age 25 and the gift will fail. Accordingly, the children are able to serve

Decedents' Estates/Trusts & Future Interests Analysis

as their own validating lives, making their residuary gift valid under the common law rule. Because the gift is valid under the common law rule, the jurisdiction's wait-and-see statute is inapplicable.

Thus, the balance of Testator's estate should be distributed to the trustee to hold in trust and to distribute the assets to Sam's two children, when and if they attain age 25. *See generally id.*, at 496–97. However, their shares will be lost if they fail to attain age 25. If both Amy and Dan meet the age contingency, each takes one half. If only one does, that one takes the whole. And if neither does, the residue passes to Testator's heirs.

[NOTE: An examinee who wrongly concludes that the gift to Sam's children violates the rule should conclude that the balance of Testator's estate passes to his daughter and to Sam's two children as partial intestate property.]

EVIDENCE/CRIMINAL LAW & PROCEDURE ANALYSIS

EVD II.A.1.; V.A., B., C., K. / CRM V.B.

ANALYSIS

Legal Problems:

- (1) Is a victim's out-of-court statement admissible when offered not to prove the truth of the matter asserted in the statement, but solely because it is relevant to prove the criminal defendant's reasonable fear of the victim?
- (2)(a) Does admission of a criminal defendant's out-of-court statement to a police officer, taken during custodial interrogation and without Miranda warnings or a waiver of Miranda rights by the defendant, fit the well-established Miranda public safety exception when the police officer asked a single question to secure weapons immediately after a shooting?
- (2)(b) Is a criminal defendant's out-of-court statement offered by the prosecution admissible as an opposing party's statement because it is not hearsay?
- (3) Under what circumstances is a witness's out-of-court statement admissible under the present-sense-impression or excited-utterance exceptions to the hearsay rule?

DISCUSSION

Summary

The court should admit testimony from the woman repeating the man's out-of-court statement to the woman ("I promise you'll be happy if you take me back, but very unhappy if you do not.") The statement is relevant to her self-defense claim because it helps prove that the woman had a reasonable fear of the man on the night of the shooting. The statement is not hearsay because it would not be offered by the defense to prove the truth of the matter asserted in the statement, and the woman's beliefs are relevant to assessing the reasonableness of her fear of the man.

The court should also admit testimony from the police officer repeating the woman's statement to the police officer ("I have a can of pepper spray in my purse. Is that a weapon?"). Her statement to the police officer is relevant because it could help the prosecution prove that, when the woman shot the man rather than using her pepper spray, she used greater force than was necessary under the circumstances. Admission of the statement does not violate Miranda because the statement fits the well-established public safety exception. Here, the single question was limited to weapons and the police officer's objective was to secure the scene and ensure public safety. Finally, the woman's statement is not hearsay when offered by the prosecution because it is an opposing party's statement.

The court might admit testimony from the police officer repeating the custodian's out-of-court statement to the police officer ("I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."). The statement is relevant because it helps to establish the time and place of the alleged crime. It is hearsay, but it may fit the hearsay

exception for present sense impressions. The statement may also fit the hearsay exception for excited utterances if the court finds that the custodian was startled by what he heard and that he remained “under the stress of excitement” when he made the statement.

Point One (25%)

The court should admit testimony from the woman repeating the man’s out-of-court statement to the woman (“I promise you’ll be happy if you take me back, but very unhappy if you do not.”) because it is relevant to prove the woman’s reasonable fear of the man and is not hearsay.

Here the man’s statement to the woman is relevant because it has a tendency to make a fact (i.e., the woman’s reasonable fear of the man) “more . . . probable than it would be without the evidence.” Fed. R. Evid. 401. The woman’s fear of the man is essential to her self-defense claim under the State A standard because she must prove that when she shot the man, she “reasonably believe[d]” that her use of force was “immediately necessary for the purpose of protecting [her]self against the use of unlawful force by [an]other person.” Like all criminal defendants, the woman has a due process right to present a defense, and the defense seeks to use the man’s statement to substantiate her self-defense claim. *See Chambers v. Mississippi*, 410 U.S. 284 (1973).

Although the man’s statement was made outside of court, it would not be hearsay if offered to prove the woman’s reasonable fear. The Federal Rules of Evidence define hearsay as “a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Under this definition, an out-of-court statement is hearsay *only* when it is offered to prove “the truth of the matter asserted in the statement.” *See McCormick on Evidence* 424 (6th ed. 2006) (“When conduct or statements . . . are not used to prove the truth of the matter asserted, the statement should generally not be treated as hearsay because it does not fit the literal definition and because under these circumstances the danger of insincerity is usually significantly reduced.”).

Here, the man’s out-of-court statement is relevant to assessing the reasonableness of the woman’s fear *regardless* of whether the jury believes that the man’s statement is true. Specifically, the jury does not need to decide whether the man actually would have made the woman “happy” or “unhappy” to conclude that her fear of the man was reasonable. Accordingly, when offered by the defense, this statement should be admitted.

Point Two(a) (30%)

The court should find that the police officer did not violate the woman’s Miranda rights by asking her “Do you have any other weapons?” before providing Miranda warnings and obtaining a waiver because this fits the well-established Miranda public safety exception.

Typically, a person who is in police custody must first receive Miranda warnings and waive Miranda rights before being subjected to interrogation. *Miranda v. Arizona*, 384 U.S. 436,

444 (1966). For Miranda purposes, custody is established if a reasonable person under similar circumstances would believe she was not free to leave. *See Berkemer v. McCarty*, 468 U.S. 420 (1984). For Miranda purposes, interrogation is established by “either express questioning or its functional equivalent” by the police. *See Rhode Island v. Innis*, 446 U.S. 291, 292 (1980). If Miranda has been violated, a court should bar the prosecution from introducing the defendant’s statement during its case-in-chief. However, Miranda warnings are not required for all custodial interrogations. For over three decades, the Court has consistently upheld a public safety exception to the Miranda requirements. *See New York v. Quarles*, 467 U.S. 649 (1984).

Here, the police officer engaged in custodial interrogation without first giving the woman Miranda warnings. The woman was in custody because a reasonable person would have not felt free to leave her office after she had shot someone, two police officers had arrived to investigate and had seized her gun, and one of the officers had blocked her doorway. The woman was under interrogation because the police officer asked her a direct question. However, limited interrogation without Miranda warnings, when intended to protect public safety, fits the Miranda public safety exception. Here, the police officer asked a single question about additional weapons intended to secure his own safety and the safety of the people gathered nearby. Thus, the court should find that the police officer did not violate the woman’s Miranda rights.

Point Two(b) (15%)

The court should admit testimony from the police officer repeating the woman’s out-of-court statement (“I have a can of pepper spray in my purse. Is that a weapon?”). The statement is relevant, and it is not hearsay because it is an opposing party’s statement.

The woman’s statement is relevant to the prosecution’s case because it could help the prosecution prove that, when the woman shot the man rather than using her pepper spray, she used greater force than was “immediately necessary for the purpose of protecting [her]self against the use of unlawful force” under State A self-defense law. Fed. R. Evid. 401.

The woman’s statement is not hearsay when offered by the prosecution. Out-of-court statements by a party are not hearsay if “offered against an opposing party and . . . made by the party in an individual . . . capacity.” Fed. R. Evid. 801(d)(2)(A).

Point Three (30%)

The court should find the testimony from the police officer repeating the custodian’s out-of-court statement (“I didn’t see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming.”) relevant. The court might find that the statement meets either the present-sense-impression or excited-utterance exception to the rule against hearsay.

The custodian’s out-of-court statement to the police officer is relevant because it has a tendency to make a fact (i.e., the time and place of the alleged crime) more probable. Fed. R. Evid. 401. If this statement is offered for these purposes, it is hearsay; but it should be admitted because it fits within at least one hearsay exception.

The custodian's statement might fit the hearsay exception for "present sense impressions" because it is "[a] statement describing or explaining an event . . . made . . . immediately after the declarant perceived it." Fed. R. Evid. 803(1). Here, the custodian's statement was limited to a description of recent events, and the statement was made to the police officer 20 minutes after the events occurred. Whether 20 minutes is close enough in time to the event to qualify under this exception, however, is unclear.

The custodian's statement also may fit the hearsay exception for "excited utterances," if the court concludes that it is "a statement relating to a startling event . . . made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). Here, the facts support use of this exception if the court finds (1) that the custodian was startled by hearing the gunshot and scream and (2) that he remained "under the stress of excitement" 20 minutes later when he was interviewed by the police officer.

Under the Federal Rules of Evidence, the fact that the custodian is not available to testify has no impact on the application of either hearsay exception. Fed. R. Evid. 803 (all FRE 803 hearsay exceptions apply "regardless of whether the declarant is available as a witness"). In addition, the fact that the custodian heard but did not see the relevant events has no bearing on the admissibility of his statement.

[NOTE: An examinee's conclusion is less important than his or her reasoning on whether the statement comes in under either exception.]

CIVIL PROCEDURE/CONFLICT OF LAWS ANALYSIS

CIV I.C.; II.A.; V.A. / CNF III.B.2., C.2.

ANALYSIS

Legal Problems:

- (1) Can a motion to dismiss be amended, prior to a responsive filing being made, to add a ground for dismissal that would otherwise be waived because it was not raised in the initial motion to dismiss?
- (2) Is service of a summons and complaint sufficient when the documents are not served personally on the defendant, but instead are given to the defendant's parent at the defendant's parents' home where the defendant previously lived?
- (3) What choice-of-law approach should be followed by a federal court exercising its diversity jurisdiction?
- (4) Under the Restatement (Second) approach to choice of law, should a court honor a contractual choice-of-law clause when the parties have chosen the law of a state that is connected to their transaction but that law is different from the law of another state with an interest in the matter?

DISCUSSION

Summary

Although normally the motion to dismiss for insufficient service of process would be waived because it was not included in the original motion, the court should consider the woman's amended motion in this case. Where, as here, the opposing party has not briefed the motion and the case will not be unduly delayed by an amendment, courts generally allow an amendment of a motion to dismiss, even when the added grounds would be waived if not raised in a defendant's initial motion to dismiss.

The court should dismiss the action for insufficient service of process. Serving process at a defendant's parents' home is not sufficient service when the defendant no longer lives there.

Whether the court should dismiss Taxes's claim that the woman violated the noncompete covenant of her employment contract is a matter of law, which depends on whether State A or State B law applies to the claim. If State A law applies, the covenant is valid and the motion should be denied; if State B law applies, the covenant is invalid and the motion should be granted. Which law applies depends, in turn, on whether the court will honor the choice-of-law clause in the parties' contract.

Choice-of-law rules are substantive rules for diversity purposes. A federal court sitting in diversity must apply the choice-of-law rules of the state where it sits. Here, the federal court should apply the Restatement (Second) of Conflict of Laws approach, which State A follows, in determining whether to enforce the contractual choice-of-law clause.

Applying the Restatement (Second), the court should honor the parties' contractual choice-of-law clause, which said that their agreement would be governed by State A law. State A has a close connection to both the transaction and the parties, and its rules on noncompete covenants are not contrary to a fundamental public policy of State B. Thus, because the parties' noncompete covenant is valid under State A law, the court should deny the woman's motion to dismiss for failure to state a claim.

Point One (20%)

The court should consider the woman's insufficiency-of-service motion. Although she did not raise her defense of insufficient service of process in her original motion to dismiss, she avoided waiving the defense by promptly amending her motion to dismiss.

Generally, when a party makes a pre-answer motion under Federal Rule of Civil Procedure 12, the party must raise any claim of insufficiency of service of process that the party has at the time of the motion; otherwise, the defense is waived. Wright, Miller, Kane, Marcus & Steinman, *Federal Practice and Procedure* § 1391 (3d ed. 2013). Rule 12 states that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). Further, "[a] party waives any defense listed in rule 12(b)(2)–(5) by . . . omitting it from a motion in the circumstances described in Rule 12(g)(2)." Fed. R. Civ. P. 12(h). Taken together, these rules would normally mean that the woman waived her Rule 12(b)(5) defense of insufficiency of service of process when she failed to include it in her original motion to dismiss. *See, e.g., Arkwright Mutual Ins. Co. v. Scottsdale Ins. Co.*, 874 F. Supp. 601 (S.D.N.Y. 1995).

Nonetheless, courts have allowed a motion to dismiss to be amended before the motion is heard, "so long as the adverse party is not prejudiced by the amendment and no delay results in the prosecution and determination of the case." *See, e.g., MacNeil v. Whittemore*, 254 F.2d 820 (2d Cir. 1958); *Friedman v. World Transportation, Inc.*, 636 F. Supp. 685 (N.D. Ill. 1986). *But see Heise v. Olympus Optical Co., Ltd.*, 111 F.R.D. 1 (N.D. Ind. 1986) (where plaintiff had already fully briefed issues raised by original motion to dismiss, motion could not be amended to add new grounds for dismissal, and omitted grounds were waived). Thus, "[a]lthough not expressly provided for in Federal Rule 12(g), a preliminary motion may be amended to include a defense or objection inadvertently omitted by the movant." Wright et al., *supra*, § 1389.

Here, the woman amended her motion to dismiss only two days after making the motion. Taxes had not yet responded to the motion and is not likely to have been prejudiced by the woman's failure to raise her insufficiency-of-service defense two days earlier. There is no indication that the proceedings will be delayed if her amended motion is treated as adequate to raise the defense. Accordingly, the woman's insufficiency-of-service defense was not waived by her failure to include it in the original motion.

Point Two (30%)

The court should grant the woman's motion and dismiss the action for insufficient service of process, because she did not live at her parents' house at the time the summons and complaint were delivered to her father.

Federal Rule of Civil Procedure 4(e) allows service by delivering a summons and complaint to an individual personally or by "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." Here, Taxes sought to serve process on the woman by leaving a copy of the summons and complaint at her parents' home with her father. Although the woman had once lived with her parents, she had moved and was living in her own apartment in another state when process was served. Thus, service was not made at the woman's *current* dwelling or usual place of abode, and leaving the summons and complaint at her parental home was not sufficient. See *United States v. Tobins*, 483 F. Supp. 2d 68, 75–76 (D. Mass. 2007) (service is not proper where the defendant no longer resides at the address to which the summons and complaint are delivered); *Coffin v. Ingersoll*, 1993 WL 208806 (E.D. Penn. 1993) (leaving summons and complaint with parents is not sufficient service when defendant "has left home and established residence elsewhere"); *Cox v. Quigley*, 141 F.R.D. 222 (D. Maine 1992) (leaving summons and complaint with parents is not sufficient where defendant left home and moved out of state after graduating from college). Thus, the court should grant the woman's motion to dismiss for insufficient service of process.

Point Three (20%)

A federal court sitting in diversity must apply the choice-of-law rules of the state where the federal court sits. Thus, the court here should apply State A's choice-of-law rules.

A federal court sitting in diversity must apply the substantive law of the state in which it sits, including that state's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In this case, the court's determination whether to apply State A or State B law to the parties' noncompete covenant must be made by applying the choice-of-law rules of State A, the state where the court is sitting. Thus, the court must apply the standards set out in the Restatement (Second) of Conflict of Laws because these are the standards that would be applied by a State A court.

Point Four (30%)

Under the Restatement (Second), the court should honor the parties' choice of State A law because (a) State A has a close connection to the parties and the transaction, and (b) State A's law upholding the noncompete covenant is not contrary to the fundamental policy of State B.

The parties' employment contract specified that it would be governed by State A law. The Restatement (Second) of Conflict of Laws generally favors the enforcement of such choice-of-law clauses. Even when, as here, the legal issue is one that the parties could not have resolved on their own (the validity of a clause of their contract), the Restatement provides that the law chosen by the parties will be applied unless

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188 [a "most significant relationship" test], would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2).

Here, the parties chose the law of State A, which has a substantial relationship to the parties and the transaction: both Taxes and the woman were located in State A when they signed their contract, and the contract concerned the terms of the woman's employment in State A. Accordingly, the issue is whether the parties' chosen law should be disregarded pursuant to Restatement (Second) § 187(2)(b).

Although State B's law would not enforce this particular noncompete covenant because its duration is more than 18 months, State B's policy does not appear to reflect a fundamental public policy against noncompete clauses in general. In fact, State B, like State A, generally enforces reasonable noncompete covenants, and this covenant would be considered unreasonable under State B law only because it is six months longer than State B courts allow. There are no facts to suggest that enforcing a noncompete clause longer than 18 months would violate a fundamental policy of State B. *See, e.g., Medx Inc. of Florida v. Ranger*, 780 F. Supp. 398, 401 (E.D. La. 1991) (noncompete covenant entered into in connection with sale of business is not contrary to strong public policy of Louisiana when Louisiana would allow such a covenant if its duration had been two years or less). Accordingly, the parties' choice of State A law should be honored, and the noncompete covenant should be enforced. Thus, if the court rules on the woman's motion to dismiss for failure to state a claim, the court should deny the motion.

[NOTE: If an examinee erroneously concludes that a federal court should follow State B's choice-of-law rules, then the examinee should conclude that the choice-of-law clause in the contract is unenforceable because expressly forbidden by a State B statute. As to the validity of the noncompete clause, State A law would apply under State B's *lex loci contractus* rule because State A was the place where the employment contract was made and was to be performed. If the court concluded that the noncompete covenant violated a fundamental public policy of State B, it might conclude that State B would refuse to enforce the covenant despite the fact that it was made in State A.]



www.ncbex.org

National Conference of Bar Examiners

302 South Bedford Street | Madison, WI 53703-3622

Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275

e-mail: contact@ncbex.org