July 2003 MPTs and Point Sheets

Vargas v. Monte

In re Franklin Forum

Meerstein v. Easy*GO Airlines*

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in July 2003 in thirty jurisdictions: Alabama, Alaska, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Nevada, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Vermont, West Virginia, Guam, and the Northern Mariana Islands.

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. The point sheet is not an official grading guide and is not intended to be a "model answer." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheet. User jurisdictions are free to modify the guidelines, including any suggested weights assigned to particular points. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet** or the NCBE website at **www.ncbex.org**.

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INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may also include some facts that are not relevant.

4. The Library contains the legal authorities needed to complete the task, and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

Vargas v. Monte

Norman & Longfellow
Attorneys at Law
405 East Gray, Suite 100
Lakeview, Franklin 33071

MEMORANDUM

To: Applicant
From: Jane Norman
Date: July 29, 2003
Subject: *Vargas v. Monte*

We have nearly completed the bench trial of the *Vargas v. Monte* timber trespass case. Our client, Les Vargas, brought this action against adjoining landowner Carla Monte for wrongfully cutting and removing trees from his property. He is seeking an award of statutory treble damages. The parties have presented their evidence at trial, and the judge has now requested briefs on the issues of whether, based on the evidence adduced at trial, (1) defendant Monte is liable for timber trespass and, if so, (2) whether single, double, or treble damages, or some combination thereof, should be assessed against her.

Please draft a persuasive brief to the court addressing the liability and damages issues outlined above. Our goals are to persuade the judge to hold Monte liable for timber trespass and award Vargas the maximum damages allowable by law based on the evidence, explaining why any lower measure of damages is inappropriate.

Prepare the brief in accordance with the guidelines set forth in the attached office memorandum. We have a statement of stipulated facts in this case so, as pointed out in the brief writing guidelines, you should write only a short introductory statement that reminds the court of the nature of the dispute and our goals. In drafting your arguments, however, you must use all relevant facts that support your arguments.

Norman & Longfellow
Attorneys at Law
405 East Gray, Suite 100
Lakeview, Franklin 33071

MEMORANDUM September 8, 1995

To: All Lawyers
From: Litigation Supervisor
Subject: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately, although emphasis is not improper. Select carefully the facts that are pertinent to the legal arguments. However, in a brief to a trial court, when there is a statement of stipulated facts, the Statement of Facts section of the brief may be abbreviated. In such cases, the lawyer need only write a short introductory statement and direct the court's attention to the statement of stipulated facts.

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THE UNDERLYING FACTS ESTABLISH PLAINTIFF'S CLAIM OF RIGHT. Proper: BY PLACING A CHAIN ACROSS THE DRIVEWAY AND BY REFUSING ACCESS TO OTHERS, PLAINTIFF HAS ESTABLISHED A CLAIM OF RIGHT.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should also generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing.

The lawyer need not prepare a table of contents, a table of cases, a summary of argument, or an index. These will be prepared, when required, after the draft is approved.

STATEMENT OF STIPULATED FACTS

1. Plaintiff Les Vargas owns property covering several hundred acres of land in Cleveland County, Franklin.

2. Adjoining the Vargas property is a several-hundred-acre parcel of land owned by defendant Carla Monte.

3. Prior to 1880, the two parcels were part of a larger tract of land owned by the United States Government.

4. In 1879, the original survey of this area was conducted by licensed surveyors for the U.S. General Land Office ("USGLO"). The original survey was undertaken for the purpose of subdividing the area into smaller parcels, which were then sold.

5. In 1880, the USGLO transferred to Vargas's and Monte's ancestors their respective parcels. The Vargas family bought the west half and the Monte family bought the east half.

6. As part of the 1879 survey, the one-quarter-mile-long common boundary running north and south between the Vargas and Monte parcels was established and marked.

7. The 1879 survey established section corners that were monumented using wooden posts set in mounds of stone. The lines between these corners were marked by blazing trees along the common boundary. A blaze is a chest-high, smooth surface cut on a tree.

8. Between 2000 and 2002, the boundary line between the parties' properties was resurveyed by the U.S. Department of the Interior, Bureau of Land Management ("BLM"), as part of a larger resurvey of portions of the county. The BLM resurvey is the only licensed survey conducted of these parcels since the original USGLO survey.

9. From March 2000 to January 2002, Carla Monte cut and removed approximately 700 trees from a strip of land along the parties' shared boundary.

EXCERPTS FROM TRIAL TESTIMONY OF PLAINTIFF LES VARGAS

DIRECT EXAMINATION BY JANE NORMAN, Counsel for Plaintiff:

* * * *

Q: How long have you and Carla Monte shared a common property boundary?

A: Well, we each inherited our parcels from our families, who had owned them for generations. So I guess that makes us lifelong neighbors in a sense.

Q: Was the boundary line between your and Ms. Monte's properties clearly delineated before the BLM resurvey?

A: Not at all. There were conflicting blaze marks at various points along the property line, and even some trees sprayed with paint and tagged with construction tape. Members of both families had tried to figure out where the true boundary was, but they eventually gave up.

Q: So, how did you and Ms. Monte deal with the uncertainty surrounding the property line?

A: Well, both of our parcels are big enough that we never really got around to sorting it out. When I heard about the BLM resurvey, I figured that we'd finally know once and for all where the true boundary line was.

* * * *

Q: How would you describe your relationship with Carla Monte?

A: Well, I thought it was pretty neighborly until I found out she was cutting down my trees.

Q: When did you discover this?

A: Sometime during the fall of 2001, when I got a call from a BLM surveyor by the name of Stan Linhart.

Q: Did you do anything as a result of Mr. Linhart's call?

A: Yes. I went out to the boundary between the two properties and saw that dozens of my trees had been chopped down. Everywhere I looked, I saw stumps where there used to be beautiful, mature ponderosa pines.

Q: What, if anything, did you do after you discovered that your trees had been destroyed?

A: I tried to reach Carla, but she never returned my calls. I left messages on her machine asking her to stop destroying my trees. I also posted some signs that said "No Trespassing."

Q: Did your efforts have any effect?

A: When I went back about a month later to check on things, I discovered that even more of my trees had been cut down and hauled off. I couldn't believe that Carla had continued to log in this area and that she'd cut down more of my trees even after I posted the "No Trespassing" signs. That was when I decided to take legal action.

Q: Did Carla Monte have your permission to cut down any of your trees?

A: Absolutely not. In fact, she knew that I'd turned down some lucrative logging contracts with logging companies that wanted to harvest trees on my property.

Q: How did she know this?

A: Well, over the years I told her about a few of the offers I'd received from logging companies. She told me I was silly to turn down these big money offers. She said that if I ever changed my mind, I should let her know because, since she was in the logging business, she wanted the logging rights to my land.

* * * *

CROSS-EXAMINATION BY WILLIAM WARREN, Counsel for Defendant:

* * * *

Q: Mr. Vargas, isn't it true that your family and the family of Ms. Monte had a longstanding agreement about the boundary of the two properties?

A: No, she and I never agreed on the exact boundary. As the landscape changed over the years, it was more and more difficult to determine the exact location of the dividing line. But we knew within a few feet or so where our property line was, especially in the area where she chopped down my trees.

Q: Showing you what has been marked as Defendant's Exhibit A for identification, can you identify it?

A: Well, it looks like a letter with a hand-drawn map from my grandfather, Amos Vargas, to someone by the name of Ben Monte.

Q: You recognize the handwriting of your grandfather, Amos Vargas, don't you?

A: Yes, it seems to be his writing. It looks like his letters that we have in the family collection.

Q: And your grandfather wrote this letter in 1906, didn't he?

A: Well, all I know is the letter says it was written on April 18, 1906.

* * * *

EXCERPTS FROM TRIAL TESTIMONY OF STAN LINHART

DIRECT EXAMINATION BY JANE NORMAN, Counsel for Plaintiff:

* * * * *

Q: As a licensed surveyor for the United States Department of the Interior, Bureau of Land Management, were you involved in the BLM resurvey of Cleveland County?

A: Yes, I was the lead surveyor and the point of contact for local landowners.

Q: Are you familiar with the parcels owned by plaintiff Les Vargas and defendant Carla Monte?

A: I am. The Vargas and Monte parcels were surveyed as part of the BLM resurvey.

* * * * *

Q: Did you have contact with Ms. Monte during the fall of 2001?

A: Yes. We were surveying a stretch of the boundary between the Monte and Vargas parcels when I spotted Ms. Monte and her crew cutting down trees west of the property line, in fact more than 100 feet onto the Vargas parcel. I noticed that she had already cut about 300 trees. When I pointed out to Ms. Monte that she was logging trees on the Vargas parcel, she told me that the trees were on her property.

Q: What specifically did she say to you?

A: She said her grandfather and Vargas's grandfather had agreed on the boundary. Then she pointed to some old blaze marks and paint stains about 20 feet farther west inside the Vargas property and said that the parties had relied on these markings for years. When I pointed out that the true boundary line was more than 100 feet east of the point where she was logging, she said it wasn't fair for BLM to come in and try to change the boundary lines after all these years.

Q: Did the conversation end there?

A: No. I warned her that the boundary markers she was relying on weren't accurate, and I cautioned her against continuing to log there until BLM could complete its resurvey.

Q: Do you know whether Ms. Monte continued logging in that area after you told her this?

A: The very next day I saw her in the same area cutting down more trees on the Vargas property. When I returned to the area a few weeks later to double check some of our survey work, I saw additional evidence of logging by Ms. Monte farther along the shared boundary line, including more stumps on the Vargas side of the property line. By that time, I had

already notified Mr. Vargas, and I figured this was something that the two property owners would have to work out.

Q: Can you describe the condition of the boundary line between the Monte and Vargas properties prior to the BLM resurvey?

A: Well, before the resurvey, the boundary line was a real mess and nobody knew exactly where it was located.

Q: Why is that?

A: Because the section lines blazed on trees during the original survey back in the 1800s had deteriorated. Previous attempts had been made to locate and perpetuate the original survey monuments. Over time, these attempts created errors and conflicting blaze marks and other evidence concerning the property boundaries. This problem wasn't limited to the boundary line between the Vargas and Monte properties. It was a widespread and well-known problem throughout the county, which is why we were called in to do the resurvey.

* * * *

CROSS-EXAMINATION BY WILLIAM WARREN, Counsel for Defendant:

*** * * * ***

Q: As the surveyor of the boundary between the Vargas and Monte properties, you are aware of the natural features in the area, aren't you?

A: Of course.

Q: So you know where Bella Creek is, correct?

A: Yes.

Q: And that creek bed shifts, doesn't it, Mr. Linhart, depending on whether it's the wet or dry season?

A: Yes, that makes sense.

Q: And over time, creek beds can shift several hundred feet, depending on changing natural conditions, right?

A: Well, several hundred feet may be a stretch but, yes, creek beds have been known to move.

Q: Well, 50 or 100 feet over 100 years wouldn't be a stretch, would it, Mr. Linhart?

A: No, that could happen.

Q: OK. Are you aware of a large outcropping near the north end of the Vargas-Monte properties, known by most local folks as "the big rock"?

A: Yes.

Q: And "the big rock" is north of Bella Creek, right?

A: Right.

Q: And the distance between the bend in Bella Creek and "the big rock" is well over 1,000 feet, isn't it?

A: At least 1,000 feet.

Q: And the area where you saw Ms. Monte logging trees along the Vargas-Monte boundary is between the bend in Bella Creek and "the big rock," correct?

A: That's correct.

EXCERPTS FROM TRIAL TESTIMONY OF DEFENDANT CARLA MONTE

DIRECT EXAMINATION BY WILLIAM WARREN, Counsel for Defendant:

* * * *

Q: Ms. Monte, whose trees did you believe you were cutting down?

A: I thought I was on my side of the boundary line and that the trees belonged to me.

Q: Why did you believe the trees belonged to you?

A: Because I followed the existing blaze marks made by our families over the years and the marks conform to the 1906 agreement between my grandfather, Ben Monte, and Amos Vargas. The Vargas parcel is west of mine, and I made sure I stayed east of the existing blaze marks, which are based on the line between the bend in Bella Creek and "the big rock."

Q: Showing you Defendant's Exhibit A, can you identify this?

A: Yes. It's a copy of a letter to my grandfather from Amos Vargas. There's a hand-drawn map on the letter showing the boundary between the two properties. It's among the family papers passed along to me by my dad before he passed on.

Q: Did you and Mr. Vargas ever discuss the boundary between your properties?

A: We had a few discussions over the years about the poor condition of the boundary line. I thought that he would not object to my logging along the common border, as long as I stayed east of the existing blaze marks.

* * * *

CROSS-EXAMINATION BY JANE NORMAN, Counsel for Plaintiff:

* * * *

Q: Ms. Monte, isn't it true that you knew before you began logging along the Monte-Vargas boundary line that BLM was in the process of resurveying property lines in this area?

A: Yes, I did receive a notification letter from BLM before I began my logging operations.

Q: And you own literally hundreds of acres of land in Cleveland County, don't you?

A: Yes.

Q: And there was nothing to prevent you from logging another section of your land away from the boundary line, was there?

A: Well, the trees that we cut were ready for thinning, and the logging trucks had easy access. But, in any event, I only cut down trees that belonged to me.

Q: But you didn't know for a fact that the trees you harvested were on your property, did you?

A: Based on everything I knew at the time, those were my trees.

Defendant's Exhibit A ~~for Identification~~

April 18, 1906

Benjamin Monte
Route 2, Box 4
Belleville, Franklin

Dear Ben,

I know it's been a while since you and I last talked about the north-south boundary line between our parcels in Cleveland County, but I just want to put in writing what I think is the understanding you and I have about that matter.

When you and I were walking the property last summer we looked for the old markers, but we couldn't figure out where they were or where the line ran. The rock piles weren't there, and we could see some scars on some of the older trees but who's to say if they were blaze marks or what.

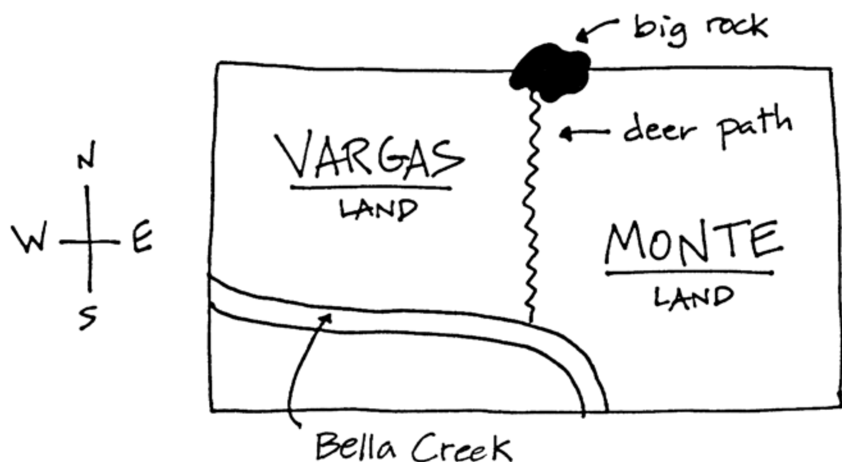
I know we talked about you and me just arbitrarily setting the boundary and agreeing that that would be it. The line we more or less decided on was a line from the southern boundary, proceeding north along Bella Creek, which is dry most of the year but changes course a bit during the winter months, to where it bends to the west, along the deer path, continuing north to the big rock on the northern boundary. I've drawn a map at the bottom of this letter.

So, as far as I'm concerned, let's agree on that. Okay? If I don't hear back from you, I'll assume it's okay with you.

Your friend,

Amos Vargas

Amos Vargas



United States Department of the Interior

Bureau of Land Management
Franklin State Office
1000 Government Way
Belle Garden, Franklin 33021

May 27, 2000

Carla Monte
14562 Cedar Ridge Drive
Belleville, Franklin 33025

Dear Landowner:

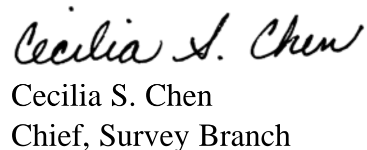
The Bureau of Land Management is conducting a land survey within Cleveland County to determine the boundaries. Records indicate that you are a landowner in the area of our survey and we wish to make you aware of our presence.

Should it become necessary to enter your lands during the course of this survey, Stan Linhart of our Maddock Field Station will attempt to contact you personally for prior permission.

Please notify Mr. Linhart of any locked gates you may have, or if you have questions regarding this survey. He may be contacted at the following address:

Maddock Field Station
332 Clarksburg Drive
Diamond Springs, Franklin 33022

Sincerely,



Cecilia S. Chen
Chief, Survey Branch

LIBRARY

Vargas v. Monte

§ 3346. Injuries to timber, trees, or underwood; treble damages; double damages; actual detriment

(a) For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or where the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment.

(b) The measure of damages to be assessed against a defendant for any trespass committed while acting in reliance upon a survey of boundary lines which improperly fixes the location of a boundary line, shall be the actual detriment incurred if the trespass was committed by a defendant who relied upon a survey made by a licensed surveyor.

(c) Any action for the damages specified by subdivisions (a) and (b) of this section must be commenced within five years from the date of the trespass.

Anderson v. Flush
Franklin Court of Appeal (1953)

Maggie Anderson brought this action to recover statutory treble damages for injuries to 39 trees in her orchard. She alleges the injuries were caused by the deliberate action of Todd Flush while moving a house along Levin Avenue, a public street, in the course of his house-moving business. The trial judge awarded double, not treble, damages. Anderson appeals the trial court's denial of treble damages. Flush also appeals, claiming that, although he damaged Anderson's trees, double damages are not mandatory and should not have been awarded.

Levin Avenue is bordered on one side by Anderson's orchard and on the other by that of John Koh. The trees in Koh's orchard bordering the avenue are interspersed with telephone poles while those of Anderson's orchard are not. Between the orchards, the paved portion of Levin Avenue is only about 15 feet wide. The damaged trees are on Anderson's property, but their branches extended over the street.

Flush observed that it would be necessary to touch the bordering trees on at least one side of Levin Avenue. He chose to strike those of Anderson because of the telephone poles on Koh's property. He thought that the house would brush by the limbs without causing any extensive damage to the trees. He sawed off some limbs to prevent them from breaking farther back near the trunks and from causing permanent damage to the trees.

The purpose of Civil Code § 3346 is to protect trees and timber. The trial court held that Flush's actions were wrongful and the double damages provision of § 3346 was mandatory. We agree.

There are three measures of damages depending on the nature of the trespass: (1) for willful and malicious trespass, the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, the court must impose double damages; and (3) for trespass in reliance on a survey, actual damages.

Under § 3346 the trial court has discretion to determine the circumstances under which to award treble damages. Because treble damages are punitive, the defendant must have acted willfully and maliciously.

While § 3346 leaves the imposition of treble damages to the discretion of the court, it places a floor upon that discretion. Double damages must be awarded whether the trespass be willful and malicious or casual and involuntary. The trial court was required to impose no less than double damages.

We must determine whether the trial court abused its discretion in refusing to award treble damages. It is undisputed that the branches of Anderson's trees extended over the street. Since the street is dedicated to public use to its full width irrespective of the paved portion, the trial court was justified in deciding that Flush did not act with malice or a reckless disregard of Anderson's rights. Flush, faced with the dilemma of inflicting what he believed would be slight damage to Anderson's orchard, damage to telephone poles, or blocking a public street for a substantial period of time, acted reasonably to minimize the damage. The trial court did not abuse its discretion in refusing to impose treble damages. Affirmed.

Hardway Lumber v. Thompson
Franklin Court of Appeal (1971)

Hardway Lumber appeals from a judgment awarding it double damages based on the value of timber wrongfully removed from its land, contending the trial court erred in not awarding treble damages pursuant to § 3346 of the Franklin Civil Code.

Hardway entered into a 10-year contract with defendant Henry Thompson for the sale of timber on Hardway's land. Five years into the contract, Hardway properly rescinded the agreement by filing a notice with the Recorder of Deeds. While the recording provided constructive notice, it is undisputed that Thompson was never given actual notice of the rescission. Shortly after the rescission, Hardway discovered that Thompson was logging timber on its property. Hardway sued, seeking treble damages.

The trial court concluded (i) Thompson was not aware that Hardway had rescinded the logging contract; (ii) at the time Thompson removed the timber, he believed he had a right to do so; and (iii) Thompson was not acting with malice or ill will toward Hardway.

Although § 3346 does not expressly so provide, Franklin courts have held that to award treble damages, the plaintiff must prove that the wrongful act was willful and malicious. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances. Malice may be found when a defendant performs an act with reckless disregard of or indifference to the rights of others.

For example, in *Guernsey v. Wheeler* (Franklin Court of Appeal 1966), the defendant had a contract permitting him to log on a parcel of land known as Sherman's Trust. Prior to removing trees, he was told repeatedly there were conflicting descriptions as to the precise location of Sherman's Trust, but he nonetheless logged a large number of trees. The trial court rejected his claim that he had probable cause to believe he was logging the land covered by his contract. We held that because the trespass was neither casual nor involuntary but was instead committed with a reckless disregard of and indifference to the rights of the owner, treble damages were appropriate.

In the present case, the trial court found that Thompson's acts were not in bad faith; that his motives were not to vex, harass, annoy, or injure Hardway; and that the trespass was committed while attempting to harvest what he thought was his own timber. The trial court did not abuse its discretion. Affirmed.

Blackjack Lumber Company v. Pearlman
Franklin Court of Appeal (1986)

Blackjack Lumber Company brought this action against Frank Pearlman to recover statutory damages for timber trespass under Franklin Civil Code § 3346. Pearlman invoked the doctrine of agreed boundary as a defense. The trial court found that predecessors of the parties had agreed upon a boundary between their respective parcels, and decided in Pearlman's favor.

At issue is the boundary line between the northern and southern halves of Section 35. In 1961, Tom Majors purchased the north half from the Union Lumber Company. Majors was uncertain as to the boundary line between the two parcels. In 1962, non-licensed Union Lumber personnel undertook an informal survey of the boundary line and blazed trees (i.e., notched them with an axe) as they went across the boundary line. Majors observed the informal survey as it progressed and agreed with the line that was drawn.

In 1970, Pearlman bought the south half of Section 35 from Union Lumber and agreed with Majors that the line blazed by Union Lumber in 1962 was the boundary line. In 1973, Majors sold the north half to Blackjack Lumber. By this time, Pearlman had flagged the blazed line and the flags were clearly visible on the ground. In 1980, Pearlman conducted logging operations on his property and logged up to the blazed line. On one occasion, Pearlman asked and received Blackjack's permission to install a landing north of the blazed line for convenience in conducting his operations.

In 1982, Blackjack hired a licensed surveyor to survey the boundary line between the two halves of Section 35. This survey showed the boundary to be several hundred feet to the south of the line blazed in 1962.

In cases of uncertainty, courts look with favor upon private agreements fixing and marking boundary lines. This judicially created rule is known as the doctrine of agreed boundary. It is intended to secure repose and prevent litigation. The essential elements of the doctrine are (1) uncertainty about the true boundary line; (2) an agreement between adjoining landowners as to the boundary; (3) an agreed-upon boundary that is identifiable on the ground; and (4) acceptance and acquiescence to the agreed-upon boundary for a period at least equal to the statute of limitations.

The doctrine of agreed boundary applies even where the parties intend to set the boundary along the true property line but fail to do so, due to a mistake. Moreover, there is no requirement that the true location be unascertainable. Here, it is clear neither Majors nor Union Lumber knew the true location of the boundary line.

The trial court found that, after the line was established by Union Lumber, both Union and Majors accepted the marked line, and their successors likewise accepted it for 20 years as the correct location of the boundary line between the two parcels. Acceptance of the line by both Majors and Union Lumber and their successors is sufficient evidence to show an agreement between Majors and

Union Lumber that the blazed line was in fact the agreed-upon boundary line between their respective properties. Therefore, we find that the elements for the doctrine of agreed boundary have been satisfied, and the trial court's judgment is affirmed.

FILE

In re Franklin Forum

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1530 Lakeside Way
Franklin City, Franklin 33033

(555) 999-1004
fammwilliamsconroy.com

To: Applicant
From: Conrad Williams
Re: *The Franklin Forum*
Date: July 29, 2003

We represent *The Franklin Forum*, a newspaper that has been publishing in Franklin City for approximately three years. Barbara Davis, the publisher of the *Forum,* has asked for our opinion concerning the legal protections and legal risks involving publication of a series of articles about the sales practices followed by several companies that perform laser eye surgery. The news editor, Peter Farley, would like to begin publishing these articles next week. Some of the information for the articles was obtained by reporters who, without revealing the fact of their employment with the *Forum*, took jobs as employees of three of the laser eye surgery companies. The publisher of the *Forum* wants to understand the legal theories that support the *Forum*'s right to publish the information obtained through the actions of the reporters acting as employees of the companies, as well as any potential liability to the laser eye surgery companies that might result from those actions.

It is clear that neither *The Franklin Forum* nor its reporters will be liable for the tort of libel because truth is a defense. On the other hand, if the reporters are found liable for any torts, the *Forum* will be responsible on principles of *respondeat superior*. So, there is no need for you to concern yourself with the issues of libel and *respondeat superior*. However, in the process of newsgathering, it is possible that the reporters committed some or all of the non-reputational torts described in the first bullet point below.

Please draft a memorandum for me that explains:

- Whether the First Amendment protects *The Franklin Forum* from liability for the torts of fraud, breach of duty of loyalty, and trespass, and, if not, whether the *Forum* can be held liable for the commission of those torts.
- Whether the First Amendment protects *The Franklin Forum* from having to pay damages to the laser eye surgery companies for injury to their reputations, i.e., publication damages.

Your memorandum should include a brief introductory statement of the key facts sufficient to inform the reader of the nature of the problem. You will, of course, need to use a broader range of the facts to support your conclusions in the discussion sections of your memorandum.

Famm, Williams & Conroy

To: File
From: Conrad Williams
Re: Excerpt of transcript of interview with Barbara Davis
Date: July 28, 2003

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* * * *

Davis: I'm here because I want to understand the legal situation we're in when we run a series of stories that a few of my reporters have done.

Attorney: Let me get this clear. I assume you don't want my advice about whether to run these stories, only an assessment of the risks you run in publishing them?

Davis: Right. The decision about publishing is for my editorial staff. I want to know the legal protections we have and the legal dangers we face. So long as my reporters follow good journalistic ethics and do a great job at getting important information to the public, I want to support them. It may be corny, but I think the law should support a vibrant press that ferrets out hidden information and gives people the material from which they can make more informed and better decisions in their lives.

Attorney: The principle you state certainly finds support in the law, but as with almost everything in the law, it's qualified and circumscribed. I need to know more about this series of stories.

Davis: A team of three reporters—Ted Morrison, Lois Fitzgerald, and Kevin Clark—who focus on health and safety issues, decided to investigate the laser eye surgery industry. They learned that aggressive and misleading sales tactics were being used by some companies to increase the number of patients who seek laser surgery. I won't explain all the aspects of their investigation. It's explained in their memo to the news editor summarizing their investigation. To conduct their investigation, the reporters took jobs as "patient counselors" at three major laser surgery companies that operate throughout Franklin. Although they did not assume false identities in applying for these jobs, they did not reveal that they were employed by the *Forum*.

Attorney: So you want to know if the law provides protection or punishment for the method they used in developing their story?

Davis: Right. They used several methods. Working as "patient counselors" was only one of them. This method has certainly been used before in journalism to uncover some great stories. But I can also see that the deception poses some difficulties. Therefore, I want to know what we're in for when we publish. I know there will be lots of organizations and groups that will support us if we're sued, but the other side will also have powerful allies. Also, if litigation results, I want you to be ready rather than rushing around figuring out the background legal situation.

Attorney: How soon do you need our assessment?

Davis: We'd like to begin running the stories in about a week. Could we get something in three days? That would give us another chance to meet if we needed it and for you to do further work if I have more questions.

Attorney: Sounds realistic. I'll let you know if we have difficulties. I'll be in touch soon.

Davis: Thanks for being here. This is just the way we need you.

THE FRANKLIN FORUM
FOSTERING DISCUSSION *BUILDING COMMUNITY*
Barbara Davis, Publisher
Megan Guzman, Editor-in-Chief

To: Peter Farley, News Editor
From: Ted Morrison, Lois Fitzgerald and Kevin Clark
Re: Laser surgery series
Date: July 25, 2003

Background

Three months ago, a "patient counselor" at Enhanced Vision, one of the major providers of laser eye surgery in Franklin, called Ted to say that his company was engaged in what he thought were a lot of unsavory sales techniques. He refused to give his name, as he was afraid of being fired, even after Ted promised not to disclose his identity in the course of further investigation or in print. He identified at least three practices that he found unsettling.

1. When patients come to Enhanced Vision, they first see a patient counselor. This person has no general medical training, let alone specialized training in ophthalmology. The patient counselors get a bonus for each customer who pays a non-refundable deposit toward the surgery. Only after payment of the deposit can the patient see a doctor who provides an assessment of the likely risks and outcomes of the procedure.

2. The patient counselors receive training in sales techniques. Their training program includes handouts that outline the points to make in an introductory session, slick presentations, and role-playing in which trainees are taught to emphasize the benefits of the surgery, minimize the risks, and create an atmosphere of enthusiasm toward the procedure. They even learn the car selling technique of going to a phony manager to make a supposed deal with a customer who is on the fence.

3. Although the company advertises its lowest rate for surgery on each eye (which is $479), there is actually a complicated rate structure. The fee structure reflects the complexity of the surgery involved, based on the type of vision impairment, the type of laser used, the extent of follow-up surgeries or enhancements desired or required, and ancillary services. The counselors are trained in both informing the patients why they do not qualify for the lowest rate (only approximately 5 percent of patients actually pay this rate) and encouraging them to get higher-priced procedures.

Actions Taken

We thought this information provided a lead to an important story. We all knew people who had had the surgery or were considering it. We thought there was critical information that the public should know in order to temper the casual attitude that has developed around this procedure and to encourage more informed decision making.

We, therefore, came up with an investigative plan:

1. verify the information that the caller had provided and obtain information that could be attributed to known and reliable sources;
2. learn how widespread the practices that our caller described were;
3. learn what other unsavory practices might be occurring;
4. find experts who could give us reliable information about laser surgery, including its risks, benefits, and history of complications; and
5. research experiences of former patients through (a) investigation of complaints with the Franklin Better Business Bureau, the Division of Consumer Affairs of the Franklin Attorney General's Office, and the Federal Trade Commission, and (b) contact with former patients.

First, Lois, who is nearsighted and wears contact lenses, went to Enhanced Vision's surgical center in Lakeview Mall (one of 6 centers they have in Franklin City and 11 throughout the state) to see what they told her. Her encounter confirmed everything that the caller had said. Her counselor went on and on about the safety of the procedure and the ways it could improve her life. Not a word about risks or dangers. When she said that her contact lenses worked fine for her, her counselor told her all about the risks of contact lenses. When she asked about consulting with a doctor, she was told that, because of the thoroughness of the exam, she could not get that consultation until putting down her deposit. The cost came to $1,056 per eye. When Lois balked and the counselor started to go to her supervisor for permission to lower the price, Lois left, saying she needed to think about her decision. Lois then went to a center run by Franklin's second largest company, Laser World, and found similar sales techniques. Finally, she went to one of the centers run by Eye Care Specialists, another statewide chain. Here, she did not find similar sales techniques. The price quoted to her was $1,598 per eye, without requiring a non-refundable deposit.

Ted attempted to contact present and former employees of Enhanced Vision and Laser World. No one would agree to talk on the record. Former employees said that when they left they signed forms agreeing not to discuss anything about company practices. One indicated that the company had given her a "good-bye present" of $1,000 as part of her termination agreement to reward her for her good work.

Kevin talked to experts, including the head of the Ophthalmology Department at Franklin State Medical School, two professors of medical ethics, and a laser surgery market analyst for Sheffield & Wagner, a major Franklin brokerage firm. He also consulted the Franklin Medical Board's ethical guidelines. Here is a sampling of pertinent information (all of which can be attributed to the above sources) that we will include in the series:

1. Laser surgery is exciting and valuable but serious surgery. Statistically, outcomes are good.
2. No guarantee of good outcomes—serious consequences can result.
3. Follow-up surgery to correct problems with the initial surgery is not always possible—each surgery can reduce the thickness of the cornea, which can become too thin for further surgery. Large pupils present a particular threat when the cornea is thin.
4. Risks include: (a) glares and haloes that can be annoying in the daytime and can make night vision particularly difficult—night driving may be impossible; (b) dry eyes—a condition that can be created or seriously exacerbated; (c) hazy vision that is not corrected by eyeglasses or contact lenses.
5. Approximately 1,000 specialized centers in the U.S. perform laser eye surgery, something over 20 centers in Franklin, and the surgery was performed on more than 1.5 million eyes during the last year. Annual revenue at these centers is estimated to be in the range of $2.3 billion.

Lois checked out complaints with state and federal agencies. No action has been taken with regard to commission-based sales practices. She found various websites, including one maintained by the FDA and one established by a group involved in litigation about unsuccessful laser surgery. She has also been speaking with patients who had both successful and unsuccessful experiences.

We all thought that there was a serious hole in our story because of our inability to get information from inside the companies. We have been reluctant to contact the heads of those companies until we had this information. Therefore, we decided to take jobs as "patient counselors" at Enhanced Vision, Laser World, and Eye Care Specialists. We knew that by going undercover, we could nail these guys. We each submitted résumés with our correct names and background information. The only fact we omitted was our current employment at the *Forum*. We were all hired, went through a one-week training program and then worked as patient counselors for seven weeks, at which time we all left. When we were hired, we weren't asked, and we didn't say anything about how long we intended to remain employed. We just said we wanted jobs as patient counselors.

While we were there, we spoke with other patient counselors, supervisors, doctors, and various employees in the marketing and billing departments. Almost all of the training for patient counselors is provided by staff from the marketing department. Although all of the doctors in the centers where we worked were board-certified ophthalmologists, none had done post-residency training as a corneal specialist. When we left, all of us were given and refused to sign termination agreements, which included non-disclosure provisions regarding their sales practices. The termination agreements provided for extra money for services well performed. Neither Ted nor Kevin, who worked at Enhanced Vision and Laser World, where they use the bonus system, received weekly bonuses because they had failed to achieve a rate of more than 65 percent deposits obtained, which they discovered to be a requirement for obtaining any bonus at all.

Publication Plan

We think that we are now in a position to write credibly about our topic. We will disclose the actions we took and attribute the information to our own observations and experiences where necessary. We still have some work to do. These tasks should be completed within another three days. We would like to begin publishing as soon as possible. We see at least five stories emerging from the work. The stories will contain a mixture of accounts of particular experiences and general information about laser eye surgery.

Please let us know when we can proceed.

LIBRARY

In re Franklin Forum

Cohen v. Cowles Media Co., d/b/a Minneapolis Star & Tribune Co.

United States Supreme Court (1991)

During the 1982 Minnesota gubernatorial race, Dan Cohen, an active Republican associated with Wheelock Whitney's Independent-Republican gubernatorial campaign, approached reporters from the *St. Paul Pioneer Press Dispatch* (*Pioneer Press*) and the *Minneapolis Star & Tribune* (*Star Tribune*) and offered to provide documents relating to a candidate in the upcoming election. Cohen made clear to the reporters that he would provide the information only if he was given a promise of confidentiality. Reporters from both papers promised to keep Cohen's identity anonymous and Cohen turned over copies of two public court records concerning Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor. The records indicated that Johnson had been charged in 1969 with three counts of unlawful assembly and that she had been convicted in 1970 of petit theft. Both newspapers interviewed Johnson for her explanation. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority workers on municipal construction projects, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying for $6 worth of sewing materials. The incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated.

The editorial staffs of the two newspapers independently decided to publish Cohen's name as part of their stories. Both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter. The same day the stories appeared, Cohen was fired by his employer.

Cohen sued the newspapers and reporters on a theory of promissory estoppel in Minnesota state court. A divided Minnesota Supreme Court concluded that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights." We granted certiorari to consider the First Amendment implications of this case.

The initial question we face is whether a private cause of action for promissory estoppel involves "state action" within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered. The rationale of our decision in *New York Times Co. v. Sullivan* (U.S. Supreme Court 1964) and subsequent cases compels the conclusion that there is state action here. Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment.

However, generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal

investigation, even though the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

The Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Cohen is not attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler Magazine, Inc. v. Falwell* (U.S. Supreme Court 1988), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. So ordered.

Food Lion, Inc. v. ABC, Inc.
Franklin Supreme Court (1999)

Two ABC television reporters got jobs at Food Lion supermarkets and secretly videotaped unwholesome food-handling practices. Some of the footage was used in a "PrimeTime Live" broadcast that was sharply critical of Food Lion. The grocery chain sued ABC, Inc., and Lynne Dale and Susan Barnett, the two reporters (collectively, "ABC"). Food Lion focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, and trespass. We (1) reverse the judgment that ABC committed fraud, (2) affirm the judgment that Dale and Barnett breached their duty of loyalty and committed a trespass, and (3) affirm, on First Amendment grounds, the refusal to allow publication damages.

In early 1992, producers of "PrimeTime Live" received a report alleging that Food Lion stores engaged in unsanitary practices. The producers recognized that these allegations presented the potential for a powerful news story. Reporters Dale and Barnett concluded that they would have a better chance of investigating the allegations as Food Lion employees. They submitted job applications that showed false identities, references and local addresses and that failed to mention their concurrent employment with ABC.

A Food Lion store hired Barnett as a deli clerk and another hired Dale as a meat wrapper trainee. They worked for two weeks. As they went about their tasks, Dale and Barnett used tiny cameras and microphones to secretly record employees treating, wrapping, and labeling meat, cleaning machinery, and discussing the practices of the meat department. The videotape that was broadcast showed employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, bleaching rank meat, and applying barbecue sauce to chicken past its expiration date to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at stores across several states. The truth of the broadcast was not at issue.

Food Lion's suit focused not on the broadcast, as a defamation suit would have, but on the methods ABC used. The chain sought millions in compensatory damages. Food Lion sought to recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett, and (2) publication damages for matters such as loss of goodwill, lost sales and profits, and diminished stock value. They also requested punitive damages for fraud.

The jury found all of the ABC defendants liable for fraud and Dale and Barnett additionally liable for breach of the duty of loyalty and trespass. The trial court ruled that damages allegedly incurred as a result of ABC's broadcast—"lost profits, lost sales, diminished stock value or anything of that nature"—could not be recovered because these damages were not proximately caused by the acts of ABC. Operating within this constraint, the jury awarded Food Lion $1,400 in compensatory damages on its fraud claim, and $1 against each individual defendant on its duty of loyalty and trespass claims. The jury awarded $315,000 in punitive damages on the fraud claim.

We first consider whether ABC can be held liable for fraud. To prove fraud, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation. It is undisputed that Dale and Barnett knowingly made misrepresentations with the aim that Food Lion rely on them. Only the fourth element, injurious reliance, is at issue. Food Lion claimed two categories of injury resulting from the lies on the job applications: the costs associated with hiring and training new employees (administrative costs) and the wages it paid. Food Lion did not show that the costs were caused by reasonable reliance on the misrepresentations.

Food Lion also argued that it was fraudulently induced to pay wages to Dale and Barnett because of the misrepresentations and sought to recover the full amount ($487.73) of the wages. The last element of fraud is again the only one at issue. Dale and Barnett were paid because they showed up for work and performed their assigned tasks. Their performance was at a level suitable to their status as new employees. Food Lion did not prove injury caused by reasonable reliance on the misrepresentations made by Dale and Barnett on their job applications. Because Food Lion was awarded punitive damages only on its fraud claim, the judgment awarding punitive damages cannot stand.

Second, ABC argues that Dale and Barnett cannot be held liable for a breach of duty of loyalty to Food Lion. Both reporters wore hidden cameras. An employee owes a duty of loyalty to her employer. It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. Employees are disloyal when their acts are inconsistent with promoting the best interest of their employer at a time when they were on its payroll and when they deliberately acquired an interest adverse to their employer.

The interests of ABC, to whom Dale and Barnett gave complete loyalty, were adverse to the interests of Food Lion, to whom they were unfaithful. ABC's interest was to expose Food Lion to the public. Dale and Barnett served ABC's interest, at the expense of Food Lion's, by engaging in the taping for ABC. Because Dale and Barnett had the requisite intent to act against the interests of Food Lion, they were liable for their disloyalty. The trial court did not err in refusing to set aside the jury's verdict.

Third, ABC argues that it was error to allow the jury to hold Dale and Barnett liable for trespass. It is a trespass to enter upon another's land without consent. Accordingly, consent is a defense. Even consent gained by misrepresentation may be sufficient. The consent is canceled out, however, if a wrongful act is done in excess of and in abuse of authorized entry.

We turn first to whether the consent Dale and Barnett had was void because of the résumé misrepresentations. Consent to an entry is often given legal effect even if obtained by misrepresentation or concealed intentions. Otherwise a restaurant critic could not conceal his or her identity when ordering a meal, a browser could not pretend to be interested in merchandise that he or she could not afford to buy, or a consumer, in an effort to bargain down an automobile dealer, could not falsely claim to be able to buy the same car elsewhere at a lower price.

Authorities in this country are not of one mind concerning when consent to enter based on misrepresentation may be given effect. Compare Restatement (Second) of Torts § 892B(2) (1965) ("if the person consenting to the conduct of another . . . is induced [to consent] by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm") with *Desnick v. Sterling Broadcasting Company* (7th Cir. 1995)(SBC agents with concealed cameras who obtained consent to enter a clinic by pretending to be patients were not trespassers because they entered offices open to anyone).

We adopt the analysis of *Desnick*. Sterling sent persons posing as patients to the plaintiffs' eye clinics, and the test patients secretly recorded their examinations. Some of the recordings were used in a news story that alleged intentional misdiagnosis and unnecessary cataract surgery. *Desnick* held that, although the test patients misrepresented their purpose, their consent to enter was still valid because they did not invade any of the specific interests relating to peaceable possession of land that the tort of trespass seeks to protect. The test patients entered offices open to anyone expressing a desire for ophthalmic services and videotaped doctors engaged in professional discussions with strangers, the testers. "Testers" posing as prospective homebuyers to gather evidence of housing discrimination are not trespassers. Consent based on a résumé misrepresentation does not turn a successful job applicant into a trespasser as this approach would not protect the interest underlying the tort of trespass. The jury's first trespass verdict cannot be sustained.

The jury also found that the reporters committed trespass by what they did after they entered Food Lion's property by breaching their duty of loyalty. We affirm the finding of trespass on this ground because the breach of duty of loyalty, triggered by the filming in non-public areas, was a wrongful act in excess of Dale and Barnett's authority to enter Food Lion's premises as employees. Although Food Lion consented to the reporters' entries, the reporters exceeded that consent when they breached their implie promises to serve Food Lion faithfully. The jury's second trespass verdict should be sustained.

Fourth, ABC raises an important constitutional question of whether to subject Food Lion's claims to any heightened level of First Amendment scrutiny based on Dale and Barnett's engagement in newsgathering. ABC argues that the court must apply this heightened level of scrutiny. Although there are First Amendment interests in newsgathering, the Supreme Court held in *Cohen v. Cowles Media Co.* (U.S. Supreme Court 1991) that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cowles*, however, is not applicable automatically to every generally applicable law. The Court has held that "the enforcement of [such a] law may or may not be subject to heightened scrutiny under the First Amendment." *Turner Broadcasting System v. FCC* (U.S. Supreme Court 1994). In *Barnes v. Glen Theatre* (U.S. Supreme Court 1991), nude dancing establishments and their dancers challenged a generally applicable law prohibiting public nudity. Because the general ban covered nude dancing, which was expressive conduct, the Supreme Court applied heightened scrutiny.

The torts Dale and Barnett committed fit into the *Cowles* framework. Neither tort targets

nor singles out the press. Each applies to the daily transactions of citizens. If an employee of a competing grocery chain hired on with Food Lion and videotaped damaging information in Food Lion's non-public areas for later disclosure to the public, these tort laws would apply with the same force as they do against Dale and Barnett. Also, when applying these laws against the media will have no more than an "incidental effect" on newsgathering and the media can do its important job effectively without resort to the commission of run-of-the-mill torts, no heightened First Amendment scrutiny is appropriate.

In its cross-appeal, Food Lion argues that the trial court erred in refusing to allow it to use its non-reputational tort claims (breach of duty of loyalty, trespass) to recover publication damages for items relating to its reputation, such as loss of goodwill and lost sales. The trial court determined that it was the food-handling practices themselves, not the method by which they were recorded or published, that caused the loss of consumer confidence and, therefore, that the publication damages were not proximately caused by the non-reputational torts. We do not reach the matter of proximate cause because an overriding First Amendment principle precludes the award of publication damages. Food Lion attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims.

Food Lion did not sue for defamation because it would have had to prove that the broadcast contained a false statement of fact made with actual malice, that is, with knowledge that it was false or with reckless disregard as to whether it was true or false. *See New York Times Co. v. Sullivan* (U.S. Supreme Court 1964). Since Food Lion was not prepared to offer proof meeting the *New York Times* standard, it sought to recover defamation-type damages under non-reputational tort claims without satisfying the stricter First Amendment standards of a defamation claim. Such an end-run around First Amendment strictures is foreclosed by *Hustler Magazine, Inc. v. Falwell* (U.S. Supreme Court 1988), which confirms that when a public figure uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*. Food Lion argues that because ABC obtained the videotapes through unlawful acts, it is entitled to publication damages without meeting the *New York Times* standard. In *Hustler*, the magazine's conduct would have been sufficient to constitute an unlawful act, the intentional infliction of emotional distress, if state law standards of proof had applied. Notwithstanding the nature of the underlying act, satisfying *New York Times* was a prerequisite to the recovery of publication damages. That result was "necessary," in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* The trial court was correct when it disallowed publication damages, although we affirm on First Amendment grounds.

Affirmed in part and reversed in part.

FILE

Meerstein v. Easy*GO Airlines*

FINIZIO AND MOYLE, PA

Attorneys and Counselors at Law
Palm Commons Complex – Suite 300
Cooper City, Franklin 33092

Memorandum

To: Applicant
From: Ralph Martin
Subject: *Meerstein v.* Easy*GO Airlines*
Date: July 31, 2003

Emily Meerstein, President and CEO of one of our corporate clients, has asked us to represent her in an action against *Easy*GO Airlines. Meerstein paid for what was supposed to be a direct, non-stop flight from Franklin City's Santa Barbara International Airport (SBA) to Tel Aviv, Israel. The flight was diverted after take-off to an intermediate "refueling" stop in Paris. Such unscheduled stopovers appear to be a practice by *Easy*GO.

My research discloses that no one has yet sued *Easy*GO concerning this deceptive practice. Our case theory is that the practice of deliberately diverting international flights for refueling stops violates the Franklin Unfair and Deceptive Trade Practices Act. However, given the likely limited damages suffered by Meerstein, we agreed that we should go forward only if we can bring a class action to aggregate the claims of passengers on numerous flights to many destinations, covering as large a time period as possible. It is highly likely that a court will certify a class that includes at least the passengers on the plane with Meerstein. Such a small class, however, would make the lawsuit economically infeasible.

Based on the factors required for class certification and the facts available to us, write a memorandum to me in which you

- identify the largest class of plaintiffs a court would be likely to certify, and
- analyze why a court would be likely to certify *that* class, and be sure to explain why the court would not certify a larger class.

You need not write a separate statement of facts. However, be sure to use the facts to support your conclusions in the discussion sections of your memorandum.

Another associate is researching whether a class action for consumer fraud under the Franklin statute must be adjudicated under either the Warsaw Convention ("The Convention for the Unification of Certain Rules Relating to International Transportation by Air") or the Federal Aviation Act. Thus, you need not concern yourself with those issues.

Finizio and Moyle, PA

INTERVIEW NOTES: Emily Meerstein by Ralph Martin, Esq.

RE: *Emily Meerstein v.* Easy*GO Airlines*

DATE: July 11, 2003

Emily Meerstein purchased a first-class, round-trip ticket (for $1,260) on *Easy*GO Airlines (EG) Flight 100 from Franklin City's Santa Barbara International Airport (SBA) to Ben Gurion International Airport (TLV) in Tel Aviv. Flight 100, according to EG's schedule, was a <u>nonstop</u> flight from SBA to TLV. Meerstein considered the alternatives and consciously chose *Easy*GO, a discount international carrier, because it was a cheap, nonstop, first-class flight. Meerstein's ticket was about $350 more than a one-stop coach ticket on the other two airlines (Delta and Skyhawk Air) that provided service between Franklin City and Tel Aviv. If Meerstein had flown on Delta, however, she would have earned enough frequent flyer miles to receive a free, round-trip U.S. domestic flight with an estimated value of $300.

Flight 100 departed SBA on April 30, 2003, slightly after its scheduled departure time of 5:55 p.m. The airplane was about three-quarters full (all seats taken in first class, about two-thirds in coach). About one hour into the flight, the captain announced that "flight conditions" required that he land the plane at Charles de Gaulle Airport in Paris "to refuel" before flying on to Tel Aviv. The captain apologized and said he would "try to keep ground time in Paris to a minimum." He also noted that arrival would be "about one hour later than our scheduled touchdown in Tel Aviv."

Meerstein spoke to chief flight attendant on board who told her that "it's not unusual" for Flight 100 to stop for fuel in Paris because of "weather conditions and the length of the routes assigned by Air Traffic Control." During the stopover, Meerstein talked to the Paris *Easy*GO representative to demand an explanation. She was told by the agent that "safety considerations dictated diverting the flight" to add fuel "to be sure there was plenty when the flight reached Middle East air space." Meerstein complained that the explanations were inadequate; the agent apologized and suggested that she contact *Easy*GO's corporate offices upon her return to the U.S.

On the leg between Paris and Tel Aviv, Meerstein spoke with other first-class passengers who were upset about the forced detour. Most of those to whom she spoke were "experienced international business travelers" who also found *Easy*GO's excuses "unacceptable." All vowed to "file a complaint" with *Easy*GO. Meerstein is in contact with three passengers who continue to be upset about the diversion (Jason Atlass, who missed an important business appointment; Craig Crespi, who missed his brother's wedding; and Nancy Nelson, who missed a connecting flight). Flight 100 landed at Ben Gurion International Airport 2 hours and 20 minutes late. The trip took 13 hours and 15 minutes. The alternative Delta flight with a scheduled stop in Paris only takes 11 hours and 55 minutes.

Meerstein was furious about what she called the "bait and switch" practice of substituting an interrupted flight for the advertised nonstop trip. She wrote to *Easy*GO's Customer Service Division and demanded a specific explanation for the detour. *Easy*GO's Vice President of Customer Relations responded and enclosed a certificate for $100 to be applied to a future *Easy*GO flight. Meerstein promptly returned the *Easy*GO certificate and asked again for the precise reason for diverting her flight. She never again heard from *Easy*GO.

I gave Meerstein an estimate of the costs associated with filing suit against *Easy*GO as an individual plaintiff, and also projected the relatively limited damages likely to be awarded to a single plaintiff. We agreed it made little sense to incur the expenses associated with an individual suit.

I explained the concept of class action litigation. Meerstein said her interest is in changing *Easy*GO's lackadaisical attitude and disregard for its customers. She authorized preliminary research and investigation of the possibility of a class action lawsuit against *Easy*GO.

I retained a private investigator, Johnny Ripka, to initiate an investigation. His report is forthcoming.

***Easy*GO Airlines**

Corporate Headquarters
1000 Easy Way
Franklin City, FR 33031

Alfred Sanchez
Vice President, Customer Relations

Ms. Emily Meerstein, President
Vanguard Inter-World Group
2400 InterWorld Boulevard
Franklin City, Franklin 33034

May 19, 2003

Dear President Meerstein:

Thank you for your letter of May 12, 2003. All of us at *Easy*GO Airlines appreciate your taking time to share your views on the quality of our service.

At *Easy*GO Airlines, we are committed to following our published schedule as closely as possible. Departure and arrival times, scheduled equipment, and designated routes are promises we try to keep. Sometimes, however, circumstances beyond our control cause us to deviate from our published commitments. Apparently that is what occurred when you traveled recently with *Easy*GO to Tel Aviv, Israel. I refer you to Rule 3 of the *Easy*GO Airlines Tariff on file with the Federal Aviation Administration. The tariff specifically provides that we may alter stopping places in case of necessity.

International flights, particularly those to the Middle East, pose special challenges to *Easy*GO personnel. *Easy*GO operational personnel must weigh a complex balance of factors—including atmospheric conditions, security issues and restrictions, physical emergencies such as sickness or accident on the plane, and government rules and regulations. We give special attention to the complicated analysis of expected fuel consumption on our long-haul flights. The final determination of whether an aircraft scheduled for nonstop service between Franklin City and Tel Aviv can safely complete the journey without an intermediate landing to take on additional fuel is made by the captain of the aircraft in consultation with the *Easy*GO Dispatch Office.

We are sorry that your flight was interrupted by the brief refueling stopover in Paris. We trust that your plans were not unduly disrupted. Enclosed is a travel voucher in the amount of $100.00 to be used in connection with the purchase of any *Easy*GO ticket in the next year. While it cannot make up for the delay you experienced, I hope you view our response as evidence of our commitment to provide you and other *Easy*GO customers with the best possible service.

Sincerely,

Alfred Sanchez

Alfred Sanchez, Vice President
Customer Relations

CNA/enclosure

Ripka Investigation Services
1216 Meade Street
Redding, Franklin 33046

John Paul Ripka
License No. PI9763

Ralph Martin, Esq.
Finizio and Moyle, PA
Palm Commons Complex – Suite 300
Cooper City, Franklin 33092

July 29, 2003

RE: *Meerstein v.* Easy*GO Airlines*

Dear Ralph:

Below and attached you will find my preliminary report in the above-captioned matter. I have examined FAA files related to *Easy*GO Airlines for relevant general information and specific data regarding the flight Ms. Meerstein took. Also, I engaged Agam Sinha, Director of Air Management Systems of JA-JET Consultants, Inc. Dr. Sinha is a leading authority on airline management. He prepared a report, which I am including.

Background

*Easy*GO Airlines' business plan was simple—establish its international hub at a U.S. airport that was destined to grow markedly in a five- to ten-year period. *Easy*GO chose Franklin City's fast-growing Santa Barbara International (SBA). With the exception of a single daily nonstop flight from New York to Istanbul, *Easy*GO now serves twelve international cities, including Tel Aviv (TLV), from its SBA hub. *Easy*GO's nonstop and one-stop flights to Tel Aviv transport almost 40% (about 56,000) of Tel Aviv's inbound passengers from the U.S. per year. The other two U.S.-based airlines divide the remaining traffic (Delta at 35%, Skyhawk at 25%).

*Easy*GO has a fleet of sixteen Boeing 747-200 series airplanes, the older jumbo jets. These planes are a bit less efficient than newer Boeing and Airbus models but *Easy*GO purchased them at favorable prices from other major carriers.

Meerstein's Flight

*Easy*GO advertises Flight 100 as a "nonstop" from SBA to TLV. Meerstein's *Easy*GO ticket receipt specifically states that her flight was a nonstop flight.

I confirmed that Flight 100 on April 30, 2003, was diverted to Charles de Gaulle Airport (CDG) in Paris for refueling. In a Flight Deviation Report filed by *Easy*GO with the Federal Aviation Administration (FAA) on May 7, 2003, the airline claimed that "conditions dictated diversion for refueling." The decision to divert was made by the captain after the flight departed SBA. That same document confirms take-off and landing times. Another FAA record notes that Flight 100 departed SBA with 316 passengers onboard; no passengers boarded at CDG.

The Flight Deviation Report shows that Flight 100 had to stop in Paris for fuel because when it left SBA it did not have enough fuel to get to Tel Aviv. Additionally, I have learned that the price of fuel was 25¢ per gallon cheaper at CDG than at either SBA or TLV.

Other Relevant *Easy*GO Documents on File with FAA

While reviewing FAA documents in connection with Meerstein's flight, I discovered that a large number of *Easy*GO's #100 flights have been diverted for refueling. In the last year, 50% of *Easy*GO's #100 flights (75 of 150) have stopped at CDG en route to TLV. In each instance, *Easy*GO's stated reason was that "conditions dictated diversion to CDG for refueling." In the year before, only 10% (15 of 150 flights) were diverted for refueling. If you need to know the exact number of Flight 100 travelers who were actually diverted to Paris, I could figure that out. It is clear, however, that even flying at half-capacity, thousands of people were affected in the last year alone. I have not yet reviewed *Easy*GO's flights to other international destinations.

I also examined *Easy*GO's Rules and Tariff on file with the FAA. As you know, this is the document *Easy*GO will claim governs its relationship with its passengers. Several sections of that document permit the Airline to alter the advertised stopping places in the "case of necessity." (See attached excerpt from *Easy*GO's Rules and Tariff.) The provisions in the *Easy*GO Rules are standard in the industry.

Sincerely,

John P. Ripka

Enc./DAB

* * * *

RULE 3: SCHEDULES AND OPERATIONS

*Easy*GO will use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. *Easy*GO may, without notice, substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. *Easy*GO is not responsible or liable for making connections, or for failing to operate any flight according to schedule, or for changing the schedule of any flight.

JA-JET Consultants, Inc.
The Office Complex at SBA
Suite 1200

Franklin City, Franklin 33032

July 24, 2003

TO: John P. Ripka
Ripka Investigation Services

FROM: Agam Sinha, Director of Air Management Systems
JA-JET Consultants, Inc.

RE: Analysis of Rerouting *Easy*GO Flight 100 from SBA to TLV through CDG

Pursuant to your request, I have considered the rerouting of *Easy*GO Airlines (EG) Flight 100 that departed from Franklin City's Santa Barbara International Airport (SBA) on April 30, 2003. Although EG Flight 100 was supposed to be a direct, nonstop flight to Tel Aviv's Ben Gurion International Airport (TLV) in Israel, the captain diverted the flight to Charles de Gaulle International Airport (CDG) in Paris, France in order to refuel the Boeing 747-200 aircraft. You specifically have asked me for information relevant to the decision to reroute EG Flight 100.

Capabilities of the Boeing 747-200:

The Boeing 747-200 can carry 450 passengers and can carry 52,000 gallons of fuel—enough fuel to give it a theoretical flying time of about 14 hours.

The average nonstop flying time between SBA and TLV is 10-1/2 hours. Average flight time from SBA to CDG is 7 hours. An average flight from CDG to TLV is 4-1/4 hours.

Average flying time is affected by a complex assessment of weather and atmospheric conditions. For example, strong adverse winds, especially while en route from east to west, can increase both flight time and fuel consumption. Internal factors affecting passengers and crew (e.g., passenger illness) also can influence the captain's decision to make an unscheduled stop.

There are sound reasons for airlines to avoid unnecessary intermediate stops on scheduled non-stop direct flights. Airlines are assessed additional landing fees and costs when an intermediate landing is made. Moreover, unexpected maintenance problems are more likely to develop during takeoff and landing than during ordinary flying.

Two other factors weigh heavily in an airline's choice between a long-haul direct flight and one with intermediate stops. If the airline can offload passengers at a stopover and replace them with additional paying passengers traveling on to the final destination, it usually makes economic sense to schedule intermediate stops. Variances in jet fuel prices also can influence the airline's decision. In this regard, please recall that fuel prices have been lower in Europe than in the U.S. over the past two years.

If you require additional information to assess the *Easy*GO decision, please be in touch.

LIBRARY

Meerstein v.* Easy*GO Airlines

Franklin Civil Code

§ 201. Unfair and Deceptive Trade Practices

A. The act, use, or employment by any person of any deception, deceptive act or practice, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, in connection with the sale or advertisement of any goods or services, is unlawful.

* * * *

D. Except in a class action, in any successful civil action, under § 201A damages shall be
   - (a) The greater of
     - (i) The amount of actual damages sustained, or
     - (ii) Five hundred dollars.
   - (b) In the case of any successful action to enforce liability, the plaintiff shall be awarded the costs of the action together with reasonable attorney fees as determined by the court.

E. In a successful class action, the court shall use the provisions of subsection D as a guide in awarding damages to the members of the class.

Franklin Rules of Civil Procedure

Rule 122. Certification of a Class of Litigants

(a) To maintain a cause of action on behalf of a class of litigants, a party must establish that

   (1) the members of the class are so numerous that separate joinder of each member is impracticable;

   (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class;

   (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class; and

   (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

(b) A claim may be maintained on behalf of a class only if the above prerequisites are met, and

   (1) class representation is superior to other available methods for the fair and efficient adjudication of the controversy;

   (2) there is a risk that individual adjudication for proposed class members would be inconsistent; and

   (3) the common questions of law or fact predominate over any question of law or fact affecting only individual members of the class.

Broin v. Philip Morris Companies, Inc.
Franklin Court of Appeal (2000)

Plaintiffs are 30 nonsmokers who are flight attendants employed by various airlines. Plaintiffs filed a class action on their own behalf, and as class representatives on behalf of all similarly situated flight attendants, against Philip Morris Companies, Inc., and other companies that manufacture and sell tobacco (collectively "defendants"). The proposed class consists of approximately 60,000 current and former flight attendants. The complaint asserts that plaintiffs are suffering from diseases and disorders caused by their exposure to secondhand cigarette smoke.

Defendants filed motions to dismiss all class action allegations. The court granted the motions, finding that the class was very large, the complaint presented issues of first impression, the class representatives raised issues that might not be shared by the entire class, and the representatives could not adequately safeguard the interests of the entire class. The class representatives appealed.

Franklin Rule of Civil Procedure 122, based on Federal Rule of Civil Procedure 23, authorizes a class action if the court concludes that the members of the class meet the requirements of numerosity, commonality, typicality, adequacy of representation, predominance, and superiority.

NUMEROSITY
Plaintiffs unquestionably meet the requirement of numerosity. The members of the class number in the thousands. Plaintiffs describe a distinct class with great certainty. Separate joinder of the 60,000 members would be impractical. Indeed, we have occasionally found it impractical to join fewer than 100 individuals in appropriate situations. Under the circumstances in the present case, the size of the class is not a factor supporting dismissal of the class action.

COMMONALITY
Commonality requires that the claims and defenses of the representative party raise questions of law or fact common to the class members. Aimed in part at determining whether there is a need for combined treatment and a benefit to be derived therefrom, the rule requires that resolution of the common questions affect all or a substantial number of the class members. Rule 122 does not require denial of class certification merely because the claim of one or more class representatives arises in a factual context that varies somewhat from that of other plaintiffs. Claims that arise out of the same course of conduct by a defendant but in differing factual contexts may be pleaded as a class action if they present a question of common interest. The class in this case meets the threshold.

There must be a common right of recovery based on the same essential facts. The alleged facts, which we accept as true at this point in the proceedings, demonstrate that the members of the class behaved in the same way, that they were passive inhalers of secondhand smoke, and that defendants acted toward each member in a similar manner, by manufacturing the cigarettes that exuded the smoke.

Class members base their claims on conduct by defendants, which raises common issues

as to all class members. For example, the common issues presented include, *inter alia*: (1) How much exposure to secondhand smoke causes disease? (2) Whether and when the tobacco industry knew that exposure to secondhand smoke caused injury? (3) Whether the tobacco industry had a duty to warn nonsmokers that exposure to passive cigarette smoke could cause serious health problems? It is noteworthy that the common issues are potentially dispositive of the case. If defendants prevail on these issues, the individual claims will be rendered moot, which in and of itself militates in favor of class certification.

It is of no moment, as defendants claim, that different statutes of limitation may apply, or that different choice of law provisions may govern. Nor is entitlement to different amounts of damages fatal to a class action.[1] Should it become appropriate, the court may divide the class into subclasses to resolve these issues. The record discloses no impediment to resolving the common issues in a single trial.

Contrary to defendants' assertions, dismissal is not required under *Enter Corp. v. Lewis* (Franklin Supreme Court 1999). *Enter Corp.* held that tenants in an apartment complex could not bring a class action against the landlord because the landlord's omissions and noncompliance varied from tenant to tenant. In the present case, no discrepancies in the defendants' course of conduct analogous to those in *Enter Corp.* support the trial court's dismissal.

[1] Once the common issue of liability is tried and determined by the court, the class members may then present their individual claims for determination in separate proceedings.

Moreover, the complaint maintains that defendants will assert common, if not identical, defenses, a factor that bolsters class action treatment.

Class action allegations do not fail because plaintiffs do not present identical as opposed to similar claims. Class actions are not dependent on class members presenting carbon-copy claims. It is virtually impossible to design a class whose members have identical claims. The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist. Requiring each person to file a separate lawsuit would be overwhelming and financially prohibitive. Although defendants would not lack the financial resources to defend each separate lawsuit, the vast majority of class members, in less advantageous financial positions, would be deprived of a remedy.

TYPICALITY

Typicality addresses the relationship of the class representatives' claim to the claims of the class members. Plaintiffs allege that their claims are typical of the claims of other class members: they all sustained injuries from inhaling secondhand smoke. All seek the same remedy. The representatives' claims and the class members' claims are not antagonistic. The mere presence of factual differences does not defeat typicality.

ADEQUATE REPRESENTATION

The adequacy of representation requirement is met if the named representatives have interests in common with the proposed class members and the representatives and their qualified attorneys will properly prosecute the class action. Rule 122(a)(4) has two

requirements: (1) plaintiffs and class members must have common interests; and (2) class representatives will properly prosecute the class action. For the reasons already discussed, we hold that the representatives and the class members share common interests and seek the same relief for themselves as they seek for all class members. They are not likely to neglect their obligations to the class. Inadequate representation is not a conclusion necessarily to be drawn from the fact that class members reside in various jurisdictions.

PREDOMINANCE

The predominance requirement means that questions of law or fact common to the class predominate over any questions affecting only individual members. The predominance inquiry sometimes has focused upon the delineation of all questions as either "common" or "individual" and then deciding which group outweighs the other. Weighing has evoked justifiable criticism. The focus of the predominance inquiry should be on promoting efficient economy of judicial resources.

The decision on whether there are common predominating questions of fact or law to support a class action should not be determined by a mechanical test. Rather, we must decide whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated. The defendants argue that the plaintiffs' injuries vary in degree and severity and, therefore, individual issues dominate any common claims. We disagree. All the allegations stem from similar conduct by plaintiffs and by defendants. Individual differences do not foreclose class representation. When we apply these principles to the instant case we find that common questions clearly dominate individual ones and that a class action will promote uniformity of decision.

SUPERIORITY

There remains the superiority requirement—whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Defendants declare that since no other aggrieved flight attendants have made themselves known and are not already in existence, it is neither fair nor efficient to permit the action to proceed as a class action. However, it is just as likely that failure to come forward means only that there is a general lack of knowledge of the lawsuit, that others lack the resources to initiate communication in this regard, or that other members of the class, knowing of this suit, do not object to plaintiffs' representation. The clear intention of the rule is that the class action be available to assist small claimants in securing redress of their grievances.

We adhere to a pragmatic approach. Any device that allows one action to do a job, or a good part of it, that would otherwise have to be done by many, must be considered superior. As far as Rule 122 is concerned, Franklin does deem one action a superior way to adjudicate multiple claims. Class treatment in this instance will aid judicial efficiency and economy, is warranted, and avoids duplicative litigation.

Holding that the complaint fulfills the requirements of the rule, we reverse the trial court's dismissal of plaintiffs' petition for class certification.

Mendelson v. Trans World Airlines, Inc.
Franklin Court of Appeal (1997)

Plaintiffs were ticket holders on Trans World Airlines (TWA) Flight 1075 between Franklin City and Las Vegas and were denied boarding because the flight was overbooked. They sued TWA, alleging (1) fraudulent misrepresentation, (2) deceptive acts and false advertising, and (3) unjust discrimination. They moved for class certification on behalf of 77 persons with confirmed reservations who were denied passage on that same TWA flight because the defendant sold tickets to more persons than it could accommodate. The trial court denied this class certification and plaintiffs filed this interlocutory appeal.

It is a common airline industry practice to overbook flights. The Federal Aviation Administration (FAA) permits overbooking because it benefits the public by allowing passengers maximum flexibility in securing, canceling, and changing reservations, and benefits the airlines by reducing the chance of departures with empty seats. The practice of overbooking can result in some passengers being denied boarding ("bumping"). Although the possibility of being bumped on a given flight may be slight, it can be highly important to the individual passenger whose vacation or business plans have been disrupted. The FAA recognizes that the practice of overbooking should be disclosed to ticket purchasers. The FAA also requires that airlines place on file their "Involuntary Boarding" rules, which must be designed to "ensure that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily." Plaintiffs allege that TWA failed to comply with the FAA's notice requirements and failed to follow the airline's rules filed with and approved by the FAA for involuntarily denying boarding to them and others.

Plaintiffs seek certification on behalf of four subclasses: (1) the 77 persons with confirmed reservations who were denied boarding on TWA Flight 1075 (Subclass A); (2) all persons with confirmed reservations who were denied boarding on all TWA #1075 flights between Franklin and Las Vegas within the three-year period preceding the filing of the suit (Subclass B); (3) persons with confirmed reservations denied boarding on TWA flights originating in Franklin City within the three-year period preceding the filing of the suit (Subclass C); and (4) persons with confirmed reservations denied boarding on TWA flights originating in the United States, other than Franklin City, within the three-year period preceding the initiation of the lawsuit (Subclass D).

The fundamental issue in class certification is whether the group asserting class status is seeking to remedy a common legal grievance.[1] The determination rests upon whether the group is more bound together by a mutual interest in the settlement of common questions than it is divided by the individual member's interest in matters peculiar to him or her. The issue is whether the use of a class action would achieve economies of time,

[1] The requirement for *legal* commonality (i.e., issues of law common to the class) is satisfied by the fact that all claims arise under the same FAA regulatory or statutory scheme. Since all class members would be claiming rights under the same law, there is no question that there are common issues of law. That leaves only the question of whether there are common issues of fact.

effort, and expense and promote uniformity of decision as to persons similarly situated.

The inclusion of subclasses B, C, and D would be inimical to the purposes of class certification and would cause this proceeding to splinter into individual trials. Issues of fact and law may vary greatly from flight to flight. The reason for denied boarding, the priority of persons actually boarded, FAA regulations applicable at the time of flight, TWA tariffs in effect at the time of flight, choice of law as to nonresident plaintiffs, acceptance of compensation for denied boarding, other flight accommodations offered and accepted, and commencement of individual suits are some of the fact and law issues that will differentiate individual litigants. In short, there is no showing that TWA acted toward each of the putative class members in a similar manner. The only fact truly common to each passenger's case in subclasses B, C, and D is that all members of the proposed subclasses had, at some time, confirmed reservations on a TWA flight and were denied boarding.

This case is clearly distinguishable from *Minorm Realty Corp. v. Sunrise* (Franklin Supreme Court 1996), in which the only legal issue was whether a fee charged by the defendant bank to all members of the proposed class was improper. The determination of this one legal issue would be dispositive in all cases.

It is also distinguishable from *Staley v. Amigas Restaurant* (Franklin Court of Appeal 1996), where plaintiffs were restaurant patrons who allegedly became ill from eating adulterated food at the defendant restaurant over a four-day period. The plaintiffs obtained certification of a class of several hundred patrons who were afflicted with various gastrointestinal ailments as a direct result of unsanitary and unsafe food-handling practices at the restaurant. The determination of this one factual issue—the defendants' course of conduct—would be dispositive in all cases. Here, the determination that TWA improperly denied boarding to class members on one flight is not determinative of its liability with respect to class members on another flight.

In contrast to subclasses B, C, and D, commonality of issues is clearly present with respect to subclass A. However, it cannot be determined at this juncture whether the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable. Discovery is permitted to identify class characteristics. TWA has submitted various affidavits attesting that all passengers have settled their claims with the exception of the three named plaintiffs. At a minimum, further discovery is required to determine the size of the remaining class. It would be a waste of time and resources, for both the court and the litigants, to allow certification where the evidence strongly indicates that only three plaintiffs remain.

Accordingly, the denial of plaintiffs' motion for class certification is reversed to the extent that plaintiffs may make an appropriate application in the trial court with respect to subclass A after focused discovery as to the size of that potential class.

POINT SHEET

Vargas v. Monte

Vargas v. Monte

DRAFTERS' POINT SHEET

This performance test requires applicants to draft a persuasive brief in the context of a pending bench trial. The setting is a timber trespass action brought by landowner Les Vargas against neighboring landowner Carla Monte, seeking statutory treble damages for wrongfully cutting down and removing trees from Vargas's land. The parties have presented their evidence at trial, and the judge has requested additional briefing on the issues of liability and damages. Specifically, the judge has asked the parties to address whether, based on the evidence adduced at trial, defendant Monte is liable for timber trespass and, if so, whether single, double, or treble damages, or some combination thereof, should be assessed against her.

The File contains the following materials: (1) an instruction memo to the applicants from the supervising attorney; (2) the firm's Memorandum regarding Persuasive Briefs, containing instructions on the format and general contents of the brief; (3) the Statement of Stipulated Facts; (4) a partial trial transcript containing excerpts of testimony; (5) Defendant's Exhibit A, a letter from Vargas's grandfather to Monte's grandfather; and (6) a notification letter to defendant Monte regarding a government resurvey of the boundary lines between the parties' properties. The Library contains the relevant timber trespass statute and the case law necessary to complete the assignment.

Applicants are expected to use these materials to write a well-organized, persuasive argument explaining why the court should impose liability against Monte and award treble damages to Vargas. The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading decisions are entirely within the discretion of the graders in the user jurisdictions.

I. Format and Organization. Applicants are expected to follow the instructions in the instruction memo and the firm's Memorandum regarding Persuasive Briefs:

- The brief should be written in a persuasive, as opposed to objective, style. Applicants who write an objective memo in which they take an on-the-one-hand/on-the-other-hand narrative approach will have failed to follow the instructions.
- In accordance with the Memorandum regarding Persuasive Briefs: (1) the brief

must contain a statement of facts (which means that applicants must extract the relevant facts from the File and concisely present them in a way that favors the plaintiff's position); (2) the headings should be persuasive and should apply the facts to the legal principles; and (3) the argument section of the brief should incorporate the facts and contain logical and persuasive arguments.

- Applicants are instructed to incorporate the case law that supports their position into the argument section of the brief, to distinguish cases that are not helpful, and to explain why a lower measure of damages would be inappropriate.
- Based on the facts and cases, applicants should conclude that Monte is liable for (1) at least double damages with respect to trees removed from Vargas's property prior to her encounter with the BLM survey team, and (2) treble damages for trees removed from that point onwards, when she continued logging with actual notice of the trespass.

II. Statement of Facts. As emphasized in the Memorandum regarding Persuasive Briefs, applicants should extract from the File the facts that are relevant to their brief and present them in the light most favorable to the plaintiff. There is no one right way to present the facts. Some applicants may choose to front-load most of the facts in their statement of facts, while others may choose to present only an overview of the case and deal more extensively with the facts in the argument section. Either way, a complete and thorough treatment of the facts should cover the following areas:

- *The parties' status as adjoining landowners.*
  - The parties own adjoining tracts of land that share a common north-south boundary approximately a quarter-mile long.
  - The parcels have been owned by the parties' respective families since 1880.
  - Prior to that time, both parcels were part of a larger tract of land owned by the United States Government.
- *The survey-related history of the two properties.*
  - Only two licensed surveys have ever been conducted with respect to the parties' boundary lines: (1) the original USGLO survey in 1879; and (2) a recent resurvey conducted by the Bureau of Land Management (BLM).
- *The condition of the boundary line prior to the BLM resurvey of the two properties.*

- The collective testimony of the witnesses establishes that at the time of the BLM resurvey, the boundary between the parties' properties was confused by conflicting evidence.

- *Monte's knowledge of the BLM resurvey and the attendant risk of logging near property lines prior to commencing logging.*
    - Monte received a notification letter from BLM regarding the impending resurvey (copy included in the File).
- *The absence of an agreement between the parties regarding the location of their shared boundary, notwithstanding Monte's reliance on the 1906 letter.*
    - Vargas testified that the parties' families were unable to ascertain the true boundary line, and that he and Monte "never really got around to sorting it out."
    - Monte claims to have relied upon a letter from Vargas's grandfather to her own grandfather regarding an agreed-upon boundary. However, as discussed below, the letter is far from clear, indicating that the original survey markers were indiscernible and that what was "more or less" agreed to was a shifting boundary line approximately 1,000 feet long that followed a creek that changed course from season to season and other natural landscape markers that also may have shifted over time.
- *Monte continued logging even after learning that she was trespassing and despite warnings received from BLM surveyor Linhart and Vargas.*
    - Monte was specifically informed that she was trespassing more than 100 feet onto Vargas's land. She was further told that the old boundary markers she was relying on were not accurate. She disregarded these warnings and continued logging the same stretch of land the very next day.
    - Monte also disregarded Vargas's phone messages and the "No Trespassing" signs.
    - Although Monte testified that she relied on the 1906 letter in conducting her logging operations, there is no evidence that the parties or their families agreed with or abided by the shifting, natural boundaries described in the letter.

- *The extent of the trespass:*
    - Between March 2000 and January 2002, Monte harvested approximately 700 trees from a strip of land along the parties' shared boundary line. According to the testimony of BLM surveyor Linhart, several hundred of those trees belonged to Vargas.

III. Argument. The argument section of the brief should be broken into two sections (liability and damages), each containing one or more headings. Better applicants will address the issue of liability before turning to the question of whether Vargas is entitled to single, double, or treble damages, since damages cannot be imposed absent liability. However, regardless of how they choose to organize the brief, applicants should cover the following points:

- BECAUSE THE PARTIES NEVER AGREED TO THE BOUNDARY LINE AND BECAUSE THE BOUNDARY WAS NOT IDENTIFIABLE, DEFENDANT MONTE CANNOT RELY ON THE AGREED BOUNDARY DEFENSE.
    - Under Franklin law, the doctrine of agreed boundary is a complete defense to an action for timber trespass. *Blackjack Lumber Company v. Pearlman*.
    - The necessary elements of the doctrine are (1) uncertainty about the true boundary line; (2) an agreement between adjoining landowners as to the boundary; (3) an agreed-upon boundary that is identifiable on the ground; and (4) acquiescence to the agreed-upon boundary for a period at least equal to the statute of limitations.
    - Here, Monte cannot satisfy the second and third elements of the doctrine, and thus the fourth element also is not met.
    - On cross-examination, Vargas specifically denied that the parties had reached any agreement allowing Monte to harvest trees along the boundary of their properties. Vargas further stated on direct that neither the parties' families, nor the parties themselves, ever resolved the uncertainty surrounding the boundary line.
    - Monte did not directly contradict this testimony. Although she claimed to have relied on the 1906 letter, there is no evidence that Vargas even knew of the letter's existence prior to trial, let alone that the parties had agreed to abide by it. The letter is unilateral in nature and ends with the cryptic

comment: “If I don’t hear back from you, I’ll assume it’s okay with you.” Monte has the burden of establishing the existence of an agreement, and she clearly has not satisfied that burden.

    - Moreover, even if the court could conclude that an agreement existed, the requirement that the boundary be identifiable certainly has not been met. To the contrary, it is undisputed that the parties’ shared boundary line was anything but “identifiable” prior to the BLM resurvey. BLM surveyor Linhart described the property line as “a real mess” and went on to state that “nobody knew exactly where it was located.” Similarly, Vargas testified in some detail about the conflicting blaze marks, paint, and construction tape on trees along the boundary. Even Monte conceded in her own testimony that the boundary line was in “poor condition.” Significantly, the natural boundary markers identified in the 1906 letter and relied upon by Monte were shifting in nature. Therefore, it cannot be said that there was any “identifiable” boundary upon which the parties could have agreed.
    - Thus, for this reason alone, the doctrine of agreed boundary does not apply, and Monte is not insulated from liability.

- HAVING FAILED TO SATISFY THE ELEMENTS FOR THE AGREED BOUNDARY DEFENSE, MONTE IS LIABLE FOR TIMBER TRESPASS BECAUSE SHE CUT DOWN AND REMOVED TREES FROM VARGAS’S PROPERTY WITHOUT HIS PERMISSION.
    - Franklin Civil Code § 3346 imposes strict statutory liability for trespass, even where the trespass is “casual or involuntary,” committed by a defendant who had “probable cause to believe” that the land belonged to him or her, or committed in reliance on a licensed survey.
    - It is clear that Monte did not have Vargas’s permission to cut the trees. Indeed, Monte knew that Vargas opposed any logging on his property. Thus, Monte is liable for timber trespass.
    - There are three measures of damages depending on the nature of the trespass: (1) for willful and malicious trespass, the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, the court must impose double damages; and (3) for trespass under

authority, actual damages. *Anderson v. Flush*. Each situation should be discussed in turn by the applicants.

- BECAUSE MONTE DID NOT RELY ON A LICENSED SURVEY, THE COURT CANNOT LIMIT VARGAS'S AWARD TO SINGLE DAMAGES.
  - Pursuant to Franklin Civil Code § 3346, single damages (i.e., the "actual detriment" caused by the trespass) are appropriate where a defendant commits trespass in reliance on a survey that improperly fixed the location of a boundary line, provided the survey was conducted by a licensed surveyor.
  - Although the original USGLO survey was conducted by licensed surveyors, Monte did not rely on the lines established thereby and there is no evidence to suggest that the original survey improperly fixed the location of the parties' shared boundary. Therefore, single damages are not an option.
- MONTE'S TRESPASS WAS WILLFUL AND MALICIOUS, AS OPPOSED TO CASUAL OR INVOLUNTARY, IN THAT SHE HARVESTED TREES ALONG THE PARTIES' SHARED BOUNDARY LINE DESPITE REPEATED WARNINGS AND THEN CONTINUED LOGGING WITH ACTUAL KNOWLEDGE OF THE TRESPASS.
  - The issue of whether Monte should be ordered to pay double versus treble damages is the primary tension in this test item. Applicants should devote the lion's share of their argument to analyzing this issue, persuading the court that Monte's conduct justifies an award of treble damages, and distinguishing the double damages case law in the Library.
  - Under Franklin law, where the reliance-on-survey-by-licensed-surveyor provision does not apply [Civil Code § 3346(b)], an award of double damages is mandatory whether the trespass is willful and malicious, or casual and involuntary. *Anderson*.
  - Although Franklin Civil Code § 3346 does not specifically address the intent required for an award of treble damages, the cases make clear that such an award is left to the discretion of the trial court and shall not be made absent a finding that the defendant's conduct was willful and malicious. *Anderson*; *Hardway Lumber v. Thompson*.

- Malice implies an act conceived in a spirit of mischief or with indifference toward the obligations owed to others. Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his or her allegedly malicious acts. *Hardway Lumber*.
- The *Anderson* and *Hardway Lumber* cases, both upholding double damage awards, are distinguishable in several respects.
- In *Anderson*, (1) the defendant damaged trees while attempting to move a house along a public street and was faced with the Hobson's choice of continuing down the street with his load or blocking traffic; (2) the defendant took precautions to minimize the injury to plaintiff's trees; and (3) the defendant found himself in a situation where he could have reasonably believed that he had a right to inflict injury to the plaintiff's trees.
- Similarly, in *Hardway Lumber,* the defendant had entered into a logging contract with the plaintiff landowner and was unaware that the plaintiff had rescinded the contract. Thus, the court concluded that the defendant could have reasonably believed that he had a right to harvest the plaintiff's trees.
- Here, in contrast: (1) Monte was not attempting to use public space; (2) there was no Hobson's choice (Monte owns hundreds of acres and was not compelled to log this particular section of her property); (3) Monte had no logging contract with Vargas and could not have reasonably believed that she had the right to log trees on Vargas's land; and (4) Monte continued cutting down Vargas's trees even after being informed by BLM surveyor Linhart that she was in clear trespass and despite Vargas's phone messages and "No Trespassing" signs.
    - Indeed, Monte affirmatively knew that Vargas had resisted efforts to log his land.
    - Moreover, Monte was in the logging business and would certainly have had a greater appreciation for the need to avoid trespassing.
- More generally, with respect to both the *Anderson* and *Hardway* opinions—and this is a subtle point that many applicants may not catch—timber trespass

cases are reviewed under an abuse of discretion standard, which means, as a practical matter, that it is unlikely that the Franklin Court of Appeal would set aside a particular judgment so long as there is evidence in the record to support it. The *Anderson* and *Hardway* decisions are fact-specific outcomes that should not dictate a particular result in this case.

- The evidence in the File strongly suggests an absence of any effort on the part of Monte to minimize the risk of trespass. The facts establish that at least from the time of her encounter with the BLM survey team, Monte acted with the scienter needed to support an award of treble damages. For instance, we know from Vargas's testimony that Monte was interested in obtaining logging rights to Vargas's land. Monte's unwillingness to heed the warnings of BLM surveyor Linhart, her complete disregard for the "No Trespassing" signs posted by Vargas, her comments to BLM surveyor Linhart about it not being "fair" for BLM to move the boundary line, and her continued logging in the area with actual notice of the trespass suggest a reckless, willful disregard of Vargas's rights.
- Given these facts, the circumstances of this case are much more analogous to the facts in the *Guernsey v. Wheeler* decision cited in *Hardway*. Here, as in *Guernsey*, we have a defendant who has disregarded repeated warnings, who has failed to take the steps necessary to eliminate or at least substantially reduce the risk of trespass, and whose motives were suspect. Therefore, as in *Guernsey*, an award of treble damages is justified and supported by the evidence in the record.

POINT SHEET

In re Franklin Forum

In re *Franklin Forum*

DRAFTERS' POINT SHEET

In this performance test item, applicants work for a firm that represents a Franklin City newspaper, *The Franklin Forum* (the *Forum*). The publisher is seeking advice on what the newspaper's liability and exposure would be in anticipation of the publication of an exposé on the commission-based sales practices of several local laser eye surgery companies.

Three *Forum* reporters conducted a thorough investigation of the practices of three local companies and discovered a number of questionable practices: deceptively low advertised "teaser" prices; sales techniques designed to lure customers into paying higher prices; sales talks that emphasized the benefits of the surgery and intentionally ignored or minimized the considerable risks, and the like. The reporters first gathered and verified a good deal of information from past employees of the companies, experts in the field, and public sources. However, to complete the investigation, they felt it necessary to get on the "inside" because many of the former employees had been paid for signing confidentiality agreements that prevented them from talking freely.

The reporters each applied for and were hired as "patient counselors" (i.e., salespersons) with three local laser eye surgery companies. They filled out the application forms truthfully, except that they did not disclose their association with the *Forum*. They went through a week of training and worked as patient counselors for seven weeks. During that time, they spoke to other employees and gathered more information that confirmed their initial investigation. They then quit the jobs and are now ready to publish.

The task for applicants is to draft a two-part memorandum explaining: first, whether the First Amendment protects the *Forum* from liability for fraud, breach of duty of loyalty, and trespass, and, if not, whether the *Forum* can be held liable for commission of those torts; and second, whether the First Amendment protects the *Forum* from having to pay the laser eye surgery companies damages for injury to their reputations, i.e., publication damages. They are told that the *Forum* fully intends to publish the exposé. Thus, applicants should not spend time evaluating the pros and cons of whether the *Forum* should or should not publish.

Applicants are specifically told not to concern themselves with liability for the tort of libel (because truth is a defense) and with the *Forum*'s potential liability for the acts of the reporters (because the *Forum* is responsible on principles of *respondeat superior*).

The File contains the instructional memorandum from the partner, the transcript of an interview with the *Forum*'s publisher, and the memorandum from the reporters to their news editor explaining their investigation and seeking permission to proceed with publishing the story. The Library contains two cases that bear on the subject.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading decisions are entirely within the discretion of the graders in the user jurisdictions.

I. Overview. Applicants are asked to write a two-part memorandum to the supervising partner. It should be an objective memorandum and resemble an office memorandum, with a brief factual introduction and a discussion section broken down into appropriate topic headings. Importantly, the client is not asking for advice on *whether* to proceed with the publication. Applicants should, therefore, refrain from giving such advice.

- The first part of the task is to analyze the facts and the law and explain whether the First Amendment protects the *Forum* from liability for fraud, breach of duty of loyalty, and trespass, and if not, whether the *Forum* can be held liable for those torts.
  - As to this part of the task, there is an overarching constitutional issue: whether the laser surgery companies' tort claims, based on the state's general tort laws, are subject to a heightened level of First Amendment scrutiny because the reporters were engaged in a newsgathering activity.
- The second part is to analyze the facts and the law and explain whether the First Amendment protects the *Forum* from having to pay the laser surgery companies publication damages.
  - The First Amendment issue is whether, by tying a claim for publication damages to general tort claims, the laser surgery companies can avoid the free speech strictures of *New York Times v. Sullivan*.
- The introductory factual section of the memorandum can and should be very short, containing only the facts relevant to the liability issues (i.e., no need to include all the details of the reporters' investigations).
- The discussion section should merge the law and the facts and reach reasoned conclusions.

II. The Key Facts.

- Three reporters employed by the *Forum* received information from an anonymous "patient counselor" (i.e, salesperson) employed by a laser eye surgery company suggesting that his employer was engaging in a number of unsavory sales techniques.
- After confirming from a variety of outside sources that the questionable techniques described by their anonymous caller were probably used by a number of the laser eye surgery chains, the reporters decided to pursue their investigation further.
- One reporter went to a surgical center on the pretext of being a potential patient and experienced the same sales presentation the anonymous caller had described: the patient counselor emphasized the safety of the procedure without discussing its risks and dangers, refused to let the reporter consult with a doctor until she posted a nonrefundable deposit, and told the reporter that she (the counselor) would have to talk with her boss about lowering the price when the reporter balked at the price first quoted.
- Current employees of the companies refused to talk to the reporters for fear of losing their jobs, and former employees were constrained by confidentiality agreements they had signed and payments they had received for remaining silent.
- In order to get on the "inside" and observe for themselves the sales practices and techniques, the reporters each applied for jobs at separate laser eye surgery companies.
- They filled out the application forms truthfully, except that they intentionally did not disclose that they were employed as reporters for the *Forum*.
- They were each hired as patient counselors; each of them went through a training course and worked for seven weeks.
- At the time of hire, they were not asked, nor did they volunteer anything, about how long they intended to remain employed.
- In the course of their employment, they talked to company personnel in various parts of the operations and observed the unsavory sales practices.
- When they felt they had learned enough and had verified what they had learned earlier, they quit their jobs as patient counselors.

- The information the reporters intend to publish is true and accurate, so there is no danger of a successful claim for defamation (libel).

III. **Discussion.** The overarching issue in this case is whether, because the activities of the reporters involve newsgathering in anticipation of a newspaper publication, the tort claims of the laser surgery companies are subject to a heightened level of First Amendment scrutiny.

- This issue invokes the courts' discussions in both *Food Lion* and *Cowles*.
- Under *Cowles*, the application of state laws in a way that would restrict First Amendment freedoms constitutes "state action."
- "If a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."
  - For these purposes, the undercover or surreptitious nature of the newsgathering by the reporters would be considered "lawful" within the meaning of the quoted language.
- However, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."
  - This is the governing principle in the present case.
    - The Franklin laws relating to fraud, breach of the duty of loyalty, and trespass are laws of general application, "applicable to the daily transactions of the citizens of [Franklin]."
    - They are not subject to a constitutional level of scrutiny merely because they might in this case have an incidental effect on the ability of the *Forum*'s reporters to gather and report the news.
- Unlike the situation regarding publication damages (discussed below), the laser surgery companies would be seeking damages directly and proximately caused by the fraud, breach of the duty of loyalty, and trespass, i.e., they would not be trying to avoid the *New York Times v. Sullivan* strictures applicable to defamation claims.
- Thus, there would be no heightened level of scrutiny of these claims, and ordinary principles would apply to the fraud, breach of the duty of loyalty, and trespass claims.

IV. Whether the *Forum* is liable for fraud.

- The *Food Lion* court's holding on the fraud issue is fairly on point.
  - There is no doubt that the reporters made false representations, intending that the laser surgery companies would rely on them, i.e., they intentionally concealed their connection with the *Forum*, knowing that they would not have been hired had the companies known about it.
  - However, one of the elements necessary to maintain a cause of action for fraud is injurious reliance.
    - It is doubtful that the laser surgery companies can prove this element.
      - Although there are administrative costs associated with hiring employees that an employer recoups over the time the employee remains employed, nothing in the facts shows that there was any reasonable expectation by the companies that the reporters would remain employed for any particular length of time.
      - Indeed, the facts show that the reporters made no representations as to how long they intended to stay, and the companies did not ask.
      - Likewise, the companies will not be able to show injurious reliance relating to the payment of wages to the reporters. The facts show that the reporters performed their assigned duties and were paid for their work irrespective of their misrepresentations.
    - Thus, there should be no actionable fraud claim because the companies will not be able to show they suffered any damages as a result of the misrepresentations.[1]

V. Whether the *Forum* is liable for breach of the duty of loyalty.

- Here, again, the *Food Lion* case is on point.

[1] It is not plausible to argue that Enhanced Vision, the company to which one of the reporters pretextually presented herself as a patient, might have a claim for fraud based on that misrepresentation. In that situation, there was even less evidence of injurious reliance because Enhanced Vision suffered no damages as a result of the reporter's action.

- “It is implicit in any contract for employment that the employee shall remain faithful to the employer’s interest throughout the term of employment.”
- It is clear in the present case that the reporters were disloyal to their respective laser surgery employers.
    - Their interests were aligned with those of the *Forum* and were adverse to those of the laser surgery companies.
    - Accordingly, they breached their duty of loyalty, and the *Forum* will in all likelihood be responsible for whatever damages the companies can prove are attributable to that breach.
        - Whether they can recover punitive damages will depend upon whether the breach is deemed a tort or a breach of a contractual duty. If it is deemed a tort, there may be some exposure for punitive damages, but not if it is deemed a breach of a contractual duty.

VI. Whether the *Forum* is liable for trespass.

- Once again, we turn to *Food Lion*. Recognizing that consent is a defense to trespass, there are two aspects to the issue:
    - First, whether the mere presence of the reporters on the companies’ premises as employees was a trespass because consent to their presence was obtained by misrepresentation.
        - The Restatement view is that, if the consent is induced by misrepresentation, it is not effective.
        - The rule in *Desnick*, however, is that even if one obtains consent by misrepresentation, the misrepresentation does not vitiate the consent if the entry is to an area or place open to anyone.
            - Adopting this view, the *Food Lion* court held that “[c]onsent based on a résumé misrepresentation does not turn a successful job applicant into a trespasser as this approach would not protect the interest underlying the tort of trespass.”

        - Thus, under the view adopted by the Franklin Supreme Court in *Food Lion*, the reporters' entry onto the companies' premises was not a trespass merely because they got jobs and gained entry by concealing their true purpose.[2]
    - The second aspect of the trespass issue is whether the laser surgery companies' consent was vitiated by the reporters' breaches of their duty of loyalty.
        - Applying *Food Lion* here, the result would be that there was a trespass, i.e, although the initial entry was consented to, the reporters exceeded the scope of that consent when, once inside the premises, they engaged in surveillance and interrogation that was in violation of their duty to act in the interests of the laser surgery companies.
    - Thus, the *Forum* is likely to be liable for trespass and responsible for whatever damages the companies can prove were proximately caused by the trespass.
        - Since trespass is an intentional tort, there is some exposure (albeit minimal because of the mild nature of the trespass) for punitive damages.

VII. Whether the First Amendment protects the *Forum* from having to pay publication damages to the laser surgery companies.

- The publication damages that the laser surgery companies would be trying to recover are reputational, i.e., for damage to their reputations.
    - By definition, those damages must be tied to an injury to their reputations.
    - The only reputational claim they could assert under the circumstances is defamation, i.e., they would be libeled if the information is published.
    - The facts do not support an actionable defamation claim.
        - In the context of media newsgathering and reporting, First Amendment standards of scrutiny apply to give the press "adequate breathing space" in which to conduct their activities. *Food Lion*.

[2] By the same reasoning, it was not a trespass when the one reporter presented herself on the pretext of wanting an eye examination at the facilities of Enhanced Vision.

        - Under *New York Times v. Sullivan*, the laser surgery companies would have to show that the reporters acted with malice or reckless disregard of the truth.
        - Otherwise the companies would not be able to recover for defamation, i.e., for damages to their reputations.
- Here, the only possible claims the companies can assert are nonreputational in nature, i.e., fraud, breach of the duty of loyalty, and trespass.
    - What they would be trying to do by asserting that their reputations were damaged by the commission of those wrongs against them is to tie reputational publication damages to nonreputational claims.
    - Under the holdings in *Food Lion* and *Cowles*, they would not be allowed to do so, i.e.,
        - The companies cannot avoid the malice and reckless disregard requirements of *New York Times*.
        - Even if their reputations suffered damage because of actions of the reporters, they cannot recover damages unless they can show malice or reckless disregard.
        - In other words, any reputational injury would not have been proximately caused by the nonreputational causes of action.
    - Thus, the laser surgery companies will probably not be able to recover publication damages.

POINT SHEET

Meerstein v.* Easy*GO Airlines

Meerstein v. *Easy*GO Airlines
DRAFTERS' POINT SHEET

In this performance test item, the applicants' law firm represents Emily Meerstein, a passenger on *Easy*GO Airlines (EG) Flight 100. Meerstein purchased a first-class ticket on what was supposed to have been a nonstop flight from Santa Barbara International Airport (SBA) in Franklin City to Ben Gurion International Airport (TLV) in Tel Aviv, Israel. The price of the ticket was about $350 more than a coach seat on one-stop flights on competing airlines. Shortly after takeoff, the captain announced that "flight conditions" required him to make an unscheduled stop at Charles de Gaulle Airport (CDG) in Paris "to refuel." As a result, the flight was 2 hours and 20 minutes late arriving at TLV.

Meerstein's inquiries as to the reason for the stop were met with what she considered feeble excuses, and a letter to EG's Customer Service Division produced a nonresponsive reply and a certificate for $100 to be applied to a future EG flight. She returned the certificate and asked again for the precise reason her flight had been diverted. She heard nothing further from EG. On later investigation, it turns out such unscheduled stops are common with EG and that, at least on this flight, the stop may have been occasioned by the fact that fuel was considerably cheaper in Paris than in either Franklin City or Tel Aviv.

Furious at what Meerstein considered EG's "bait and switch" tactic, she consulted the firm regarding a possible suit to force EG to change its "lackadaisical attitude and disregard for its customers." Once she understood that the amount of her damages would not justify bringing an individual action against EG and was told the advantages of a class action, she authorized the firm to research and investigate the possibility of bringing a class action under the Franklin Unfair and Deceptive Trade Practices Act (UDTPA).

The task for applicants is to identify, based on the facts and the law provided, the largest class of plaintiffs a court would be likely to certify and explain why a court would not certify a larger class. The File contains the instructional memorandum from the partner, notes of an interview with Meerstein, the report of an investigator hired by the firm, and a memorandum from an airline management consultant. The Library contains Franklin Civil Code § 201 (UDTPA), Rule 122 of the Franklin Rules of Civil Procedure (the Franklin equivalent of FRCP Rule 23), and two Franklin appellate cases.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading decisions are within the discretion of the graders in the user jurisdictions.

I. **Overview.** Applicants are asked to write a two-part memorandum exploring class action issues:

- First, applicants must analyze the facts and the law and identify the largest potential class of plaintiffs. They are told that a court would probably certify a class consisting of, at a minimum, all the passengers on the Flight 100 that Meerstein took to TLV, but that a class that small is not "economically feasible." This part of the task is designed to require the applicants to discuss each of the elements set forth in Rule 122 of the Franklin Rules of Civil Procedure necessary for certification of a class action. The court's discussion in *Broin v. Philip Morris Companies, Inc.*, provides the template for such a discussion. There is no "school answer" to this part of the task. Rather, the applicants should recognize that there are limitations and define the class within those limitations.
- Second, applicants must explain why they believe the class they have identified is certifiable and why a class larger than the one they have identified would not be certifiable. This part of the task requires a close analysis of the law and application of the facts. For example, a knee-jerk reaction might lead one to conclude that the class should consist of all passengers who purchased nonstop tickets on any of EG's international flights during a period of time, but analysis of the facts in light of the court's discussion in *Mendelson v. TWA* would dictate otherwise. Applicants should articulate the limitations and support their conclusions with the facts and the authorities.

The form of the memorandum is not a major grading consideration, but it should resemble an office memorandum. Applicants are told that there is no need to write a separate statement of facts but to be sure to use the facts to support their conclusions.

II. **The Key Facts.** The File documents supply all the facts necessary to the discussion. Applicants are expected to weave these facts into their discussions where appropriate.

- <u>Facts relating to Ms. Meerstein's trip to TLV</u>:

    - Meerstein paid $1,260 for a first-class ticket on Flight 100 that was advertised as nonstop between SBA and TLV. Her ticket receipt specifically stated that it was a nonstop flight.
    - The flight took off from SBA with 316 passengers; the first-class section was full, and the coach-class section was about two-thirds full.
    - Soon after takeoff, the captain announced that "flight conditions" required him to land the plane at CDG in Paris "to refuel."
    - As a result of the layover in Paris, Flight 100 was 2 hours and 20 minutes late in arriving at TLV.
    - No passengers boarded at CDG.
    - When the plane left SBA, it did not have enough fuel on board to get to TLV.
    - Although fuel prices have fluctuated over the past year, the price of fuel at CDG at this particular time was 25¢ cheaper per gallon than at either SBA or TLV.
    - Meerstein chose EG Flight 100 specifically because it was a cheap, nonstop, first-class flight.
    - Meerstein has kept in touch with three passengers who continue to be upset: Jason Atlass (who missed an important business appointment), Craig Crespi (who missed his brother's wedding), and Nancy Nelson (who missed a connecting flight).
- Facts relating to EG's fleet operations and past practices:
    - EG's base hub for all its international flights is SBA, with the exception of a single daily nonstop flight from New York to Istanbul. Flight 100 is the number assigned to all of EG's flights that are advertised as "nonstop" from SBA to TLV.
    - Each of EG's 16 Boeing 747-200s has a passenger capacity of 450.
    - Each plane has a fuel capacity of 52,000 gallons, yielding a theoretical flying time of 14 hours. Dr. Sinha, the airline management consultant, observes in his report that fuel prices can influence an airline's decision regarding intermediate stops.

- Although actual flying time can vary depending on weather and atmospheric conditions, average flying time between SBA and TLV is 10½ hours (vs. the 13 hours and 15 minutes it actually took Meerstein's Flight 100).
- FAA documents filed by EG show that, in the past year, 50 percent (75 of 150) of EG's nonstop 100 flights have stopped in Paris for the same reason: "Conditions dictated diversion to CDG for refueling."
- In the year before that, only 10 percent (15 of 150) of EG's #100 flights were diverted for refueling.
- Counting all of EG's nonstop and one-stop flights to TLV, EG transports about 56,000 passengers bound from the U.S. to Tel Aviv, which is about 40 percent of the total U.S.-Tel Aviv traffic.
- Rule 3 of the tariff EG filed with the FAA generally disclaims liability for flight delays and provides that EG "may alter . . . stopping places shown on the ticket in case of necessity." EG's letter to Meerstein refers to Rule 3 as the justification for the diversion of her flight.

III. A General Survey of the Statutory Factors in Light of the Facts. Whether applicants do it separately, as in these guidelines, or as an integral part of their analyses of the largest class, they should analyze the law and apply the facts to each of the statutory factors, bearing in mind that, under Franklin Rule 122, the *proponent* of the class must establish all the factors. If they follow the template used by the court in *Broin*, applicants should have no problem addressing each of the factors.

- **Numerosity.** The test under Rule 122(a)(1) is whether there are so many members of the class that separate joinder of each member would be impracticable.
  - Both *Broin* and *Mendelson* suggest that numerosity is a fluid standard that depends on the circumstances. The *Broin* court stated that it has occasionally found numerosity with classes of "fewer than 100 individuals." In *Mendelson*, the court suggested that the 77 paid passengers who were bumped from a flight might be enough, depending on how many of them had not yet settled their claims with the airline.
    - In the present case, the potential number of passengers on diverted 100 flights runs into the thousands.

            - It is unclear how many first-class passengers and how many coach passengers there might be, but that should not make any difference in the class certification inasmuch as they were all subjected to the identical conduct by EG (see "Commonality," below).
            - As far as is currently known, no other diverted passengers have filed suit against EG.
                - What is unknown is how many, if any, of the potential class members might have accepted a certificate, such as the $100 certificate offered to Meerstein, in "settlement."
                    - That number can be determined during discovery, as the court suggests in *Mendelson*.
            - The likelihood is that most of the Flight 100 passengers who were diverted are viable class members.
                - As the court stated in *Mendelson*, "The issue is whether the use of a class action would achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly situated."
                - It is indisputable that it would be impractical to join thousands of plaintiffs in a single lawsuit and that one class action representing them all would be more efficient.
- **Commonality.** Under Rule 122(a)(2), it must be established that "the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class."
    - There are two considerations that help in establishing this factor: (1) all the potential class members were subjected to the same course of conduct by EG, and (2) the facts suggest that EG will assert the same defense against all potential plaintiffs, i.e., Rule 3 of EG's tariff.
    - Here, EG's course of conduct was probably the identical deceptive trade practice as to all diverted Flight 100 passengers.
        - The flights that were advertised as nonstop turned out not to be nonstop.

- The diversions were based on the pretext that they were "necessary," but the very strong inference is that they were pre-planned stops to avail EG of a substantial dollar savings in fuel costs, i.e.,
    - At least Meerstein's plane took off from SBA with insufficient fuel to get to TLV;
    - Taking off with a full fuel load would have been enough to get to TLV (i.e., capacity to fly 14 hours versus 10½ hours flight time nonstop to TLV); and
    - Fuel was 25¢ cheaper per gallon in Paris, potentially saving EG $13,000 in fuel costs (i.e., 25¢ × 52,000 gallons).
- The fact that different passengers might have been ultimately affected differently (e.g., Atlass, Crespi, and Nelson on Meerstein's flight suffered slightly different consequences because of the delay), or that they each might have suffered different kinds and amounts of damages, does not militate against class treatment.
    - All that is required is that the claims of the class members be *similar* and that they be more bound by a mutual interest in common questions of fact or law than by interests of individual members. "Class actions are not dependent on class members presenting carbon-copy claims." *Broin*; *Mendelson*.
    - Ultimately, their right to recover, if they prevail in the suit, will be based on the same facts, and that is the essence of the element of commonality.
    - Further, they will all be suing for exactly the same deceptive trade practice under the same law and subject to the same damage limitations.
        - This fact avoids the "conflict of laws" problem, i.e., the problem that, because of their varying states of origin, different class members might be making claims under different laws. (See footnote in *Mendelson.*)

        - Also, it appears that EG would be asserting the same defense against all the class members, i.e., that Rule 3 of its tariff justified the diversion.
            - If EG prevails on that issue, then all the individual claims would be rendered moot.
            - This fact, as the *Broin* court puts it, is a "factor that bolsters class action treatment."
- **Typicality.** Rule 122(a)(3) requires that the "claim or defense of the representative party [be] typical of the claim or defense of each member of the class."
    - This component addresses the relationship of the class representative's claim to the claims of the class members. *Broin*.
    - There is no question that Meerstein's claim is typical of and not antagonistic to that of the others.
        - Even if other passengers also become named plaintiffs, their claims would remain typical of all others.
        - All the passengers on diverted 100 flights, including Meerstein, were deprived of the nonstop flight they had paid for and they would all be seeking the same remedy, i.e., compensation for the deception perpetrated by EG.
- **Adequate Representation.** Rule 122(a)(4) requires that "the representative party fairly and adequately protect and represent the interests of each member of the class."
    - This component has two aspects: first, that the plaintiffs and the class members have common interests and, second, that the class representatives be able to properly prosecute the class action. *Broin*.
        - From the foregoing discussion, it is plain that Meerstein has exactly the same interests as all of the other diverted Flight 100 passengers: to require EG to stop its "bait and switch" tactics and to recover compensation for the deceptive practice.
        - The mere fact that Meerstein has pursued the matter as far as she has is an indicator that she will represent the class zealously and see it through to the end.

        - Although it is an unknown in this case, it is likely that the potential class members reside in various U.S. jurisdictions.
            - This fact alone does not adversely affect Meerstein's ability to represent the interests of the class nor does it militate against class treatment. *Broin*.
- **Superiority.** Rule 122(b) requires that all the foregoing prerequisites be met and that, in addition, class treatment be "superior to other available methods" for adjudication of the controversy.
    - The principal consideration affecting this factor is that a class action is the only practical way to address the small claims of the possible thousands of potential plaintiffs who have an interest in the matter.
        - It is highly unlikely that, individually, any of them will litigate what is patently a viable claim to collect on what is probably a $500 damage claim. Collectively, however, prosecution of the claims would be worthwhile.
        - The fact that no others have stepped up to the plate is indicative only of either the lack of knowledge of the availability of a lawsuit or the lack of resources available to them to pursue the matter.
            - This fact does not necessarily indicate a lack of interest.
        - Moreover, pursuing the claims as a class is plainly more efficient than a series of separate suits in terms of the inherent systemic costs, i.e., court and judicial resources.
        - The clear intention of the rule is that the class action be available to assist claimants who have suffered significant injury but minor monetary loss in securing an efficient, effective, fair, and even-handed redress of their grievances. *Broin*.
- **Predominance.** Rule 122(b)(3) also requires that, in addition to the provisions of subpart (a), "the common questions of law or fact predominate over any question of law or fact affecting only individual members of the class."
    - This subsection deals with common questions of law or fact.

        - The most significant common fact is that all passengers on diverted 100 flights bought a nonstop passage and received a one-stop passage.
        - All Flight 100 passengers necessarily boarded in Franklin City and would therefore be claiming under the same UDTPA. The common legal question is whether this constituted a violation of that statute.
        - Moreover, EG's likely defense is common to all, i.e., whether EG's tariff absolves EG of liability.
    - There are common questions of law *and* fact that likely predominate as to all diverted Flight 100 passengers.
        - The fact that there may be minor differences in the circumstances of the passengers and their damages does not defeat this factor. *Broin*.
            - As the *Broin* court points out in a footnote, once liability is determined, the class members may then present their individual claims for determination in separate proceedings.
    - Another consideration that the *Broin* court takes up under the rubric of "predominance" is whether a class action would promote uniformity of decision in a situation like this, where the circumstances affect all class members in a like manner.[1] The issue is whether there is a danger that inconsistent decisions would result if the issues were to be tried in separate lawsuits in different courts or jurisdictions.
        - There is probably a significant risk of inconsistent separate decisions in these circumstances because laws equivalent to Franklin's UDTPA in the home jurisdictions of many of the passengers might differ. This risk is another factor favoring class treatment.
- **Conclusion.** Considering the Rule 122 factors and the facts, it seems an easy conclusion that a court would be likely to certify a large class.

[1] Actually, Rule 122 sets uniformity of decision out as a separate disjunctive factor in determining whether a class should be certified: i.e., a class action is the preferred mechanism if "there is a risk that individual adjudication for proposed class members would be inconsistent." Rule 122(b)(2). Applicants may discuss this factor separately or as part of their "predominance" discussion.

IV. The Largest Plausible Class a Court Would Be Likely to Certify. In this part of the answer, applicants should identify what they consider to be the largest class a court would be likely to certify and support their conclusion with the facts and the authority. One of the things they must do is to "describe a distinct class with great certainty." *Broin*. While all of the several Rule 122 factors could be brought to bear, the ones most likely to circumscribe the size, as suggested in *Mendelson*, are commonality, typicality, superiority, and predominance. As the *Mendelson* court says:

> The fundamental issue in class certification is whether the group asserting class status is seeking to remedy a common legal grievance. The determination rests upon whether the group is more bound together by a mutual interest in settlement of common questions than it is divided by the individual member's interest in matters peculiar to him or her. The issue is whether the use of class action would achieve economies of time, effort, and expense and promote uniformity of decisions as to persons similarly situated.

- The facts the applicants can bring to bear on the scope of the class are:
  - Flight 100 is always advertised as a nonstop flight.
  - In the past year, 50 percent (75 of 150) of EG 100 flights have stopped in Paris for refueling, and, in the year before that, 10 percent (15 of 150) of the flights did so.
  - Fuel prices were considerably less in Paris than at SBA or TLV for the past two years (from which, coupled with Dr. Sinha's opinion and the fact that the plane took off from SBA with less than a full load of fuel, it can be inferred that Flight 100 would divert to Paris whenever fuel prices were cheaper).
  - EG transports on all of its SBA/TLV flights (both nonstop and one-stop) 40 percent of the total number of U.S.-to-Tel Aviv air travelers, i.e., about 56,000 people per year.
  - EG serves 12 international destinations from SBA with its fleet of 16 Boeing 747-200s.
  - Each EG plane has a passenger capacity of 450.
  - As observed in Ripka's report, "even flying at half-capacity, thousands of people were affected [by the Paris stopovers] in the last year alone."

- The most plausible largest class would be defined as follows: All passengers for the past two years on EG 100 flights that were diverted for refueling.
  - There would certainly be no problem with numerosity; i.e., 90 flights × 225 passengers (assuming half-capacity) = 20,250 passengers.
  - There would be commonality, in that all of them would have been affected in the same way by the same "bait and switch" conduct of EG.
  - Meerstein's claim under the UDTPA would be typical of all the others and common questions of law and fact (including EG's probable defense) would predominate.
  - A class action would clearly be the superior method of handling this number of small claims.
  - The factual support for such a class is clearly present (see above).
    - To the extent that some of the flights might have been diverted for legitimate, non-"bait and switch" reasons, EG would be free to prove what it could and eliminate from the class all passengers on those flights.
    - Note that this definition of the class does not limit the class to those passengers on flights that were diverted to Paris, thus covering the possibility that EG, in shopping around for fuel prices, might have selected other locations to stop over. In addition, since Meerstein's main goal is to change EG's practices, the ultimate remedy being sought would be an injunction to prevent EG from making pre-planned fuel stops anywhere on advertised nonstop flights to any destination.

V. Why a Court Would Not Likely Certify a Larger Class.

- Based on the facts, the *possible* larger class configurations in descending order are:
  - All passengers for the past two years[2] on *all EG international flights* that were advertised as nonstop but which were diverted for *any reason whatsoever,* or

[2] The reason for the two-year period is that the Ripka report provides information for that period of time. An applicant could just as easily define the class as including all passengers for the "statutory period of limitations," whatever that might be.

        - All passengers for the past two years on *all EG international flights* that were advertised as nonstop but which were diverted for *refueling*.
        - Given the available facts, both of these class definitions would probably be overbroad. Although a court would likely allow Meerstein to conduct limited discovery, such discovery would be confined to determining the characteristics and scope of a class already narrowly defined. See *Mendelson*.
            - Moreover, this definition would necessarily include EG's New York-Istanbul flight as to which there are no facts to suggest that class treatment would be proper.
        - There would be no problem with numerosity, but commonality, typicality, and predominance would be likely problems, i.e.,
            - There is no clue in the facts to suggest that the possible claims by this universe of passengers have anything in common with the claim Meerstein asserts or that Meerstein's claim is typical of those of all the other passengers.[3]
            - Nor is it predictable that common issues of law or fact would predominate over those affecting individual members.
    - Another possibility might be all passengers for the past two years on all EG #100 flights (i.e., flights from SBA to TLV) that were diverted to any place for any reason whatsoever.
        - This might also be overbroad because there is no factual support for naming such a class.
        - The very description of this class suggests that there might have been different reasons for the diversion, thus defeating commonality, typicality, and predominance.

[3] *Mendelson* suggests the possibility that the class in a class action can consist of "subclasses," and applicants could well follow that lead in dividing the possible plaintiffs into subgroups. However, *Mendelson* is instructive in showing that even the subclasses must have commonality among themselves.

NOTES