



2003 MEE
Questions and Analyses



2003 MEE Questions and Analyses

Table of Contents

Preface	ii
Description of the MEE	ii
Instructions	iii
February 2003 Questions	1
February 2003 Analyses	11
July 2003 Questions	37
July 2003 Analyses	47

Preface

This publication includes the questions and analyses from the February 2003 and July 2003 Multistate Essay Examinations. Each test includes seven questions; most jurisdictions that use the MEE select the six questions their applicants will answer.

The model analyses to the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination. These models are not an official grading guide. Some jurisdictions grade the MEE on the basis of state law, and jurisdictions are free to modify the analyses as they wish, including the suggested weights given to particular points. Grading of the MEE is the exclusive responsibility of the jurisdiction using the MEE as part of its admissions process.

The topic or topics covered by each question are listed on the first page of its accompanying analysis, followed by Roman numerals which refer to the MEE subject matter outline for that topic. For example, Question 4 on the February 2003 MEE tested Agency and Partnership I, agency relationships, II.B, apparent authority, and III, vicarious liability of principal. Subject matter outlines are included in the *MEE Information Booklet* and can also be found at www.ncbex.org.

Description of the MEE

The MEE is a three-hour examination consisting of six questions. The examination is administered in one continuous three-hour time period. Applicants are expected to spend approximately thirty minutes answering each of the questions. The areas of law covered by the questions in the examination are: Agency and Partnership, Commercial Paper, Conflict of Laws, Corporations and Limited Liability Companies, Decedents' Estates, Family Law, Federal Civil Procedure, Sales, Secured Transactions, and Trusts and Future Interests. Some questions include issues in more than one area of law.

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

Instructions

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

Do not break the seal on this booklet until you are told to begin.

You will have three hours in which to write your answers to six of the seven questions contained in this booklet; you will be told which of the questions you are to answer. Each question is designed to be answered in thirty minutes. There will be no break once the formal testing session begins. You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise, simply draw a line through the material you wish to delete.

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

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

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

Some jurisdictions instruct applicants to answer MEE questions according to the law of the jurisdiction. Absent such an instruction, you should answer the questions by applying fundamental legal principles rather than local case or local statutory law.

FEBRUARY 2003

Questions

Question 1

Testator was an 80-year-old mentally alert widow. Testator retained Lawyer to prepare her will naming Charity, a charitable organization, as the sole beneficiary of her estate. One week later, Testator received a photocopy of a proposed will that Lawyer had prepared for her.

A few days later, on October 1, 1998, Lawyer called Testator to inquire whether the proposed will conformed with her wishes. When Testator responded that it did, Lawyer suggested that Testator make an appointment to come to his office so that she could execute the original, which was in his possession. Testator responded that, because of her arthritic condition, it would not be convenient for her to do so, and she told him, "Just go ahead and sign the will for me." Lawyer said, "OK."

Later that day, Lawyer inserted "October 1, 1998" as the date of execution on the original will and signed Testator's name on the will in front of three secretaries who acted as witnesses. The secretaries then signed their names in the spaces provided on the will. All of them saw Lawyer sign Testator's name, and each of them saw the others sign their own names. Lawyer then called Testator and told her the will had been signed and witnessed. Testator replied, "Good, now it's done. Please keep the will for me."

A year later, Testator decided that she wanted to change the will to give her diamond ring to her niece, Nora. Deciding to make the change herself, she asked a friend to type up a document, which was identified as "a codicil to my existing last will." This document was then validly executed and stated, "I leave my diamond ring to my niece, Nora. In all other respects I hereby affirm my existing last will, executed on October 1, 1998."

A year later, Testator had a falling out with Nora. Remembering that she had devised her diamond ring to Nora, she gave the ring to another niece, Betty, as a gift. Testator died a few months later. Her closest surviving relatives were her two nieces, Nora and Betty. At the time of her death, her only asset was a parcel of real estate known as "Blackacre."

Who is entitled to Blackacre and to the diamond ring? Explain.

Question 2

Mariner owned several large fishing nets that required repairs. In January 2002, he took the nets to Chandler, who sells and repairs all kinds of new and used fishing equipment, including nets. Chandler agreed to repair and return the nets for \$4,000 payable in 45 days. Mariner issued a valid, negotiable promissory note to Chandler promising to pay \$4,000 to the order of Chandler on March 1, 2002.

Chandler repaired the nets, but did not return them to Mariner. Instead, on February 27, 2002, without Mariner's knowledge or permission, Chandler sold the nets as used goods to Trawler. At the time of the sale, Trawler was shopping for nets in Chandler's store and believed the nets belonged to Chandler.

When Mariner's note became due on March 1, 2002, he refused to pay Chandler because Chandler had not returned the nets.

On March 10, 2002, Chandler indorsed the note and sold it to Financier for \$3,500. However, Chandler did not tell Financier anything about his dealings with Mariner and Trawler. In negotiating the note to Financier, Chandler wrote the words "without recourse" above his indorsement. When Financier later presented the note to Mariner and demanded payment, Mariner refused to pay.

Despite repeated requests, Trawler has refused to return the fishing nets to Chandler or to Mariner.

1. What rights, if any, does Financier have on the note against Mariner? Explain.
2. What rights, if any, does Financier have on the note against Chandler? Explain.
3. What rights, if any, does Mariner have against Trawler for recovery of the nets? Explain.

Question 3

Husband and Wife married in State X in 1992 and resided there for the following 10 years. They have three children, ages 5, 7, and 9.

In early February 2002, Husband told Wife that he wanted a divorce and was moving to State Z for a new job. He asked Wife to let him take the children. Wife refused. The next day, Husband moved to State Z without the children.

In March 2002, six weeks after arriving in State Z (the minimum period of residence for divorce in State Z), Husband filed an action for divorce. In this action, he also sought primary custody of the three children, asserting that Wife had been violent and abusive toward him throughout their marriage.

Wife was served with the summons and complaint in Husband's action at the family home in State X. Wife, who has never been to State Z, did not answer or appear in Husband's divorce proceeding.

In July 2002, the State Z court granted Husband a default judgment granting Husband a divorce, dividing their property, awarding him primary custody of the three children, and giving Wife "reasonable visitation." Husband served Wife with the judgment.

In August 2002, Wife allowed the children to go to State Z for a two-week visit with Husband, whom they had not seen for nearly five months. This was the children's first time in State Z. At the end of the two-week period, Husband notified Wife that he would not return the children to Wife.

Wife immediately filed an action in State X for divorce, property division, and custody.

Husband appeared in Wife's State X action and contested her claims. He sought enforcement of the State Z judgment awarding him custody. He also argued that Wife's other claims were precluded by Husband's State Z judgment of divorce.

1. Is the State X court required to enforce the State Z custody decree? Explain.
2. Are Wife's claims for divorce and property division precluded by Husband's State Z judgment? Explain.

Question 4

Lessor owns and manages apartment buildings in the town of Utopia.

Handy is the sole proprietor and only employee of a small business called “Rapid Repairs.” Most of the income from this business is generated by making small household repairs for homeowners and apartment dwellers in Utopia. Handy has a good reputation for performing quality work and charging reasonable rates.

One year ago, Lessor contracted for an indefinite period with Handy to perform repair work at several apartment units that Lessor owns in Utopia. The tenants of these units are told to make requests for repairs by calling a telephone number listed as “Lessor’s Repair Line.”

Under the Lessor/Handy contract, any call to “Lessor’s Repair Line” actually rings directly through to Rapid Repairs. Handy is obligated to investigate any tenant’s request for repair within 24 hours. Before actually making any repair, however, Handy is required to contact Lessor, describe the nature of the repair, and seek authorization to proceed. Once authorized to make the repair, Handy must make it within 24 hours. Lessor is obligated to pay Handy \$50 per hour for any work done pursuant to the contract (including investigating repair requests) and, in addition, to reimburse Handy’s out-of-pocket expenses.

The Lessor/Handy contract further provides that Handy:

- may perform similar work on other apartment buildings, but may not perform work “on the side” for Lessor’s tenants in Lessor’s buildings;
- must provide his own tools;
- may not perform any electrical work, but must subcontract it to a licensed electrician, approved by Lessor, who will work under Handy’s supervision.

Last month, Tenant called “Lessor’s Repair Line.” Handy answered. Tenant said he had a cracked sink drainpipe. Handy immediately investigated. After obtaining permission from Lessor to repair the sink, Handy returned to make the repair. While Handy was making the repair, Tenant asked Handy to install an electrical outlet in the apartment for Tenant’s computer. Despite his contract with Lessor, Handy agreed to do so, but told Tenant there would be a charge of \$200 as it was an improvement to the apartment, not a repair covered under the lease. Tenant agreed to pay \$200 for a new outlet. Tenant assumed that the money would go to Lessor, but Handy intended to keep it for himself.

Handy was negligent in installing the electrical outlet. The outlet caused a fire, which destroyed Tenant’s personal property. Tenant never paid for the installation work.

On what alternative theories should Tenant argue that Lessor is liable for Handy’s negligence, and what is the likely outcome on each theory? Explain.

Question 5

Acme Corporation, a citizen of State X, manufactures widgets. Acme widgets are distributed to retailers throughout the United States by Widgets, Inc., a citizen of State Y. Plaintiff, a citizen of State Y, purchased an Acme widget from a retailer in her hometown. Shortly after purchasing the widget, Plaintiff was seriously injured when the widget overheated and exploded.

Plaintiff sued Acme in the federal district court located in State Y, properly invoking the court's diversity jurisdiction. Plaintiff sought \$100,000 in damages on two state-law tort theories: (1) failure to warn, and (2) sale of a dangerously defective product.

Under the applicable state law, a manufacturer's duty to warn is fully discharged if a proper warning is affixed to the product *at the point of delivery to its distributor*. A distributor's duty is fully discharged if the warning is affixed *at the point of delivery to the retailer*. State law further provides that both manufacturers and distributors may be held separately and strictly liable for selling a "dangerously defective" product, even if they have given adequate warning of the risks. Plaintiff's complaint alleged both that Acme had failed to affix a warning label to the product and that Acme's widgets had a dangerous propensity to overheat.

After extensive discovery, Acme filed a motion for summary judgment on the failure to warn claim. It attached to its motion the supporting affidavits of employees of both Acme and Widgets attesting that a proper warning label had been affixed to the widget both at the time of delivery to Widgets and at the time of distribution to the retailer who sold the widget to Plaintiff. While conceding that the warning label usually provided with the product did give adequate notice of the danger of overheating and explosion under certain circumstances, Plaintiff nevertheless contested the motion for summary judgment with her own affidavit, in which she stated that there had been no warning label affixed to her widget when she purchased it from her local retailer.

The federal court granted Acme's motion for summary judgment on the failure to warn claim and entered judgment on that claim against Plaintiff. No appeal was taken. Soon afterward, Acme and Plaintiff settled the dangerous defect claim for an undisclosed amount.

Shortly after the conclusion of the federal litigation, Plaintiff filed suit in the state court of State Y, asserting against Widgets, Inc., the same two claims she had asserted against Acme in federal court: failure to warn and sale of a dangerously defective product. Widgets answered and then moved to dismiss on grounds of claim and issue preclusion.

1. In Plaintiff's suit against Acme, did the federal court properly grant Acme's motion for summary judgment on the failure to warn claim? Explain.
2. Should the State Y state court give preclusive effect to the federal court judgment and dismiss Plaintiff's claims against Widgets? Explain.

Question 6

Decedent died one year ago. Decedent's duly probated will created a \$1 million trust. Trustee is the trustee of this trust. The trust provides that:

Trust income shall be payable annually to my son Adam for 10 years. Adam's interest shall be free from control, debts, liabilities, and assignments by Adam and shall not be subject to execution or process for the enforcement of judgments or claims of any sort against Adam. After 10 years, I direct that the income be paid for 5 years to Charity, a charitable organization. After this 5-year period, the trust will terminate and the principal shall be paid to my daughter Beth.

Decedent was survived by Adam and Beth. Adam had a history of lavish spending, which Decedent deplored. Beth was very careful in her financial dealings.

Three months ago, Susan, Adam's former spouse, gave Trustee a copy of a judgment for alimony she had obtained against Adam and proof that Adam had failed to pay her the required \$5,000. Susan demanded that Trustee pay her \$5,000, which was less than the trust's annual income.

Two months ago, Beth gave Trustee a copy of a tort judgment that John had obtained against Beth. She then requested that Trustee pay John \$10,000, the amount of that judgment, from the trust principal.

Last month, Adam, Beth, and Charity commenced an appropriate judicial action to terminate the trust and have the trust assets distributed to them. Trustee has filed appropriate objections in this action.

1. Is Susan entitled to be paid \$5,000 from the trust income? Explain.
2. Can Trustee properly pay John \$10,000 from the trust principal? Explain.
3. Should the court terminate the trust and distribute the trust assets to Adam, Beth, and Charity? Explain.

Question 7

Corn Corp was properly incorporated in 1980 with \$500,000 of initial capital. Its shares are owned equally by Alan, Bruce, and Kathy, who are also the sole directors and officers. Corn Corp produces and sells corn under the brand name “Super Corn.” Until 2000, it was a profitable corporation.

In the late 1990s, Kathy, who has a Ph.D. in genetics and is in charge of product development, was experimenting with genetically engineered corn. She created a new strain of corn that was more resistant to disease than regular corn. Corn Corp patented the new strain of corn. In order to be the first to bring genetically engineered corn to market, Kathy, without the knowledge of Alan and Bruce, negligently omitted several tests that would normally be applied to a new strain of corn, including tests to establish whether it would cause allergic reactions.

Alan, president of Corn Corp, was concerned that some food processors might not want genetically engineered corn. Therefore, on December 31, 1999, Corn Corp properly incorporated Gen-Corn, Inc. (GCI), a wholly owned subsidiary, to produce and sell the new strain of corn. In exchange for all of GCI’s stock, Corn Corp contributed to GCI the patent to the new strain of corn and \$6,000, just enough to produce the seed for the first crop. Alan, Bruce, and Kathy were the sole directors and officers of GCI.

In 2000, GCI, operating out of the offices of Corn Corp, started marketing the genetically engineered corn under the name “Super Corn Plus.” While Kathy scrupulously maintained minute books for Corn Corp, she kept no minute books for GCI. Corn Corp kept meticulous records of all of its business transactions, but GCI did not keep separate records. Although each corporation had its own bank account, Corn Corp often made informal “emergency loans” to GCI to help with cash flow problems. Unfortunately, GCI never became profitable.

Shortly after the first harvest of “Super Corn Plus,” Stuart, a young business executive, died from an allergic reaction after eating cornbread made from “Super Corn Plus.” GCI immediately pulled “Super Corn Plus” from the market and soon after filed for bankruptcy. Because of the similar product names, Corn Corp’s sales of “Super Corn” plummeted, and Corn Corp can no longer pay its bills.

Assuming Stuart’s estate obtained a wrongful death judgment against GCI, can it recover the judgment from Corn Corp or any of Corn Corp’s shareholders? Explain.

FEBRUARY 2003

Analyses

DECEDENTS' ESTATES, WILLS

Question 1 Analysis

- Legal Problems:
- (1) Was Testator's October 1, 1998, will properly executed?
 - (2) Did Testator's codicil effectively incorporate her earlier will by reference?
 - (3) Did Testator's gift of the diamond ring to Betty adeem the codicil's bequest of the ring to Nora?

DISCUSSION

Summary: Although Testator's will was not validly executed because it was signed in her name but outside of her presence, it was validly incorporated by reference into Testator's duly executed codicil, which expressly referred to it by date. Thus, the will, as incorporated by reference into the codicil, is valid to pass title to Blackacre to Charity, the beneficiary under the will.

Because the bequest of the ring in the codicil to Nora adeemed by virtue of Testator's gift of the ring to Betty, Nora is not entitled to the ring.

Point One: Testator's October 1, 1998, will was not effectively executed because Lawyer, (35-45%) while signing it at Testator's direction, did not sign it in her presence.

Will execution statutes commonly provide that another person may sign a testator's will if it is done at the testator's direction and in the testator's conscious presence. *See, e.g.*, Uniform Probate Code (UPC) § 2-502(2). A few statutes additionally require that persons who sign for the testator must also sign their own names and sometimes also give their addresses. *See* Restatement (Second) of Property: Donative Transfers, Statutory Note to § 33.1. Many wills statutes require one or both of the following additional requirements: (1) that the testator declare the instrument to be his or her will to the witnesses, or (2) that the testator ask the individuals selected as witnesses to witness his or her execution of the instrument.

In this case, Lawyer signed Testator's name at her direction, but the question is whether he did so in her presence. The likely answer is that he did not. Courts have used two tests to determine presence: the majority "line-of-sight" test and the minority "conscious presence" test. Under the "conscious presence" test, the will execution is sufficient "if it was done in the testator's conscious presence, i.e., within the range of the testator's senses such as hearing." *See* Unif. Prob. Code § 2-502 cmt.

Lawyer clearly did not satisfy the “line-of-sight” test because Testator did not see Lawyer signing the will on her behalf. Under the “line-of-sight” test, the testator should be capable of seeing the witnesses and the person who is signing the will on the testator’s behalf actually sign the will. In those cases where the testator must specifically ask the witnesses to act as such, the witnesses should be capable of hearing that request. *Matter of Jefferson’s Will*, 349 So. 2d 1032 (Miss. 1977). Even under the more liberal “conscious presence” test (which the UPC expressly adopts), it is very unlikely that the court will conclude that the presence requirement was satisfied. In the analogous situation where a testator acknowledges her signature to witnesses over the telephone, courts have held that this does not satisfy the “conscious presence” requirement. *See In re Estate of McGurkin*, 743 P.2d 994 (Idaho Ct. App. 1987). There is too much room for fraudulent or mistaken substitution of one document for another under these circumstances to permit the will to be admitted to probate.

The defect with the signature requirement is itself sufficient reason to conclude that the will was defectively executed. Additionally, since Testator did not sign the will, acknowledge her signature, acknowledge the will to the witnesses in their presence (under either test), or ask them to act as witnesses, there was defective execution with respect to the witnessing requirements of the will statutes in most states.

The Uniform Probate Code’s harmless error provision, UPC § 2-503, would not likely allow the October 1, 1998, writing to be admitted as a will. There are two defects here, signature and attestation, and the Comment to § 2-503 provides that the greater the departure from the required formalities of execution, the less likely that the provision will cure the defects. This is especially true with respect to defects in the signature requirement. *See* UPC § 2-503 cmt.

Point Two: The validly executed codicil incorporated the October 1, 1998, will by reference, (25-35%) and therefore the October 1, 1998, will can be given legal effect even though it was defectively executed. Therefore, Charity is entitled to Blackacre.

The codicil is Testator’s only duly executed will. A properly executed codicil can incorporate by reference an earlier will that was defectively executed, as here. *See Allen v. Mattock*, 14 Eng. Rep. 757 (P.C. 1858); Jesse Dukeminier & Stanley Johanson, *WILLS, TRUSTS, AND ESTATES* 303 (6th ed. 2000). Therefore, if the jurisdiction recognizes the doctrine of incorporation by reference, the court should give effect to the October 1, 1998, will as an incorporated extrinsic writing.

The doctrine of incorporation by reference is recognized in most states. Either by statute (e.g., UPC § 2-510) or by judicial decision, several requirements must be met in order for a properly executed will to incorporate an extrinsic writing by reference. The usual requirements are: (1) the extrinsic writing must in fact have been in existence at the time the incorporating will was executed; (2) the incorporating will must refer to the extrinsic writing as having been in existence at the time of execution; (3) the incorporating will must refer to the extrinsic writing in such a way as to reasonably identify it; and (4) the incorporating will must manifest the testator’s intent to incorporate the extrinsic writing. *See Wagner v. Clauson*, 78 N.E.2d 203 (Ill. 1948). All four of the requirements were met here. The codicil’s reference to the existing October 1, 1998, will is sufficiently clear, as is the intention to incorporate the earlier writing. Therefore, Charity is entitled to Blackacre.

Note: If the jurisdiction does not recognize the incorporation doctrine, the probate court should not give any effect to the October 1, 1998, writing. Specifically, the doctrine of republication by codicil cannot be used to republish an earlier will that was defectively executed. The republication requirement can be used to give effect to an earlier will that was invalid for reasons other than defective execution. The October 1, 1998, will was invalid solely because it was defectively executed, so republication is not available here. If the will was not incorporated by reference, Blackacre would pass to Nora and Betty equally as Testator's heirs.

Point Three: The bequest of the diamond ring to Nora was adeemed by Testator's gift of the ring to Betty. Therefore, Nora is not entitled to the ring and Betty keeps it.
(25-35%)

The doctrine of ademption by extinction provides that if the subject matter of a specific bequest is not part of the estate at the testator's death, the bequest is adeemed. The doctrine applies only to specific bequests. The bequest here was specific because the will referred to a specific asset. Under the traditional approach to ademption—the so-called “identity theory”—the testator's intent as to ademption is irrelevant. All that matters is whether or not the specifically bequeathed asset is part of the estate at death. Accordingly, Testator's gift of the ring to Betty caused the bequest to Nora to adeem.

Even under the Uniform Probate Code's non-ademption provision, UPC § 2-606(a)(6), which adopts the so-called “intent theory” of ademption, the result would be the same. In the Comment to § 2-606, the drafters provide a hypothetical problem with facts similar to those of this case. The Comment states, “G's deliberate act of giving away the specifically devised property is a fact and circumstance indicating that ademption of the devise was intended.” Therefore, § 2-606(a)(6) would yield the same result as the traditional ademption doctrine, particularly because the facts state that Testator gifted the ring to Betty in order to ensure that Nora did not take under the codicil.

COMMERCIAL PAPER IV.A, C, D; V.G, H
SALES II.B, IV.B

Question 2 Analysis

- Legal Problems:
- (1) May Financier enforce the note against Mariner despite Mariner's defense that Chandler did not return the nets?
 - (2) May Financier recover from Chandler for breach of transfer warranty because the note was subject to a defense when Chandler transferred it?
 - (3) Did Trawler acquire good title to the fishing nets when Trawler purchased them from Chandler?

DISCUSSION

Summary: Financier, the holder of the note, cannot recover against Mariner, the maker of the note, because Mariner has a valid defense: Chandler, the original payee of the note, breached his contract to repair and return the nets. Financier is not a holder in due course because the note was overdue on its face when Financier took it from Chandler.

Financier can, however, recover from Chandler. Although Chandler endorsed the note "without recourse," that language only limits Chandler's liability as an indorser. In addition to indorsing the note, Chandler transferred it for value, thus making certain transfer warranties, including a warranty that the note was not subject to any defenses. Because Chandler breached that warranty (as the note was in fact subject to Mariner's breach of contract defense), Financier can recover its loss (\$4,000) from Chandler.

Mariner may not recover his nets from Trawler because Mariner entrusted them to a merchant who deals in fishing nets (Chandler) and Trawler purchased them from Chandler in the ordinary course of business. In this case, the UCC protects the purchaser, even though Chandler had no right to sell the nets.

Point One: (35-45%) Mariner is not liable to Financier on the note because Mariner has a defense to payment that it may assert against Financier.

Chandler negotiated the note by indorsing it and delivering it to Financier. Uniform Commercial Code § 3-201(b). Financier became the holder of the note when he took the note from Chandler with Chandler's indorsement. UCC § 3-201(a) (specifying consequence of negotiation).

The holder of a note is a person entitled to enforce the note against its maker. UCC § 3-301. Accordingly, Financier is a person entitled to enforce the note against Mariner. Mariner, however, has a defense to payment because Chandler breached the contract to repair and return the nets. Mariner may assert this defense against Financier, unless Financier is a holder in due course. *See* UCC § 3-305(a)(2) (permitting the maker to assert contract defenses); § 3-305(b) (limiting the assertion of defenses against a holder in due course).

To be a holder in due course, among other requirements, a holder must take a note without notice that the note is overdue. UCC § 3-302(a)(2)(iii). In this case, the note was payable on March 1 and therefore became overdue after that date. UCC § 3-304(b)(2) (specifying when a note becomes overdue). Financier took the note after it was due. Financier had notice on the face of the note that it was overdue. Financier therefore is not a holder in due course and Mariner may assert against Financier the breach of contract defense Mariner has against Chandler.

Point Two: Chandler is liable to Financier for breach of transfer warranty because the note was (35-45%) subject to a defense to payment when Chandler transferred it.

A person who transfers a note for consideration warrants that the instrument is not subject to a defense to payment. UCC § 3-416(a)(4). Chandler is deemed to have made this warranty to Financier when Chandler transferred the note and Financier paid \$3,500 to Chandler in consideration for it. UCC § 3-303(b) (defining consideration). The warranty was violated because, as explained in Point One, Mariner was entitled to assert Chandler's breach of contract as a defense to payment.

For breach of warranty, a person who took the instrument in good faith may recover damages from the warrantor in an amount equal to the loss suffered as a result of the breach. UCC § 3-416(b) (specifying the measure of damages). In this case, Financier appears to have taken the instrument in good faith because Chandler did not tell Financier anything about the origin of the note. *See* UCC § 3-103(a)(4). The amount of Financier's loss equals the difference between what the note is worth and what it would have been worth if it had been as warranted. *See* William D. Hawkland, 6 HAWKLAND UNIFORM COMMERCIAL CODE § 3-416:10 (2001). In this case, the note has no value to Financier because Mariner has a defense to payment. If the note had been as warranted, it would have been worth \$4,000 to Financier because Mariner would have had to pay that amount. Accordingly, Financier may recover \$4,000 from Chandler, not just the \$3,500 he paid for the instrument.

Ordinarily upon dishonor, one who indorses a note is liable for payment based on the indorsement. UCC § 3-415(a). In this case, however, Chandler is not obliged to pay the note based on his indorsement because he indorsed the note "without recourse." UCC § 3-415(b). Financier therefore cannot enforce the note against Chandler based on Chandler's indorsement. Financier's claim against Chandler is limited to the breach of warranty claim. The indorsement "without recourse" is not effective to disclaim warranties. UCC § 3-416 cmt. 5.

Point Three: Trawler owns the fishing nets and may retain them because Mariner entrusted the nets to Chandler, a merchant who deals in goods of the kind, and Chandler sold them in the ordinary course of business to Trawler.
(15-25%)

A seller who does not have title to goods generally may not transfer title to the buyer. UCC § 2-403(1). This general rule, however, contains an important exception that sometimes permits a seller to transfer title to goods that the seller does not own. In particular, “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in the ordinary course of business.” UCC § 2-403(2).

In this case, Chandler is a merchant with respect to the fishing nets because he deals in all kinds of fishing equipment. UCC § 2-104(1). Mariner entrusted the fishing nets to Chandler when Mariner left them to be repaired. UCC § 2-403(3) (specifying that entrusting includes “any delivery and acquiescence in retention of possession”); Hawkland, *supra*, § 2-403:7 (citing the leaving of goods for repair as a typical example of entrusting). Trawler purchased the goods in the ordinary course of business because Chandler regularly sells used goods and because Trawler believed that Chandler owned the fishing nets. Accordingly, Chandler had the power to transfer to Trawler good title to the fishing nets. Trawler now has title to the fishing nets and may retain them.

FAMILY LAW III.B, IV.A, IV.E
CONFLICT OF LAWS

Question 3 Analysis

- Legal Problems:
- (1) Under the Uniform Child Custody Jurisdiction Act (UCCJA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), or the Parental Kidnapping Prevention Act (PKPA), must the State X court enforce the State Z decree awarding custody to Husband?
 - (2) Should the State X court give preclusive effect to Husband's State Z judgment and therefore bar Wife's claims for divorce and property division?

DISCUSSION

Summary: The State X court is not required to enforce the State Z decree awarding custody to Husband. Although the custody provision entered by the State Z court was the first custody order entered, the State Z court lacked jurisdiction under both the Uniform Child Custody Jurisdiction Act (UCCJA) and Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Consequently, a court in State X applying the UCCJA or UCCJEA need not recognize or enforce the custody provision in the State Z decree. Also, the Parental Kidnapping Prevention Act (PKPA) would not require that the State X court give the State Z decree full faith and credit. The assertion of jurisdiction by State Z was not consistent with the requirements of the PKPA.

The State X court should give preclusive effect to Husband's State Z judgment of divorce. The State Z court had jurisdiction to adjudicate the divorce, given Husband's domicile. However, the State X court should adjudicate Wife's claim for property, since the State Z court lacked *in personam* jurisdiction over Wife to adjudicate that claim, and since the State X court has such jurisdiction over Husband.

Point One: (45-55%) The State X court is not required under the UCCJA, the UCCJEA, or the PKPA to enforce the State Z decree awarding custody to Husband.

Every state has adopted either the UCCJA or the UCCJEA. These acts require that states recognize and not modify sister state custody judgments that were based upon jurisdictional requirements similar to those found in the UCCJA or UCCJEA.

The UCCJA and UCCJEA both set forth four bases upon which a state court may assert jurisdiction to make an initial child custody determination. A court has jurisdiction to make an order if (1) the state is the home state of the child at the time of the commencement of the proceeding (*i.e.*, *home state jurisdiction*); (2) the child and at least one contestant have a “significant connection” with the state (*i.e.*, *significant connection jurisdiction*); (3) the child is physically present in the state and has been abandoned or subject to abuse (*i.e.*, *emergency jurisdiction*); or (4) no other state appears to have jurisdiction under the Act, or the state with jurisdiction has declined to exercise it, and it is in the best interest of the child for the court to assert jurisdiction (*i.e.*, *default jurisdiction*).

State Z did not have jurisdiction on any of these bases. The children had resided in State X since they were born, so State Z was not the children’s home state. The children had never been to State Z, so there was no basis for “significant connection” jurisdiction. State Z also lacked “default” jurisdiction because State X could have exercised “home state” or “significant connection” jurisdiction, and State X had not declined to exercise jurisdiction. Finally, the children were not present in State Z when the court issued its custody decree, nor was there any evidence that they were in danger, so the State Z court lacked emergency jurisdiction. *See* UCCJA § 3.

Note: Although § 204 of the UCCJEA deals more directly than does the UCCJA with issues of emergency jurisdiction in situations of spousal abuse, the UCCJEA still requires that the child be present in the state issuing the emergency order.

Therefore, under both the UCCJA and UCCJEA, the State Z court lacked jurisdiction to adjudicate custody and the State X court need not enforce this aspect of the State Z decree.

Nor does federal law require that the State X court enforce the State Z decree. The federal Parental Kidnapping Prevention Act (28 U.S.C. § 1738A) dictates the circumstances in which the courts of one state must give full faith and credit to an earlier custody decree from a sister state. The PKPA contains provisions that are substantially similar to those of the UCCJA and UCCJEA. First, under 28 U.S.C. § 1738A(c)(1), the issuing court must have had jurisdiction under its own state laws. Here, State Z surely did not. Second, under 28 U.S.C. § 1738A(c)(2), even if State Z had jurisdiction under its own law, the PKPA requires enforcement only if the initial assertion of jurisdiction was consistent with the jurisdictional standards set out in the PKPA, which are very similar to the standards required by the uniform acts.

Note: The principal difference between the jurisdictional requirements of the PKPA and the UCCJA is that the PKPA permits jurisdiction to be based upon a “significant connection” only if the child does not have a “home state.” For the reasons noted above, State Z’s assertion of jurisdiction was not consistent with those standards. Since neither prong (c)(1) nor (c)(2) is satisfied here, the decree need not be enforced.

Accordingly, under all three statutes, State Z lacked jurisdiction to award Husband custody, and therefore, State X need not enforce the custody decree.

Point Two: The State X court must give preclusive effect to Husband's State Z judgment of divorce, but not to the State Z determination respecting property division.
(45-55%)

The principle of “divisible divorce” provides that the jurisdictional basis for termination of marriage is different from the jurisdictional basis for deciding the incidents of marriage such as alimony, property division, and child support. *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). Divorce jurisdiction is based on “domicile” or some equivalent long-term connection between at least one of the parties to the marriage and the forum state. *Id.*

In this case, it appears that Husband had changed his domicile from State X to State Z. He had moved to State Z and his new job there demonstrated his intent to remain there for the foreseeable future. Thus, State Z was his new domicile at the time he filed for and obtained his default divorce decree. *Williams v. North Carolina (I)*, 317 U.S. 287 (1942).

Because Wife neither answered nor otherwise appeared in Husband's State Z divorce action, she now may collaterally attack that judgment in State X. However, Wife may challenge only the jurisdictional basis for the State Z divorce decree, not the merits. *Williams v. North Carolina (II)*, 325 U.S. 226 (1945). Unlike the situation in *Williams (II)*, where the deserting spouses stayed only temporarily in Nevada to get divorced and then immediately returned to their previous home state, Husband has remained in State Z and has accepted a new job there. Because there is substantial evidence that State Z became the bona fide domicile of Husband when he moved there, Wife's collateral attack on the validity of the State Z divorce decree obtained by Husband will fail. Thus, the State Z dissolution of the marriage must be recognized and will preclude Wife's action for divorce.

On the other hand, Husband's claim that the State Z judgment precludes Wife's claim in State X for property division should be rejected. The jurisdictional basis for such claims is *in personam*. *Estin*, 334 U.S. 541; *Vanderbilt*, 354 U.S. 416. No factual basis for *in personam* jurisdiction over Wife by the State Z court has been shown. As Wife had never been in State Z, and did not answer the divorce petition, there were no “minimum contacts” sufficient to support the assertion of *in personam* jurisdiction in State Z over Wife with respect to property division. *See Kulko v. Superior Court of California*, 436 U.S. 84 (1978). Thus, the State Z judgment would have no preclusive effect on Wife's property division claim in State X. *Estin*, 334 U.S. 541; *Vanderbilt*, 354 U.S. 416.

AGENCY AND PARTNERSHIP I, II.B, III

Question 4 Analysis

- Legal Problems:
- (1)(a) Does Lessor exercise sufficient control over Handy to establish Handy as Lessor's "servant" so that Lessor is liable for Handy's torts?
 - (1)(b) If Handy is Lessor's servant, is Handy's conduct within the scope of employment?
 - (2) If Handy is not a servant, did Tenant reasonably rely upon Handy's apparent authority to install an electrical outlet so that Lessor is nonetheless liable for Handy's tort?

DISCUSSION

Summary: Lessor may be held liable for Handy's tortious conduct under either of two theories. First, if the Lessor-Handy relationship is one of master and servant, Lessor is liable for Handy's torts if Handy was acting within the scope of his employment when he committed them. *See* Restatement (Second) of Agency § 219. Second, even if the relationship between Lessor and Handy does not rise to the level of a master-servant relationship, Lessor will be liable for Handy's tort if Tenant relied on statements or conduct by Handy that were within Handy's apparent authority. Restatement (Second) of Agency § 265.

Point One (a): The relationship between Handy and Lessor may be a master-servant relationship (30-40%) such that Lessor is liable for torts committed by Handy while acting within the scope of his employment.

A master is liable for the torts of the master's servants committed while acting in the scope of their employment. Restatement (Second) of Agency § 219(1). Handy is clearly an agent as he agreed to work for, and subject to the control of, Lessor. The more difficult question is whether Handy would be considered to be Lessor's servant.

Note: The Restatement (Third) of Agency has adopted "Employer-Employee" language in place of the traditional "Master-Servant" terminology and applicants may of course use this newer terminology.

Whether Handy performed the work for Tenant as Lessor's "servant" or as an independent contractor agent depends on the degree of control exercised by Lessor over Handy's activities. The Restatement (Second) of Agency § 2(2) provides that a "servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is

controlled or is subject to the right to control by the master.” Conversely, the Restatement (Second) of Agency § 2(3) provides that “an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” The Restatement (Second) of Agency § 220(2) lists factors used to determine whether an agent is a servant. These factors are:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant;
and
- (j) whether the principal is or is not in business.

In Handy’s case, the facts permit a persuasive argument on either side. Several factors suggest that Handy should be considered a servant of Lessor. First, Lessor exercises significant control over Handy, in insisting that any repair be approved by Lessor. Second, the relationship appears to be long term, not a temporary arrangement for a small number of repair jobs; it has already lasted for a year. Third, payment is by time worked, not by the particular job. Finally, the work performed is a necessary part of Lessor’s business of owning and operating apartment buildings.

On the other hand, several factors support an argument for classifying Handy as an independent contractor. First, Handy, as a repairman, is engaged in a distinct occupation and business that requires some degree of special skill. Second, Handy provides his own tools. Third, Handy has his own separate repair business and appears to have taken on Lessor’s work in the course of operating that separate business. Fourth, Lessor approves repairs to his properties but does not specify the methods that Handy must use.

Note: Either analysis of the servant issue is plausible. The point is that Lessor is only liable under the theory of *respondeat superior* if Handy is a servant.

Point One (b): If Handy is a servant, his actions were within the scope of employment because, (15-25%) although not authorized, adding an electrical outlet was incidental to authorized conduct.

Conduct is within the scope of employment if the conduct is of the “same general nature authorized or incidental to the conduct authorized.” Restatement (Second) of Agency § 229(1). Factors examined in determining whether conduct is within the scope of employment include whether the

conduct is the kind the servant is employed to perform; whether it occurs substantially within the authorized time and space; and whether it was performed, at least in part, to serve the master. *See* Restatement (Second) of Agency § 228.

In this case, Handy was not authorized to add the electrical outlet as Handy's contract with Lessor expressly prohibited him from doing electrical work. It also prohibited him from doing work "on the side" for a tenant. However, even forbidden activity can be within the scope of employment. Restatement (Second) of Agency § 230.

The Restatement (Second) of Agency § 229(2) sets forth factors to consider in determining whether an action is incidental to the authorized conduct so that it comes within the scope of employment. These factors include:

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

A key fact that points to the conclusion that adding the electrical outlet was incidental to the scope of employment is the fact that Handy did the electrical work while providing Tenant with authorized services.

Point Two: (50-60%) Even if Handy is not a servant, or is a servant not acting within the scope of employment, Lessor is liable if Tenant reasonably believes Handy was Lessor's agent and relied on what appeared to be authority for Handy to perform the work.

Restatement (Second) of Agency § 265 sets out the general rule: "(1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority." Section 265(2) conditions this liability upon reliance.

An agent is clothed with apparent authority when a principal "by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27. The facts indicate that Lessor clothed Handy with apparent authority by advising tenants to call the "Lessor's Repair Line" when they needed repairs, and

then using Handy's business phone number as the "Lessor's Repair Line." The act of using Handy's number reasonably caused Tenant to believe that Handy was authorized by Lessor to act on Lessor's behalf. There are no facts to suggest that Tenant knew or could expect to know that a person authorized to make general repairs was prohibited by contract from adding an electrical outlet.

With respect to reliance, the facts permit a persuasive argument on either side. Arguably, Tenant did not reasonably rely on Handy's apparent authority because Tenant was told that adding an electrical outlet was an improvement, not a repair, and Handy made repairs. Further, Handy indicated that there was a charge for the electrical work.

However, the alternative argument could also be made. Lessor arranged to have "Lessor's Repair Line" ring directly to Handy's office. Tenant knew that Handy was working for Lessor; in fact Handy was present doing work on behalf of Lessor. It is not unreasonable to believe that the same person designated to make repairs would also make improvements. Further, the facts indicate that Tenant believed the payment for the work (\$200) was to go to Lessor.

FEDERAL CIVIL PROCEDURE II.A, IV.E, VI.E

Question 5 Analysis

- Legal Problems:
- (1) Under Fed. R. Civ. P. 56, should summary judgment be granted to a defendant who supports his motion with evidence negating the plaintiff's claim when the plaintiff's response fails to directly controvert that evidence?
 - (2)(a) Does claim preclusion arising from a prior federal suit against a product's manufacturer bar a subsequent suit against the product's distributor?
 - (2)(b) In this case, may the distributor successfully invoke issue preclusion against the plaintiff?

DISCUSSION

Summary: In the federal court action, defendant Acme's motion for summary judgment was premised on the claim that a proper warning label was attached to its widget at the time the widget was delivered to the distributor. Under the applicable state law, Acme's duty to warn was fully discharged if that fact were true. To support its claim, Acme provided affidavits of witnesses who said the label was present at the relevant time. In the face of this evidence, Plaintiff had a duty to present evidence of "specific facts" showing that there was a genuine issue for trial. Plaintiff's affidavit, which asserted only the absence of a label *when she purchased the widget*, did not contradict Acme's evidence that a label was present when it delivered the widget to the distributor. Hence, summary judgment was appropriate on that issue.

Nothing that happened in the federal court action should preclude Plaintiff from proceeding with the state court action. Claim preclusion is inappropriate because there is no mutuality of estoppel: the defendant in the state court action was not the same as, or in privity with, the federal defendant and would not have been precluded or otherwise affected by the result in the federal action. Issue preclusion is inappropriate because the only issue *actually decided* in the federal action (whether a warning label was present when the manufacturer delivered the widget *to the distributor*) is not an issue in the state action, where the question is whether a warning label was present when the widget was delivered *to the retailer*.

Point One:
(30-40%) Because Plaintiff's response to Acme's motion for summary judgment failed to demonstrate a genuine issue of material fact as to Acme's supported assertion that a warning label was affixed to the product at the time of delivery to the distributor, the court properly granted summary judgment to Acme on the failure to warn claim.

A motion for summary judgment should be granted in favor of a party if “there is no genuine issue as to any material fact” and the party is “entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A defendant on a claim may move for summary judgment by attacking any *necessary* element of the plaintiff’s case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In determining whether there are any genuine issues of material fact, the court should construe all factual matters in the light most favorable to the non-moving party. However, where the moving party presents evidence of facts that would defeat the non-moving party’s claim, the non-moving party “may not rest upon the mere allegations” of her pleading. The non-moving party has a responsibility to offer, “by affidavits or as otherwise provided” in Rule 56, evidence of “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

On the facts of this problem, the court properly granted Acme’s motion for summary judgment on the failure to warn claim. The law of State Y (which the federal court is obliged to apply under the *Erie* doctrine in this diversity case) states that a manufacturer fully discharges its duty to warn if adequate warning labels are affixed to the product *at the time of delivery to its distributor*. Thus, to win on her failure to warn claim, Plaintiff must prove that no proper warning label was affixed to the widget at the time of delivery to the distributor.

Defendant Acme’s summary judgment motion alleged that adequate warning labels were, in fact, affixed to the product at the relevant time, and that allegation was supported by affidavits attesting to the presence of the warning label at the time of delivery to the distributor. This properly supported motion therefore negates a key element of Plaintiff’s claim, thereby discharging Acme’s duty to support its summary judgment motion under Fed. R. Civ. P. 56(e).

At this point, the burden shifted to Plaintiff to come forward with controverting evidence. Plaintiff responded to the summary judgment motion with her own affidavit, in which she attested that no warning label had been present on her widget when she purchased it. This does not directly controvert Acme’s motion, since it does not contend that the warning label was missing at the point of delivery to the distributor, the critical moment for manufacturer liability under applicable state law. Consequently, Plaintiff failed to meet her burden to produce evidence controverting Acme’s version of the facts. *See* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *CIVIL PROCEDURE* 461 (3d ed. 1999).

Thus, Acme has demonstrated that no genuine issue of material fact exists on a key element of Plaintiff’s claim, and that it is, therefore, entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Point Two (a): Because Widgets was not a party to the prior action, it probably cannot bar Plaintiff’s (20-30%) action against it on claim preclusion grounds.

Note: Even though the current suit is in state court, the effect of the Acme judgment is governed by federal law because the judgment came from a federal court. A state court is required to give to a federal judgment the same preclusive effect that the judgment would have *in federal court*. *See generally* Eugene F. Scoles & Peter Hay, *CONFLICT OF LAWS* § 24.2 (2d ed. 1992). The preclusive effect of a judgment by a federal court sitting in diversity ordinarily would be determined by

the preclusion rules of the state in which the federal court sits. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

In order to bar a plaintiff's subsequent lawsuit on claim preclusion grounds, a defendant must show (1) that the prior judgment is final, valid, and on the merits (which is true here), (2) that the present claims are within the scope of the prior judgment, as measured by the same transaction test (also true here), and (3) that there is mutuality of estoppel (i.e., that the defendant urging preclusion is the same as, or in privity with, the defendant in the prior suit). Although the first two elements of claim preclusion are easily satisfied on the facts of the problem, Widgets' claim preclusion argument will probably fail on the final prong: mutuality of estoppel.

Here, there are no facts to suggest that Widgets had such a close relationship with Acme that Widgets would have been bound by the prior judgment had that decision gone against Acme. Widgets apparently did not control or participate in the Acme litigation. Nor are Widgets and Acme in any agency or representative relationship that would warrant treating Acme's actions as binding on Widgets. In short, there is nothing to suggest that Widgets bore such a close relationship to the first suit or to Acme that it would be proper to treat the first action as binding on Widgets. Under the circumstances, the usual rule that a judgment operates only against parties to the first suit seems fully applicable. *See* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4406.

Where, as here, a plaintiff brings separate suits against alleged joint tortfeasors whose liability is joint and several (and not derivative), the courts traditionally hold that the plaintiff is entitled to maintain separate actions and that a judgment in a case involving one tortfeasor does not preclude the bringing of a claim for the same harm against another tortfeasor. *See* Restatement (Second) of Judgments § 49, cmt a. *See, e.g., Drescher v. Hoffman Motors Corp.* 585 F. Supp. 555, 558 (D.C. Conn. 1984); *U.S. v. Manning Coal Corp.*, 977 F.2d 117, 122 (4th Cir. 1992); *Levy v. Verser, Inc.*, 882 F. Supp. 736, 740 (N.D. Ill. 1995). *But see Meshulam v. General Motors Corp.*, 995 F.2d 192, 194 (11th Cir. 1993) (under Florida law, the manufacturer, the wholesale distributor, and the retailer of an allegedly defective product are treated as identical parties for *res judicata* purposes and an action against a retailer is a bar to a subsequent action against the manufacturer on product liability grounds).

Note: Although the doctrine of mutuality of estoppel has been widely abandoned in relation to *issue preclusion*, it is still largely operative in the context of *claim preclusion*. *See, e.g., Sidag A.G. v. Smoked Food Products Co.*, 776 F.2d 1270, 1275 (5th Cir. 1985). The traditional rule requiring mutuality of estoppel for claim preclusion purposes appears to be undergoing some modification in federal courts. Wright, Miller and Cooper report that increasing numbers of federal courts now allow claim preclusion against a party to a prior action by litigants who would not themselves have been bound by the results of the prior case if there are "good reasons why [the new defendant] should have been joined in the first action and the old party cannot show any good reasons to justify a second chance." Wright, *supra*, § 4464 (2000 Supp.) In the present case, however, there is no evidence of a good reason why Plaintiff ought to be required to sue both Acme and Widgets at the same time.

Point Two (b): Widgets will not be able to assert issue preclusion against Plaintiff because the issues (20-30%) in Plaintiff's suit against Widgets are not the same as the issues that were actually litigated in Plaintiff's prior suit against Acme.

Widgets' attempt to invoke issue preclusion will also fail. The problem for Widgets is that none of the issues involved in Plaintiff's suit against it were actually decided in Plaintiff's suit against Acme. As to the failure to warn issue, although evidence was presented in Acme's suit on whether the required warning was present at the time Widgets delivered the product to the retailer (in the form of the employee affidavits), the court did not need to use that evidence to decide the summary judgment motion, since the key point there was whether the label was affixed at the point of delivery *to the distributor*, not the retailer. As to the dangerous defect issue, the settlement in Acme's case obviated any actual litigation on the point. The settlement also precluded any actual litigation as to the amount of Plaintiff's damages. It is well settled that a judgment entered pursuant to a settlement cannot serve as the basis for issue preclusion in a later case. *See generally* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *CIVIL PROCEDURE* § 14.11 (3d ed. 1999).

Because issue preclusion essentially exports the factual findings of one case into another, any issue to be precluded must be precisely the same one that was actually litigated, decided, and necessary to the judgment in the prior suit. Here, that is not the case.

TRUSTS & FUTURE INTERESTS I.E, H

Question 6 Analysis

- Legal Problems:
- (1) Should Trustee distribute \$5,000 from the trust income to Susan in payment of her unpaid alimony claim?
 - (2) Should Trustee distribute \$10,000 from the trust principal to John in payment of his tort judgment against Beth?
 - (3) Should the court terminate the trust and distribute the trust assets to Adam, Beth, and Charity?

DISCUSSION

Summary: Generally, an income interest subject to a spendthrift clause is not available for payment of claims against the income beneficiary. However, many states, for public policy reasons, do not apply this rule to unpaid alimony claims. In such states, Trustee should pay Susan's \$5,000 claim. On the other hand, Trustee cannot pay John's claim from the trust because Beth is not entitled to any principal until the trust terminates and a payment to John would harm both Adam and Charity. Lastly, the court should refuse to terminate the trust because termination would be inconsistent with Decedent's intent as evidenced by the presence of a spendthrift clause in the trust instrument.

Point One: Trustee should distribute \$5,000 from trust income to Susan in payment of her unpaid alimony claim notwithstanding that Adam's interest is subject to a spendthrift clause.
(30-40%)

The testamentary trust created by Decedent contains language that clearly indicates Decedent's intention to subject Adam's 10-year term interest to a spendthrift restriction. Spendthrift clauses are widely recognized. *See generally* Restatement (Second) of Trusts § 152(1) and Restatement (Third) of Trusts § 58 (Tent. Draft No. 2). The effect of a spendthrift clause is to bar a creditor from reaching the beneficiary's interest in satisfaction of the creditor's claim.

However, there are exceptions to the general rule for public policy purposes. A well-established exception enables a former spouse with an unpaid alimony judgment to reach a spendthrift trust interest of his or her former spouse. *See* Restatement (Second) of Trusts § 157(a); Restatement (Third) of Trusts § 59(a)(Tent. Draft No. 2); Uniform Trust Code § 503(b). This exception recognizes a strong public policy against allowing a trust beneficiary to enjoy a trust interest while neglecting to pay the court-ordered support of the beneficiary's former spouse. Accordingly, Trustee should pay Susan \$5,000 to satisfy her unpaid alimony judgment against Adam.

Note: Even though Susan is entitled to receive \$5,000 from the trust income, Trustee, as a practical matter, should not make that distribution to her without an authorizing court order. This protects Trustee from any possible liability for having made an inappropriate distribution to Susan. Also, if the jurisdiction does not adhere to the alimony exception, Trustee should distribute nothing from the trust to Susan.

Point Two: Trustee cannot properly pay \$10,000 to John from the trust principal in payment (30-40%) of his tort judgment against Beth because Beth's interest is a remainder interest.

The testamentary trust created by Decedent contains no language evidencing Decedent's intent to subject Beth's remainder interest to a spendthrift restriction. Absent such a restriction, Beth's interest would generally be alienable and reachable by her creditors. *See generally* Restatement (Second) of Trusts §§ 132 & 157 and Restatement (Third) of Trusts §§ 51 & 57 (Tent. Draft No. 2).

However, because Beth is a remainder beneficiary and not an income beneficiary, she has no immediate right to the possession and enjoyment of any trust property. Rather, she must await the termination of the trust to receive any trust property. John, as her creditor, can have no greater rights in the trust property than she had. As her creditor he simply steps into her shoes. Thus, he cannot obtain possession of her share any earlier than she could have obtained possession of it. Payment of trust principal to him at this time, therefore, would be premature.

Furthermore, if Trustee gave John any trust principal at this time, the rights of both Adam and Charity would be adversely affected since the income to which they are and will be entitled is generated from the principal. Any payment to John, therefore, would reduce the future income flow from the trust.

Accordingly, Trustee should not pay John's \$10,000 claim from the trust principal.

Point Three: The court should refuse to terminate the trust and should not distribute the trust as- (30-40%) sets to the beneficiaries.

It is a well-established rule that a testamentary trust can be terminated by a court upon the request and consent of all trust beneficiaries unless a material purpose remains to be accomplished. *See* Restatement (Second) of Trusts § 337. The bar against termination when a material purpose remains is referred to as the *Claflin* doctrine and is based on the seminal nineteenth-century case, *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). The *Claflin* doctrine assures that a trust will not be terminated when termination would be inconsistent with the grantor's intent.

Accordingly, the question is whether there is a material purpose of the trust that would be defeated if the trust were to terminate. The traditional view is that a material purpose remains if any trust interest is subject to a spendthrift restriction that bars alienation of the spendthrift interest. Termination is inappropriate because, if trust assets are distributed to a beneficiary of a spendthrift interest, the beneficiary could later alienate the property. Under this view, the court should refuse to terminate the trust and should not order Trustee to distribute the trust assets to the beneficiaries.

Even under the third Restatement, the court should refuse to terminate the trust. This Restatement rejects the *per se* prohibition on trust termination where there is a spendthrift clause. It requires a finding that the trust grantor really intended the spendthrift provision to bar premature trust termination. Under this test, a spendthrift clause inserted in a trust as mere boilerplate might not bar a requested termination when all trust beneficiaries consent to the termination. Restatement (Third) of Trusts § 65, comment e (Tent. Draft No. 3). *See also* Uniform Trust Code § 411(c) (spendthrift clause is not presumed to constitute a material purpose of the trust). Here, however, the facts clearly indicate that Decedent would not have wanted Adam to prematurely reach his interest due to Decedent's unhappiness with Adam's lavish spending, and therefore the court should not terminate the trust.

CORPORATIONS III, V.C.2, VIII

Question 7 Analysis

- Legal Problems:
- (1) Can a judgment creditor “pierce the corporate veil” of a wholly owned subsidiary corporation to recover the creditor’s judgment from the parent corporation shareholder?
 - (2) Assuming that a judgment creditor can pierce the corporate veil of a wholly owned subsidiary corporation, can it further pierce the parent corporation’s corporate veil to recover its judgment from the parent corporation’s shareholders?

DISCUSSION

Summary: Stuart’s estate will probably be able to pierce the corporate veil to hold Corn Corp liable for the estate’s judgment against GCI. Whether a court will pierce the corporate veil depends heavily on the facts of a particular case, and here the facts support holding Corn Corp liable. In the first place, the usual facts supporting veil-piercing are present here: the business records of Corn Corp and GCI were completely intermingled, GCI did not observe the formalities of a separate corporate existence, GCI was inadequately capitalized, and GCI’s business (selling Super Corn Plus) was held out to the public as a mere extension of Corn Corp’s business. In addition, the activities that led to the judgment against GCI were the result of decisions made and directed by an officer of Corn Corp at a time when Super Corn Plus was still a Corn Corp product.

It is less likely that a court would pierce the corporate veil of Corn Corp in order to hold its shareholders liable to pay Stuart’s estate’s claim. There is nothing to suggest that the shareholders used Corn Corp as a “mere instrumentality” or their “alter ego.” They respected corporate formalities, and Corn Corp appears to have been adequately capitalized.

Point One: (50-60%) Stuart’s estate will likely be able to pierce GCI’s corporate veil and recover its judgment from Corn Corp, the “parent” corporation, because GCI failed to maintain a formal separate existence as evidenced by its inadequate capitalization and failed to maintain corporate formalities, and because justice requires piercing to prevent Corn Corp from insulating itself from its wrongdoing.

Shareholders generally are not liable for the corporation’s debts. *See Revised Model Business Corporation Act § 6.22.* A court, however, will “pierce the corporate veil” when circumstances indicate that the privilege has been misused or when necessary to do justice. *See Pepper v. Litton,*

308 U.S. 295, 310 (1939). The decision to pierce the corporate veil will be based on a determination of the facts.

While a parent corporation is expected to exert some measure of control over a subsidiary corporation, the subsidiary corporation is expected to be separate, at least in form. When a parent corporation so dominates a subsidiary corporation that the subsidiary has no real separate existence, and justice so requires, a court will disregard the corporate form and hold the parent corporation personally liable for the subsidiary's debts.

One basis for piercing the corporate veil is fraud or illegitimate purpose. In the absence of fraud or illegitimate purpose, a court may still pierce the corporate veil when justice so requires if (a) the parent and subsidiary intermingle their respective business transactions, accounts, and records; (b) the subsidiary fails to observe the formalities of separate corporate procedures; (c) the subsidiary is not adequately financed in light of its foreseeable normal obligations; or (d) the parent and subsidiary do not hold themselves out to the public as separate enterprises. *See* Harry Henn & John R. Alexander, *LAWS OF CORPORATIONS* § 148 (1983).

Based on the facts, GCI is a wholly owned subsidiary of Corn Corp. Corn Corp had a legitimate purpose for organizing GCI. Creating a separate entity for marketing reasons (because some food processors might not have wanted genetically engineered corn) is an acceptable business reason. Despite this legitimate purpose, a court might still pierce the corporate veil because GCI did not formally maintain a separate existence from Corn Corp (internally or externally). GCI did not formally maintain corporate formalities and was not initially adequately capitalized.

Corn Corp and GCI intermingled their assets and business transactions. GCI operated out of the offices of Corn Corp and had exactly the same directors and officers. GCI did not keep separate records of its business transactions. Additionally, while the two corporations each had separate bank accounts, the fact that GCI received "informal" loans from Corn Corp is further evidence of the blurred boundaries between the parent and subsidiary.

GCI did not observe corporate formalities. It did not keep separate minute books. Additionally, Corn Corp did not adequately finance GCI in light of its foreseeable normal obligations. Corn Corp funded GCI with only the patent, which was new and of speculative value, and \$6,000, which was only enough to produce the seed for the first crop. The inadequate initial capitalization was further evidenced by GCI's need for "emergency loans" from Corn Corp to meet day-to-day cash flow needs.

Finally, Corn Corp and GCI marketed products with very similar names (Super Corn and Super Corn Plus). These similar product names could be reasonably interpreted by the public to be from the same entity. The decline in sales experienced by Corn Corp after Stuart's death seems to indicate that the public viewed Corn Corp as the same entity as GCI. Further, as discussed above, both Corn Corp and GCI operated from the same location, which could lead the public to conclude that the businesses were not distinct.

Justice requires piercing because Super Corn Plus was developed by Corn Corp, and an officer and director of Corn Corp negligently rushed it to market without the proper testing. Corn Corp

should not now be able to use a wholly owned subsidiary that did not maintain a separate existence to insulate itself from liability.

Point Two: The facts do *not* support piercing Corn Corp’s corporate veil to hold Alan, Bruce, (40-50%) and Kathy, as shareholders, liable for Stuart’s estate’s judgment. Kathy, however, might be liable for her negligent acts.

While the facts support piercing the corporate veil to hold Corn Corp liable for the judgment against GCI, this will not help Stuart’s estate because the facts indicate that Corn Corp cannot pay its bills (so it will be unable to pay the judgment). Therefore, Stuart’s estate would like to recover the judgment against GCI from the shareholders of Corn Corp (Alan, Bruce, and Kathy). However, the facts do *not* support a claim to recover from Alan, Bruce, or Kathy in their capacity as shareholders of Corn Corp.

Shareholders generally are not liable for the corporation’s debts. *See* RMBCA § 6.22. Courts generally respect the corporate form and shield shareholders from liability unless the shareholders use the corporation as a “mere instrumentality” or “alter ego” to carry out an improper or illegal purpose (e.g., to perpetrate fraud, to evade the law, to escape obligations). “[W]here corporate formalities are substantially observed, initial financing reasonably adequate, and the corporation not formed to evade an existing obligation or a statute or to cheat or to defraud, even a controlling shareholder enjoys limited liability.” *See* Henn and Alexander, LAWS OF CORPORATIONS § 146 (3d ed. 1983).

There are no facts to support a conclusion of an illegal or improper purpose when Corn Corp was incorporated. There is also no suggestion that Corn Corp was inadequately capitalized when it was incorporated. Corn Corp had \$500,000 of initial capitalization and had been profitable for 20 years. The fact that Corn Corp cannot currently pay its bills is irrelevant to this determination.

Further, there is no evidence that the shareholders did not respect the corporate formalities. For example, Kathy scrupulously kept Corn Corp’s minute books. Nor is there any evidence that Alan, Bruce, or Kathy ignored the “separateness” of Corn Corp. In summary, there are no facts to indicate that any of the shareholders of Corn Corp treated Corn Corp as their “alter ego” or a “mere instrumentality,” and the interests of justice do not require piercing the corporate veil in this case.

Although the facts do not support a holding that Kathy is liable in her capacity as a shareholder of Corn Corp, Stuart’s estate could bring a separate action against Kathy for her negligent acts as the head of Corn Corp’s product development.

JULY 2003

Questions

Question 1

Corp owns 95% of the outstanding stock of Sub. Pat and Dale own the remaining 5% of Sub stock, and they are also two of the three directors of Sub. Both Corp and Sub are properly incorporated and have only one class of stock outstanding. Corp's board of directors is composed of five directors; none of them is Pat or Dale.

Corp's board of directors voted unanimously, for valid business reasons, to merge Sub into Corp and to adopt a plan for a cash-out merger. Pursuant to the plan of merger, each Sub shareholder would receive \$20 per share, which is \$4 per share above the current book value. No changes to Corp's articles of incorporation are required as a result of this merger, and Corp shareholders will not experience a change in their shareholder rights. Corp did not submit the plan of merger to its shareholders for a vote.

At a regularly scheduled meeting of Sub's board of directors, Corp announced its intent to merge with Sub. Sub's board voted against the merger by a 2 to 1 vote, with Pat and Dale voting against it. Corp decided to proceed with the merger in spite of the vote against it by Sub's board and subsequently filed articles of merger with the Secretary of State. Shortly thereafter, Pat and Dale each received a check for \$20 per share, a copy of the plan of merger, and a notice including all other statutorily required information.

Pat and Dale sued to unwind the merger. They claim the merger was improper because (a) Sub's board of directors did not approve the merger, (b) Corp's shareholders did not vote on the merger, and (c) Sub's shareholders did not vote on the merger.

Further, Pat and Dale claim that, even if the merger stands, they are entitled to receive more than the \$20 per share paid by Corp. They claim the true value of their shares is \$25 per share. Pat and Dale base this valuation on their knowledge of the financial condition of Sub, which they acquired while serving as directors of Sub, and the advice they received from an independent financial advisor. The independent financial advisor is willing to testify that the value of Sub is between \$21 and \$26 per share.

1. Should the court unwind the merger for any of the reasons asserted by Pat and Dale? Explain.
2. Assuming that the merger is allowed to stand, do Pat and Dale have any legal basis for asserting the right to receive more than the \$20 per share offered by Corp? Explain.

Question 2

In 1988, Testator duly executed a will devising Blackacre to Adam, \$100,000 to Carrie, and the residue of her estate to Doris. However, in 1992, Testator telephoned her lawyer, Lawyer, who had possession of the 1988 will, and asked her to destroy it because Testator had changed her mind. Lawyer agreed. Immediately after hanging up the phone, Lawyer found the will, shredded it, and threw it away.

In 1996, Testator signed and dated a wholly handwritten document that stated: "I devise Blackacre to Earl and \$2,500,000 to my good friend, Fred."

Testator died in 2002, a domiciliary of State A. She was survived by Greg, age 30, who was her child and only heir. Adam, Carrie, Doris, Earl, and Fred also survived Testator. There was no surviving spouse. Testator's net probate estate (after taxes, debts, and expenses) consisted of \$5,000,000 plus Blackacre.

The 1996 document, together with an unexecuted copy of the 1988 will, the original of which Lawyer had shredded, were found among Testator's valuable papers. Both documents were offered for probate.

Under State A law, holographic wills are valid.

1. Which documents, if any, govern the distribution of Testator's estate? Explain.
2. What are the respective shares, if any, in Testator's estate of each of the following: Adam, Carrie, Doris, Earl, Fred, and Greg? Explain.

Question 3

Garden Shop borrowed \$10,000 from Finance Co. to finance its current operations. The parties agreed that Garden Shop would repay the loan in 90 days by making a single payment of \$10,450. The additional \$450 represented interest at a lawful rate.

Finance Co. issued a \$10,000 check to Garden Shop. In exchange, Garden Shop delivered to Finance Co. a signed and dated promissory note stating: "In 90 days, Garden Shop promises to pay to the order of Finance Co. \$10,000.00 (*Ten thousand four hundred fifty and 00/100 dollars*)." Neither party noticed the inconsistency between the numerically expressed amount as "\$10,000.00" and the written "*Ten thousand four hundred fifty and 00/100 dollars*."

On the 90th day, Finance Co. demanded payment from Garden Shop but could not produce the note, which, despite a diligent search, Finance Co. could not find. Finance Co. could not remember whether it had indorsed the note.

1. If Finance Co. later finds the note, can Finance Co. enforce it and, if so, in what amount? Explain.
2. If Finance Co. does not produce the note and Garden Shop nonetheless pays Finance Co., would Garden Shop's obligation on the note be discharged as against all persons? Explain.
3. If Garden Shop refuses to pay because Finance Co. cannot produce the note, what must Finance Co. prove and what conditions must it satisfy in order to obtain a judgment against Garden Shop? Explain.

Question 4

Farmer brought a class action lawsuit in federal district court in State A, alleging that the defendant, Truckco, marketed a line of pickup trucks with defective shock absorbers. Farmer's complaint identified the members of the class as 100,000 individuals nationwide who had bought the trucks from 1995-2000 and suffered losses as a result of the defective shock absorbers. The alleged losses ranged from the \$250 cost of replacing the shock absorbers to serious personal injuries suffered in accidents alleged to have been caused by the defective shock absorbers. The only claim personal to Farmer was the \$250 replacement cost claim. Farmer properly asserted that federal jurisdiction was based on a breach of warranty claim under a recently enacted federal automobile safety statute.

Farmer moved to certify the class. Opposing this motion, Truckco submitted court papers from lawsuits brought by individual owners who claimed to have suffered a wide variety of personal injuries as a result of accidents said to have resulted from the failure of the defective shock absorbers during the years in question. Truckco also noted that Farmer had previously filed (and still has pending) a class action against Truckco in a state court in State Z. In the State Z case, which was premised on state-law warranty claims, Farmer sought relief similar to the relief sought in the federal action and asked to represent the same class of plaintiffs. Finally, Truckco pointed out that Farmer's lawyer in both actions was a recent bar admittee who had not previously handled class action litigation.

In addition to arguing against certification of the class, Truckco asked the federal district court to abstain from adjudicating the class action in light of the pendency of the state court class action.

The federal district court first denied Truckco's motion for abstention. The court then denied Farmer's motion for class certification, finding that class certification was "inappropriate under the circumstances."

1. Was the court's ruling on Truckco's motion for abstention correct? Explain.
2. Was the court's ruling on Farmer's motion for class certification appropriate? Explain.

Question 5

Adam, Barbara, and Carl are partners in a beverage distribution business. They have no written partnership agreement. The partnership distributes alcoholic and nonalcoholic beverages to bars and restaurants throughout State A. Jane owns one of these bars. She also owns a number of pinball and video game machines, which are located in many of the same bars and restaurants served by the partnership. In past dealings with the partnership, Jane has dealt exclusively with Carl.

A number of beverage distribution businesses have expanded into the pinball and video game machine business. To capitalize on this trend, Jane decided to sell her pinball and video game machines. At about the same time, Adam, Barbara, and Carl decided that their partnership should consider expanding into the pinball and video game machine business. The partners agreed that Carl would approach Jane to obtain information about the number of machines she had for sale, their locations and condition, and the associated revenues and expenses. However, because the opportunity represented a new line of business, Adam and Barbara instructed Carl not to finalize a deal with Jane without first discussing the terms with them.

When Carl met with Jane, she said that she owned 127 machines located in 72 bars and restaurants. After they visited 50 bars and saw 98 machines, Carl decided he had seen enough. Carl told Jane he would go back to the office to “run some numbers” and would call her soon.

Based on Jane’s representations and his observations of 98 machines, Carl decided to offer \$225,000 for all of Jane’s 127 machines. Jane accepted the offer and signed the contract Carl had drafted. Carl signed the contract on behalf of the partnership. At no time, however, did Carl consult with Adam or Barbara before finalizing the deal. Adam and Barbara later discovered that the revenue generated by the machines was insufficient to justify the contract price.

1. Is the partnership bound by the contract that Carl signed? Explain.
2. Can the partnership recover from Carl any loss on the contract with Jane? Explain.

Question 6

NOTE: Applicants answering this question in a community property state should use community property principles. For this purpose, the phrase “marital property” means community property.

On July 1, 1990, Ann and Burt got married in State X, where they have lived all their lives.

At the time of their marriage, Ann and Burt were each 22 years old. Burt had graduated from high school and had been working for one year as a data entry technician, earning \$30,000 annually. Ann had graduated from high school and had worked since graduation as a grocery store cashier, earning \$27,000 annually. Ann had a trust fund that she acquired when she was 18 years old. The trust fund was worth \$200,000, and Burt knew all about it. Neither had any other property or debts. Ann knew that Burt planned to become a lawyer, and Burt knew that Ann intended to be a homemaker.

Three months prior to the marriage, Burt told Ann that he would not marry her unless they signed a premarital agreement. Ann was surprised because Burt had never told her this was a precondition to their marriage. She reluctantly agreed, and they immediately went to the office of Burt's lawyer, Lawyer. Lawyer showed Ann and Burt a draft agreement under which both Ann and Burt would waive all rights to separate and marital property titled solely in the other's name if they divorced. They would also waive any right to claim child support if they divorced.

Lawyer told Ann that by signing the agreement she would be waiving her rights to marital property and child support. Lawyer also told Ann that he represented only Burt, and not her, and that she should retain her own lawyer. Ann decided not to retain her own lawyer because she trusted Burt. Ann read the agreement the next day and expressed no reservations about signing it. Ann and Burt then both signed the agreement.

After the marriage, Burt became a very successful lawyer. Ann became a homemaker and had no out-of-home employment. The value of the property acquired from Burt's earnings during the marriage is \$900,000. The value of Ann's trust fund, managed at all times by her father, is now over \$800,000. Ann and Burt have two children, currently ages seven and ten.

Ann now sues Burt for divorce in State X. Ann and Burt agree that Ann will have custody of the children. However, the parties cannot agree on the division of property.

Ann seeks property division and child support under the marital dissolution statute. Burt argues that (a) the court should enforce the premarital agreement, and (b) if the court invalidates the premarital agreement, that Ann's trust fund is marital property subject to distribution.

Question 6 (continued)

Ann concedes that the premarital agreement was and is substantively fair. Nonetheless, she argues that it is unenforceable (a) because she lacked legal counsel, and (b) because it addresses property distribution and child support upon divorce. She also argues that (c) regardless of the premarital agreement's validity, her trust fund is not subject to division.

1. How should the court rule on Ann's and Burt's arguments regarding the premarital agreement? Explain.
2. How should the court rule on Ann's and Burt's arguments regarding the trust fund? Explain.

Question 7

Debtor, the sole proprietor of a small restaurant, borrowed \$20,000 from Bank. The loan was used to purchase kitchen equipment for Debtor's business, including a stove unit, a large refrigerator, two freezers, and a commercial microwave oven. Debtor signed a promissory note and a security agreement granting Bank a security interest in the items purchased. The security agreement contained clauses (1) waiving Debtor's right of redemption should default occur, and (2) providing that, if Debtor failed to make any regular installment payment, "the entire unpaid obligation due from Debtor to Bank shall, without further notice, immediately become due and payable." Bank properly perfected its security interest in the collateral.

Debtor missed four monthly installment payments. When Debtor was approximately \$1,600 in arrears, Bank's representative drove a large truck to the alley behind the restaurant. Bank's representative was accompanied by two movers. The time was 11:10 p.m., shortly after the restaurant's closing time. Bank's representative pounded loudly on the locked back door, which was opened by one of the restaurant's employees. "We're here to repossess the kitchen equipment," stated Bank's representative. "Well, my boss isn't here, and I don't think I should let you in," replied the employee. Without further discussion, Bank's representative and the two movers walked right past the employee and began moving the kitchen equipment out to the truck. At first, the employee objected loudly, but soon he shrugged and watched quietly as they removed the equipment.

The next day, Debtor went to Bank and offered to pay the \$1,600 arrearage in monthly payments. Bank refused the tender, reminding Debtor the entire balance was now due. When Debtor then offered to pay the entire balance due including Bank's repossession expenses, Bank told Debtor that it would not allow him to redeem because he had waived his right of redemption. Thereafter, Bank sent Debtor a notice of public sale and then duly held the sale, the terms of which were commercially reasonable. Bank now has threatened to sue Debtor for a deficiency judgment of \$4,000, the difference between Debtor's unpaid loan obligation and what Bank recovered in the sale.

Debtor has had to close the restaurant because the kitchen equipment was repossessed.

What are Debtor's rights, remedies, and liabilities under the Uniform Commercial Code? Explain.

JULY 2003

Analyses

CORPORATIONS V.A, V.B, VIII.B

Question 1 Analysis

- Legal Problems:
- (1)(a) In a parent-subsiary merger, does the board of directors of the subsidiary corporation have to approve the merger?
 - (1)(b) In a parent-subsiary merger, do the shareholders of the parent corporation have to approve the merger?
 - (1)(c) In a parent-subsiary merger, do the shareholders of the subsidiary corporation have to approve the merger?
 - (2) In a parent-subsiary merger, if the subsidiary's minority shareholders believe that the parent corporation is paying less than fair value, can they force the parent corporation to pay more money?

DISCUSSION

Summary: None of the objections presented by Pat and Dale will suffice for unwinding this merger. Corp's ownership of 95 percent of Sub's shares gives it the power to merge Sub into itself without securing the approval of Sub's board of directors and without holding any vote of Corp's or Sub's shareholders. However, Pat and Dale are entitled to receive the fair value of their shares, provided they properly invoke their appraisal rights.

Point One (a): The approval of Sub's board of directors is not required for this parent-subsiary (20-30%) merger.

A merger between two corporations is normally effectuated by adoption of a plan of merger by the board of directors of both corporations. Revised Model Business Corporation Act (RMBCA) § 11.04(a) (1999 Rev.). However, when a parent owns at least 90 percent of the outstanding shares of each class of stock of a subsidiary, the parent may merge the subsidiary into itself without the approval of the subsidiary's board of directors. *See* RMBCA § 11.05 (1999 Rev.). The rationale for this rule is that the parent owns sufficient shares of the subsidiary to remove any members of the board of directors voting against the merger and replace them with members who would vote in favor of the transaction.

The facts of this problem present such a parent-subsiary situation. Because Corp owns 95 percent of Sub, approval of the merger by the Sub board of directors is not necessary. Thus, Corp could proceed with the merger despite the Sub board's negative vote on the plan of merger, and the negative vote provides no basis for unwinding the merger.

Note: Some state's parent-subsidary merger statutes require that the parent corporation own at least 95 percent (e.g., Arkansas), while other states require only 80 percent (e.g., Alabama).

Point One (b): Approval by the shareholders of Corp is not required for this parent-subsidary (20-30%) merger.

A plan of merger usually must be submitted to shareholders for their approval. *See* RMBCA § 11.04 (1999 Rev.). However, RMBCA § 11.04(g) provides that approval by shareholders of the surviving corporation is not required when the merger will not result in a fundamental change in the corporation or the ownership rights of its shareholders. In particular, no shareholder approval is required if

(1) the corporation will survive the merger . . . ; (2) . . . its articles of incorporation will not be changed; (3) each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger . . . will hold the same number of shares, with identical preferences, limitations, and relative rights, immediately after the effective date of change; and (4) the issuance in the merger . . . of shares or other securities . . . does not require a vote under § 6.21(f).

RMBCA § 11.04(g)(1999 Rev.).

The facts presented satisfy the requirements for this exception insofar as Corp's shareholders are concerned. First, Corp will survive the merger because Sub is being merged into it. Second, Corp's articles of incorporation will not change as a result of the merger. Finally, no vote to issue shares is required because this is a cash-out merger (the Sub shareholders are receiving cash, not securities). The cash-out nature of the merger also means that no Corp shareholder will experience a change in the number of shares owned or the rights and preferences of those shares. Therefore, the fact that the Corp shareholders did not vote does not constitute a basis to unwind the merger.

Note: Prior to the RMBCA 1999 revision, approval by Corp's shareholders would not have been required simply because this was a short-form merger (parent's subsidiary). *See* old RMBCA § 11.04. Under the revised act, the analysis is more elaborate but the result is the same.

Point One (c): The shareholders of Sub are also not required to approve this parent-subsidary (20-30%) merger.

As noted above, shareholder approval of a plan of merger is generally required. *See* RMBCA § 11.04(b)(1999 Rev.). However, parent-subsidary mergers are an exception to this rule when the parent owns at least 90 percent of the outstanding shares of each class of the subsidiary. *See* RMBCA § 11.05 (1999 Rev.). Shareholder approval is not required in these circumstances because the parent corporation owns a sufficient number of shares to ensure that the plan of the merger will be adopted. In our problem, because Corp owns 95 percent of Sub, it would easily

prevail in any shareholder vote and, accordingly, the law does not require a vote by the shareholders of Sub for the merger to proceed. Therefore, the failure of the Sub shareholders to approve the transaction does not constitute a basis to unwind the merger.

Point Two: Pat and Dale are entitled to exercise appraisal rights and seek the “fair value” of (30-40%) their shares.

Appraisal rights (also referred to as dissenter’s rights) allow shareholders to force the corporation to pay fair value for their shares in the event of certain fundamental changes, including a parent-sub subsidiary merger for which shareholder approval is unnecessary. *See* RMBCA § 13.02 (a)(1)(ii) (1999 Rev.). Thus, Pat and Dale, as minority shareholders of Sub, are entitled to exercise appraisal rights in connection with this merger. As Pat and Dale believe that each share is worth \$5 more than Corp paid them in the merger, they will exercise their appraisal rights. Assuming that they follow the procedure established by the applicable statute (including notifying the corporation of their assertion of appraisal rights and demanding payment), they will be entitled to receive the fair value of their shares.

If Corp and Pat and Dale cannot agree on fair value, a court will decide the matter. In the court proceeding, Pat and Dale would offer the testimony of the independent financial advisor, stating the fair value of Sub shares to be between \$21 and \$26 per share, to support their contention. They might not get \$25 per share, but based on this independent evaluation, they would probably get more than \$20 per share.

DECEDENTS' ESTATES AND TRUSTS II.A, II.C, II.F, III.B

Question 2 Analysis

- Legal Problems:
- (1) Was the 1988 will that was destroyed by Testator's lawyer outside of Testator's presence legally revoked by physical destruction?
 - (2) Is Testator's 1996 handwritten will entitled to be probated, and if so, as a subsequent testamentary instrument, did it revoke Testator's 1988 will?
 - (3) Is Greg entitled to any share of the estate as a "pretermitted heir"?

DISCUSSION

Summary: Blackacre is distributable to Earl under the terms of the valid holographic will and the balance of the estate is distributed as follows: \$100,000 to Carrie under the 1988 will, \$2,500,000 to Fred under the 1996 will, and the residue to Doris under the 1988 will. Adam and Greg take nothing. This distribution results from the fact that the 1988 will was not wholly revoked by destruction but only partially revoked by the inconsistent provisions of the codicil. Furthermore, Greg is not entitled to a forced share because he was alive when the wills were signed.

Point One: (25-30%) The 1988 will was not revoked because it was physically destroyed by someone other than the testator and not in the testator's presence.

Most states require that a revocatory act (such as physical destruction of a will) by someone other than the testator be done in the testator's presence, or at least in the testator's "conscious presence," and at the testator's request. *See, e.g.*, Uniform Probate Code (UPC) § 2-507. Therefore, in most states, the 1988 will would not have been legally revoked. Testator asked Lawyer to destroy the will, but the destruction did not occur in Testator's presence.

Although the 1988 will was physically destroyed, it was not revoked and the unexecuted copy is available to prove its content.

Point Two: (35-45%) Because holographic wills are valid in State A, the 1996 will can be probated. The 1988 will was revoked by the 1996 holographic will only to the extent that it was inconsistent with the later holographic will.

The 1996 document is a holographic will because it is entirely in Testator's handwriting; under the laws of State A holographic wills are valid and therefore the 1996 will is entitled to be probated.

The fact that the 1996 will is entitled to be probated, however, does not preclude the possibility that the 1988 will can also be probated so long as it was not revoked. Wills may be revoked either by physical destruction, accompanied by an intent to revoke, or by the execution of a subsequent will. Typically, if a will has been executed and then another will is executed, the latter will revokes the former will only to the extent that they are inconsistent, unless, of course, the latter will has an express revocation clause. *See generally* UPC § 2-507(a)(1). Here, the 1996 will did *not* have an express revocation clause. Because it did not have a residuary clause (it contained only a specific bequest and a general bequest), its terms are not wholly inconsistent with the terms of the 1988 will. In fact, the only inconsistency between them is the disposition of Blackacre. Under the 1988 will, Blackacre was bequeathed to Adam; under the 1996 will, it was bequeathed to Earl. Since the later will trumps the earlier will, Blackacre is distributable to Earl.

Assuming that both documents can be probated for the reasons stated, the probate estate should be distributed as follows: Blackacre to Earl, \$100,000 to Carrie, and \$2,500,000 to Fred; Doris, the residuary legatee under the 1988 will, takes the remaining \$2,400,000. Adam takes nothing.

Point Three: Greg, Testator's child and only heir, is not entitled to any share of Testator's estate (20-25%) because he is not a pretermitted heir.

In most jurisdictions, pretermitted heir statutes have been enacted permitting children of a testator under certain circumstances to claim a share of the estate even though they were omitted from the deceased testator's will. Typically, these statutes apply only if the child was born or adopted after the execution of the will. *See generally* UPC § 2-302. Here, Greg was alive when both the 1988 will and the 1996 will were executed. Thus, Greg would not be entitled to a "forced share" under the typical pretermitted heir statute. However, if the statute protects children born before the will was executed who were not expressly disinherited, then Greg would take the entire estate.

Question 3 Analysis

- Legal Problems:
- (1) When a negotiable instrument contains contradictory terms, is it enforceable and, if so, which terms prevail?
 - (2) When does payment discharge a negotiable instrument?
 - (3) What does one who loses a negotiable instrument have to show and do in order to enforce the note?

DISCUSSION

Summary: Finance Co. can enforce the note for \$10,450. The rule is that words prevail over numbers. If Garden Shop paid the missing note, whether the payment discharged its obligation would depend on whether Finance Co. had already indorsed or negotiated the note. In either of those cases, it is possible that a “holder in due course” could later appear and enforce the note against Garden Shop. To avoid this contingency, a court would require Finance Co. to prove that it had lost the note and provide adequate security to Garden Shop against double liability before the court would order Garden Shop to pay.

Point One: (15-25%) The enforceability of the note is not affected by the inconsistency in its terms. The amount of the note is \$10,450 because words prevail over numbers.

If Finance Co. can find the note, it can enforce it in the amount of \$10,450. Despite the inconsistency as to the amount payable between the numbers and the words of the note, the note is still negotiable. The note contains an unconditional promise to pay a fixed amount of money to the order of a specific party at a definite time, with no other promises stated by the maker other than to pay. Uniform Commercial Code § 3-104(a). As payee, Finance Co. qualifies as a person entitled to enforce the instrument under § 3-301. Garden Shop’s obligation as the issuer of the note under § 3-412 would be to pay the note according to its terms to a person entitled to enforce the instrument.

Section 3-114 covers the situation where there are contradictory terms within an instrument. Under § 3-104(b), this promissory note qualifies as an “instrument” because it is a negotiable instrument. The rule under § 3-114 is that in a case of contradiction such as this one, words prevail over numbers. Therefore, this note is enforceable for \$10,450 rather than for \$10,000.

Note: The note will be *overdue* if Finance Co. finds it and presents it at a later time (i.e. after the due date) but this fact will not affect Finance Co.’s right to enforce the note. Finance Co. might not be able, however, to collect any interest that accrues after the due date. With respect to possible

third party holders, any holder that took the note after the due date (and therefore with notice that it was overdue) could not be a holder in due course. But a holder who took the note before the due date could be a holder in due course and could enforce the note even after it became overdue. Therefore, the fact that the note becomes overdue will not affect this part of the analysis or either of the other two basic points.

Point Two: Because Finance Co. cannot produce the note, if Garden Shop pays Finance Co., (35-45%) it would discharge its obligation to pay against all persons as long as Finance Co. has not negotiated or indorsed the note.

If Garden Shop pays Finance Co. despite the loss of the note, Garden Shop's obligation on the note is discharged as against all persons unless Finance Co. had voluntarily transferred the note or had indorsed the note in blank prior to losing it. Section 3-602(a) says that a party obligated to pay the instrument is discharged on the instrument when it makes payment to a person entitled to enforce the instrument. Section 3-601(b), however, states that discharge of a party is not effective against a person acquiring the rights of a holder in due course of the instrument who has no notice of the discharge. However, if Finance Co. did indeed lose the note and had not indorsed the note in blank prior to losing it, then no other party could become a holder, much less a holder in due course. *See* UCC § 3-201(b) and § 3-301, discussed in Point One above, and Official Comment to § 3-309. On the other hand, if Finance Co. had voluntarily transferred the instrument rather than losing it, then payment to Finance Co. does not discharge Garden Shop because Finance Co. would not be a person entitled to enforce the instrument. *See* UCC § 3-309(a).

Alternatively, if Finance Co. indorsed the note in blank prior to losing it, the note would now be bearer paper. Thus, a third party in possession of the note would be a holder. *See* UCC § 3-201(a) (negotiation may occur even by means of an involuntary transfer) and Official Comment 1 to § 3-201 ("For example, if an instrument is payable to bearer and it is stolen by Thief or is found by Finder, Thief or Finder becomes the holder of the instrument when possession is obtained.") If that third party then negotiated the note for value to a good-faith purchaser who had no notice of any defense or discharge, that purchaser would be a holder in due course under § 3-302(a)(2) and would not be subject to Garden Shop's discharge defense under § 3-601(b).

Point Three: Finance Co. must prove that it lost the note and must provide adequate protection (35-45%) against double liability before a court can enter judgment against Garden Shop.

If Finance Co. sues on the note without producing it, it can obtain a judgment against Garden Shop only if it meets the conditions set out in UCC § 3-309. First, Finance Co. must qualify under § 3-309(a) as a person entitled to enforce the instrument even though it is not in possession of the instrument. In order to do this, Finance Co. must show that (1) it was in possession of the instrument and entitled to enforce it at the time of its loss, (2) the loss was not the result of a transfer by Finance Co. or a lawful seizure, and (3) the instrument's whereabouts cannot be determined.

Second, Finance Co. must prove the terms of the instrument.

July 2003, Question 3 Analysis

Third, Finance Co. must provide adequate protection to Garden Shop against loss that might occur to Garden Shop by reason of a claim by another person to enforce the instrument. The court must decide what protection to require. A surety bond is a common source of protection. If Finance Co. can convince the court that it lost the note and never indorsed it, then the need to provide protection is diminished because, without an indorsement by Finance Co., no later party could be a holder of the note. Thus, Garden Shop would not face a credible risk of being forced to pay the note again. *See* Point Two above and Official Comment to UCC § 3-309 (“On the other hand if the instrument was payable to the person who lost the instrument and that person did not indorse the instrument, no other person could be a holder of the instrument. In some cases there is risk of loss only if there is doubt about whether the facts alleged by the person who lost the instrument are true.”)

FEDERAL CIVIL PROCEDURE IV.B, IV.C, VI.F

Question 4 Analysis

- Legal Problems:
- (1) Does the pendency of a parallel state court proceeding in State Z require the federal district court to abstain from adjudicating the class action?
 - (2) Is class certification appropriate in this case under the guidelines set forth in Fed. R. Civ. P. 23?

DISCUSSION

Summary: The court's refusal to abstain was correct. The court is not required to abstain merely because the federal litigation is duplicative of state litigation. The facts do not present any other basis for abstention.

The district court properly denied class certification because Farmer's breach-of-warranty claim is not typical of the claims of those class members who have suffered personal injuries. In addition, Farmer is not an adequate representative of the class because his interests differ significantly from the interests of the personal injury claimants and Farmer's attorney is inexperienced with this kind of litigation.

Point One: (30-40%) Although duplicative federal and state court litigation is wasteful, no federal rule requires abstention simply on the basis of duplication. The court's denial of abstention was correct because no existing federal abstention rule would support abstention in this case.

In general, parties may proceed to judgment in a federal district court action without regard to the pendency of state proceedings that seek similar relief. *See Kline v. Burke Construction Co.*, 260 U.S. 226 (1922). Indeed, a federal district court has a "duty . . . to adjudicate a controversy properly before it," and it may abstain "only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976).

The facts of this problem do not support abstention under any established abstention rule. *Pullman* abstention, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), operates only when the state court's resolution of unsettled state law issues may obviate the necessity of resolving a difficult federal law issue. *Burford* abstention is appropriate only if federal adjudication would interfere with the state's administration of a complex regulatory scheme, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger* abstention is limited to cases where the federal

court is asked to enjoin the actions of state officials, *Younger v. Harris*, 401 U.S. 37 (1971). Nothing in this problem implicates any of these standard abstention doctrines.

There is an argument that the district court should dismiss the action under the U.S. Supreme Court's decision in *Colorado River*, 424 U.S. 800. Viewed expansively, the *Colorado River* doctrine, which is based on "principles of federalism, comity, and conservation of judicial resources," could be said to warrant federal court restraint when parallel state proceedings mean that pursuit of federal proceedings will waste judicial resources and potentially involve federal resolution of issues also pending before state courts. See *Black Sea Investment, Ltd. v. United Heritage Corp.*, 204 F.3d 647, 650 (5th Cir. 2000). Such an argument could be bolstered by observing that dismissal under *Colorado River* is not governed by a "hard and fast rule," but by the application of an elaborate balancing test. See *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 16 (1983).

However, *Colorado River* does not justify abstention in this case. In *Colorado River*, the Supreme Court emphasized that the dismissal of the federal action in that case (in favor of parallel state proceedings) was an "extraordinary and narrow exception," 424 U.S. at 813, to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817.

The mere fact of duplicative litigation, which is all that appears to justify abstention on our facts, is not enough to justify abstention under *Colorado River*. See *Black Sea Investment, Ltd.*, 204 F.3d at 650. ("Duplicative litigation, wasteful though it may be, is a necessary cost of our nation's maintenance of two separate and distinct judicial systems.") There must be evidence of other factors that militate against federal litigation, such as the risk of inconsistent rulings with respect to a particular piece of property or clear evidence of a federal policy favoring unitary adjudication of the claims at issue. In conducting the necessary balancing inquiry, moreover, "the balance [is] heavily weighted in favor of the exercise of jurisdiction." *Cone Mem. Hosp.*, 460 U.S. at 16. In our case, there appears to be no special state interest to protect, no federal policy supporting unified state court adjudication of these product liability claims, and no apparent risk of inconsistent adjudications. It thus appears that the court's ruling was correct, as the class action here falls under the general rule of no abstention, rather than the narrow exception in *Colorado River*.

Point Two: The district court was justified in ruling that class certification was unwarranted
(60-70%) because the facts suggest the absence of claim typicality and adequate representa-
 tion.

Federal Rule of Civil Procedure Rule 23(a) identifies the prerequisites that must be satisfied before any class may be certified. Rule 23(a) requires evidence that:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

If the Rule 23(a) prerequisites are satisfied, a class action may be certified if it falls within one of the categories specified in Rule 23(b). Of particular relevance to this case is Rule 23(b)(3), which

also requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

For a number of reasons, the district court’s refusal to certify Farmer’s class action was appropriate. While Farmer has satisfied a few of the prerequisites specified in Rule 23(a), he has not satisfied all of them. With respect to the few, the 100,000 members of the class easily satisfy the numerosity requirement, and there are issues of law and fact common to the members of the class. In particular, there are the questions whether the shock absorbers are defective and, if so, whether relief is appropriate under federal warranty law.

Farmer has not likely, however, satisfied the typicality and adequacy of representation requirements. As for typicality, the claims of representatives and class members are typical when they stem from a single event or are based on common legal theories. *Rall v. Medtronic*, 1986 WL 22271 (D. Nev. 1986). Here, Farmer’s individual claim seeks to recover for out-of-pocket losses resulting from replacement of the shocks. While Farmer’s claim is “typical” of other class members’ claims to the extent that all the claims involve the question of the defectiveness of the shock absorbers, Farmer’s warranty claim otherwise differs significantly from claims for personal injuries, which some members of the class have here. Personal injury claims are highly individualized, involving issues of causation, extent of damages, contributory negligence, etc., that are not present with respect to Farmer’s breach-of-warranty claim. Because of differences of this sort, federal courts have been reluctant to grant class certification where the claims of injured persons will be represented by class representatives who have no personal injury or where personal injury claims are lumped with claims that do not involve personal injury. Moreover, personal injury claimants have a strong interest in individually controlling the prosecution of their claims and in making individual decisions on whether to settle. A class action is designed for situations where individual claims are too small to warrant individual prosecution. *See, e.g., Walsh v. Ford Motor Co.*, 106 F.R.D. 378, 404-408 (D.D.C. 1985). *See generally Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615-619 (1997). Consequently, a typicality problem arises here. *Cf. Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) (class certification proper because class limited to economic loss claimants; personal injury claimants excluded).

The adequacy of representation requirement involves a two-part inquiry. First, the court must ask whether the representative’s interests are aligned closely enough with other class members to ensure fair representation of the absentee class members. Second, the court must ensure that class counsel is experienced and qualified to carry out the litigation in order to fairly and adequately protect the interests of the class. Both requirements pose problems in this case. *See, e.g., Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); *Emig v. American Tobacco Co., Inc.*, 184 F.R.D. 379, 387 (D. Kan. 1998). The difference between the nature of the contract and warranty claims of Farmer and those of the personal injury victims presents a potential conflict of interest that raises doubts about Farmer’s adequacy as a representative of the interests of the personal injury claimants. Farmer might be more willing to accept a modest settlement than would the personal injury claimants in the class. This adequacy of representation problem is magnified in view of the lawyer’s inexperience with class litigation. There is a real question as to whether a new bar admittee is appropriate counsel for such complex litigation.

Even if the district court were satisfied that the Rule 23(a) prerequisites were satisfied, these same concerns would warrant denial of class certification pursuant to Rule 23(b). As noted above, the court may certify the class action only if common questions predominate over questions affecting individual members of the class. Given the existence of personal injury claimants in the class, some of whom have already filed independent claims, and given the existence of questions about the adequacy of the representation being provided by Farmer for the class, it was certainly within the scope of the court's discretion to conclude that the efficiency to be had by litigating "common questions of law and fact" in a class action would be overwhelmed by the problems posed by the presence of litigants with diverse personal injury claims, raising non-common issues of fact and law. *See, e.g., Amchem*, 521 U.S. at 622-25. In this regard, the personal injury claimants probably have a strong interest "in individually controlling the prosecution . . . of [their] separate actions." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 633 (3d Cir. 1996). Moreover, given the potential variability in the nature of the claims asserted by the class members, and the inexperience of class counsel, the "difficulties likely to be encountered in the management" of an action involving such diverse claims would probably significantly reduce the efficiencies stemming from class litigation. *Id.*

Accordingly, although the class is large and there are some common issues of law and fact, given the wide discretion residing with the court, it appropriately refused to certify the class.

AGENCY AND PARTNERSHIP II, IV, VII, VIII.B

Question 5 Analysis

- Legal Problems:
- (1) Under the theory of apparent authority, is a partnership bound by a contract entered into by a partner when that partner lacked actual authority?
 - (2) Is a partner liable to the partnership for breach of fiduciary duties when the partner enters into a contract against the other partners' instructions and without providing complete information to his partners?

DISCUSSION

Summary: Carl lacked actual authority to bind the partnership by signing the contract. In this three-person partnership, Adam and Barbara had expressly limited his authority when they told him "not to finalize a deal with Jane without first discussing the terms with them." The partnership, however, may be bound by the contract if Carl had apparent authority. Whether Carl had apparent authority depends on (a) whether expanding into the pinball and video game machine business could be considered "carrying on in the ordinary course" of this partnership's business, and (b) whether Jane viewed Carl as authorized to negotiate and sign the contract on behalf of the partnership. These issues can be resolved by a fact-based analysis.

Carl is liable to the partnership for any loss arising from the contract because he is an agent of the partnership and violated his fiduciary duties to the partnership: Carl violated express instructions when he entered into the contract without first consulting with Adam and Barbara; he also failed to make adequate disclosure to Adam and Barbara.

Point One: Although Carl lacked actual authority to enter into the contract, the partnership is bound by the contract if Carl had apparent authority to act on the partnership's behalf on this matter.

Carl's Actual Authority (10-20%): Each partner is entitled to participate equally "in the management and conduct of the partnership business." Uniform Partnership Act (UPA) § 18(e), Revised Uniform Partnership Act (RUPA) § 401(f). The rules of partnership management provide for majority rule on matters arising in the ordinary course and unanimous rule on matters arising out of the ordinary course of business. UPA §18(h), RUPA § 401(j).

Carl lacked actual authority to sign the contract binding the partnership because Adam and Barbara expressly instructed Carl "not to finalize a deal with Jane without first discussing the

terms with them.” The express instruction from Adam and Barbara “not to finalize” restricted Carl’s actual authority. In this three-partner partnership, Carl lacked unanimous or majority approval to proceed beyond investigating the opportunity. Therefore, Carl lacked actual authority and the partnership is not bound on an actual authority basis.

Carl’s Apparent Authority (40-50%): As a partner, Carl is an agent of the partnership. “An act of a partner . . . for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knew . . . the partner lacked authority.” RUPA § 301 (1997). *See also* UPA § 9(1) (1914). There is no suggestion that Jane was aware of any limitation on Carl’s authority. Thus, two questions arise: (a) whether Carl had apparent authority to enter into purchase agreements on behalf of the partnership, and (b) whether the purchase of pinball and video machines was within the ordinary course of the partnership’s business. These questions are appropriately viewed from Jane’s perspective. *See Luddington v. Bodenvest, Ltd.*, 855 P.2d 204, 209 (Utah 1993). *See also Smith v. Dixon*, 386 S.W.2d 244 (Ark. 1965) (look to custom and past dealings between the parties or with the particular partnership).

With respect to the first question, it would be perfectly reasonable for Jane to believe that Carl had the authority to enter into a purchase agreement without consulting his partners and there is no evidence that she knew that he lacked authority in this instance. The facts state that Carl represented the partnership in past dealings with Jane, negotiating and signing contracts without input from Adam or Barbara. Thus, from Jane’s perspective, when Carl signed the contract with Jane, he was carrying on business “in the usual way” in which it was always carried on for the partnership. *See RNR Investments Limited Partnership v. Peoples First Community Bank*, 812 So. 2d 561 (Fla. Ct. App. 2002) (“apparently carrying on in the ordinary course” means that partnership business must have been carried on “in the usual way”).

With respect to the second question, the issue is whether the purchase of *pinball and video game machines* would appear to be a carrying on of “the *partnership* business or business of the kind carried on by the partnership.” RUPA § 301 (emphasis added). The partner’s act must not only be an act carrying out business “in the usual way,” but it must also be an act the public would “reasonably conclude is directly and necessarily embraced within the partnership business as being incident or appropriate to such business according to the course and usage of conducting it.” *Merrill v. O’Bryan*, 93 P. 917 (Wash. 1908). The act must be “apparently within the nature of the business” of the partnership. *Cummings v. Nordmark*, 438 P.2d 605, 606 (Wash. 1968). *See also Luddington v. Bodenvest Ltd.*, 855 P.2d at 210 (act must be “within the ordinary and apparent scope of the partnership business”).

In this case, the partnership was engaged in the beverage distribution business. An argument could be made that Carl’s purchase of pinball and video game machines was neither “partnership business” nor “business of the kind carried on by the partnership.” RUPA § 301. Ownership of pinball and video games is not “directly and necessarily embraced” within the scope of a beverage business, nor is it obviously “incident or appropriate to such business.” *Merrill v. O’Bryan*, 93 P. 917.

On the other hand, other beverage distribution businesses in the same geographic area as this partnership have been expanding into the pinball and video game machine business. Thus, even if the business of this partnership had been limited to beverage distribution, it is arguable that the supply of other goods and services to bars and restaurants, including game machines, is a “business of the kind carried on by the partnership” and is therefore within the “nature of the business” of this partnership. *See Cummings v. Nordmark*, 438 P.2d 605. Moreover, Jane, who was aware of the trend of beverage distributors expanding into the pinball and video game business could view this partnership’s expansion as being “incident or appropriate to [its] business according to the course and usage of conducting it [in her area].” *Merrill v. O’Bryan*, 93 P. 917. *Cf.* Florida Revised Uniform Partnership Act § 301(1) (scope of partnership business is determined with reference to acts of such businesses “in the geographic area in which the partnership operates.”).

The apparent authority arguments could go either way. The important task for applicants is to recognize the issue and apply the test appropriately. There is also an argument that even if Carl lacked authority to enter the contract, the partnership ratified the partnership contract when it presumably accepted the machines and began operating them.

Point Two: Carl is liable to the partnership for any loss arising from the contract with Jane (40-50%) because Carl breached his fiduciary duty to the partnership by signing this contract in violation of the instructions from Adam and Barbara, and without providing full disclosure to Adam and Barbara.

A partner is an agent of the partnership and owes duties to the partnership and the other partners. When a partner violates a duty, the partner is liable to the partnership and other partners for the resulting loss. Carl violated his duties to the partnership and the other partners when he entered into the contract in violation of his instructions and without discussing the terms with Adam and Barbara. Although the rationale differs under the UPA and the RUPA, under either statute, Carl is liable to the partnership for the loss resulting from his breach of duty.

Carl breached several duties to the partnership. First, under the common law and the UPA, Carl is an agent of the partnership and owes a duty of obedience to his other partners, including a duty to follow reasonable instructions. *See* Restatement (Second) of Agency § 385 (1958); UPA § 4(3). Carl breached this duty by failing to follow Adam and Barbara’s instruction that he not enter into any contract with Jane unless he first discussed the terms with them. (In a jurisdiction where the RUPA is applicable, one could also argue that this failure to follow instructions was “intentional misconduct” and a breach of Carl’s duty of care. *See* RUPA § 404(c).)

Second, Carl had an obligation to provide full information to Adam and Barbara. That obligation was imposed by their express instruction to him “not to finalize a deal with Jane without first discussing the terms” with them. *See* UPA § 20 (“[p]artners shall render on demand true and full information of all things affecting the partnership to any partner”). In addition, courts have interpreted the UPA to require full disclosure of information material to partnership affairs even in the absence of an explicit demand, and the RUPA specifically imposes such an obligation. *See Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *Silverberg v. Colantuno*, 991 P.2d 280 (Colo. App. 1998); RUPA § 403(c).

Finally, it is arguable that Carl breached his duty of care by failing to thoroughly investigate the facts before entering into the contract with Jane. The amount of money involved was substantial, and Carl arguably should have visited all 72 bars and checked all 127 machines, not just 50 bars and 98 machines, before entering the contract. The common law, the UPA, and the RUPA all impose on partners a general duty of care, including a duty to act in good faith when carrying out partnership business. *See generally* RUPA § 404.

However, the duty of care is generally violated only by “grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.” *See* RUPA § 404(c). Although Carl may have been negligent in failing to inspect all machines and was clearly wrong in failing to consult with Barbara and Adam before finalizing the deal, these omissions may not rise to the level of gross neglect (or worse) necessary to violate the duty of care. *See Duffy v. Piazza Construction, Inc.*, 815 P.2d 267 (Wash. Ct. App. 1991). From all that appears, Carl acted in the good faith belief that he was making a good deal for the partnership, he undertook an extensive (if incomplete) examination of the relevant information before agreeing to purchase the pinball machines, and his failure to consult with Adam and Barbara, while a violation of instructions, was consistent with the way the partnership had done business in the past. Under the circumstances, a breach of the duty of care may be difficult to establish.

There is no evidence of any self-interest in the transaction, and thus there is no duty of loyalty problem.

In summary, Carl likely did not breach his duty of care. He did, however, breach his duty of obedience and his duty to provide full information. He is therefore liable to the partnership for the losses resulting from either breach.

FAMILY LAW I.C, I.F, III.D, III.F, IV.B

Question 6 Analysis

- Legal Problems:
- (1)(a) Should the State X court enforce the premarital agreement even though the party challenging the agreement lacked legal counsel?
 - (1)(b) Should the State X court uphold the provisions that waive the right to marital property and child support upon divorce?
 - (2) Is Ann's trust fund subject to distribution as marital property?

NOTE: Applicants answering this question in a community property state should use community property principles. For this purpose, the phrase "marital property" means community property.

DISCUSSION

Summary: The court will probably enforce the premarital agreement's provisions regarding property division. Ann appears to have voluntarily entered the agreement despite the fact that she lacked legal counsel. Although the absence of legal counsel would be a factor a court would consider in assessing voluntariness, the other facts suggest that the agreement was voluntarily entered into. However, the court will not enforce the premarital agreement's provision waiving child support because parents cannot waive a child's right to support. If the premarital agreement is upheld, then consistent with the terms, Burt cannot reach Ann's trust fund. If the premarital agreement is invalid, in most states Burt will not be able to obtain Ann's trust fund because it is separate property. The entire amount is separate property because the base amount was acquired before marriage and the appreciation in the fund is not the result of spousal labor.

Point One (a): The court in State X will probably enforce the premarital agreement, except for the (40-50%) provision on child support (see Point One(b)), because the agreement was voluntarily entered into.

Today in all states premarital agreements are enforceable and not void as "contemplating divorce." However, the premarital agreement will not be enforceable against Ann if she can prove that she involuntarily entered the agreement. American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.04 cmt. b (2001) [hereinafter ALI PRINCIPLES] (both case law and statutes generally require that consent to a premarital agreement be voluntary); *see also* Uniform Premarital Agreement Act § 6(a)(1), 9B U.L.A. 373 (1987)

[hereinafter UPAA]. Here no facts support duress, oppression or unfair surprise. *See generally* ALI PRINCIPLES, *supra*, § 7.04 cmt. b; *see* Ira Mark Ellman, Paul M. Kurtz & Elizabeth S. Scott, FAMILY LAW: CASES, TEXT, PROBLEMS 800-01 (1998).

The fact that Ann did not have a lawyer will probably not affect the court's determination of whether Ann entered into the agreement voluntarily. Neither any state nor the UPAA mandates the assistance of independent counsel. Courts generally have not required independent counsel as a precondition to enforcing an agreement against an objecting party. *See* ALI PRINCIPLES, *supra*, § 7.04 cmt. e, reporter's note. Moreover, the lack of independent counsel is probably not enough to invalidate the agreement here. Ann was advised to obtain a lawyer, she had plenty of time before the marriage to do so, and her trust fund and job gave her the resources to do so.

Factors suggesting that the agreement was entered into voluntarily include the length of time between the date the premarital agreement was presented and the wedding (three months), and the fact that Ann's background permitted her to read and understand the agreement (she had a high school education); the factual history also indicates that Ann read the agreement, that she did not express any reservations about signing it, that Burt's lawyer told her of the agreement's exact effect, and that she had more assets than Burt when entering the marriage. The facts, on the whole, suggest that Ann voluntarily entered into the agreement.

Point One (b): A premarital agreement can address property division upon divorce but cannot bind (15-25%) a court on matters of child support.

In virtually all states, premarital agreements can include provisions about the disposition of property upon marital dissolution. *See, e.g.*, UPAA § 3(a)(3). *See also* ALI PRINCIPLES, *supra*, § 7.04 cmt. a. Therefore, the provisions on property division are not objectionable because of their subject matter.

However, almost all states agree that a child's right to support cannot be adversely affected by a premarital agreement. *See* UPAA § 3(b); Ellman, Kurtz & Scott, *supra*, at 839 ("The traditional rule is that a contract between prospective spouses cannot bind a court in deciding child support.").

The fact that the child support provision is probably invalid does not preclude enforcement of the rest of the agreement. Even if the court declares one or more provisions of the premarital agreement to be unenforceable, the remaining provisions may be valid and enforceable. Typically, if an agreement contains some unenforceable terms (such as an impermissible waiver of child support), the remaining terms may be enforced if the parties intended them to be enforceable even without the unenforceable terms. 17A C.J.S. CONTRACTS § 332, p. 309-310; Arnold H. Rutkin, 5 FAMILY LAW & PRACTICE § 59.04(4) (1999) ("The standard rules of contract law apply to antenuptial agreements."). *See, e.g., Rogers v. Yourshaw*, 448 S.E.2d 884, 887 (Va. Ct. App. 1994). Here there is no provision specifying whether the contract is entire or severable, and in all likelihood, the court would find it is severable and uphold the rest of the agreement.

Point Two: (15-25%) If the premarital agreement is valid, then it would independently shield the trust fund from Burt's claim. If the premarital agreement is valid, Burt will probably not be entitled to any of Ann's trust fund because it was separate property.

If the premarital agreement is valid (see Point One(b)), Burt waived his rights in Ann's separate property and would not be entitled to any part of the trust fund.

Even if the agreement were not enforced, property acquired before marriage is generally considered separate property. *See* ALI PRINCIPLES, *supra*, § 4.03 cmt. b. Therefore, Ann's trust fund of \$200,000 is her separate property. Typically, separate property is not subject to division in an equitable distribution or a community property regime.

Regarding the additional \$600,000 that represents the appreciation in the value of the trust fund, the general rule is that appreciation of separate property remains separate property if the appreciation is not attributable to spousal labor. ALI PRINCIPLES, *supra*, § 4.04 cmt. a. Since the facts state that Ann's father solely managed the trust, the property would be considered separate. About fourteen states, however, make all property subject to division upon divorce. *See* Uniform Marriage and Divorce Act (UMDA) § 307, Alternative A, 9 U.L.A. (Part I) 288 (1988). But even in these states, there is little to support Burt's contribution to the appreciation of the asset or his claim of need, the two factors primarily considered by courts in distributing property.

SECURED TRANSACTIONS V.A., V.B.

Question 7 Analysis

- Legal Problems:
- (1) When will a repossession be invalidated as having been conducted in breach of the peace?
 - (2) What are the requirements for a valid waiver of the right of redemption, and what must the debtor tender if the security agreement contains an acceleration clause?
 - (3) What are a debtor's remedies if a secured party fails to comply with the debtor's rights of redemption and seeks to recover a deficiency judgment?

DISCUSSION

Summary: It is debatable whether the repossession, which Bank had the right to carry out, was or was not conducted without a breach of the peace. In any case, Bank's refusal of Debtor's tender of the entire balance violated Debtor's rights because the right of redemption cannot be waived in the security agreement. Given that the repossession was unlawfully carried out because of Bank's refusal to accept Debtor's tender of redemption, Debtor is entitled to recover any damages caused by Bank's failure to comply with the rules relating to the repossession. This might include damages for loss of business. Debtor can also challenge Bank's claim for a deficiency, but, since the sale was commercially reasonable, it is unlikely that Debtor will prevail on his challenge.

Point One: (30-35%) Debtor can argue that Bank's repossession of the collateral was conducted in breach of the peace. Bank equally can assert that its repossession was peaceable.

Section 9-609 of the Uniform Commercial Code provides that "after default, a secured party may take possession of the collateral," and may proceed without judicial process if this can be done "without breach of the peace." This "self-help repossession" is a significant right accruing to the secured party under Article 9's default provisions, and it may be exercised without giving prior notice to Debtor. Because Debtor was in default in its monthly payments in the amount of \$1,600, Bank was within its rights in repossessing the kitchen equipment, so long as Bank did so without a breach of the peace. UCC § 9-609.

"Breach of the peace" is not defined in Article 9. White and Summers suggest that claims of breach of the peace be analyzed with a "crude two-factor formula of creditor entry and debtor response . . . refined by a consideration of third-party response, the type of premises entered and

possible creditor deceit in procuring consent.” James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE, 5th ed. § 25-7, at 219 (2000).

Applicants should discuss a number of facts in considering whether the repossession was carried out without a breach of the peace. First, the repossession took place on business property, rather than in a private home. The courts are most sensitive to unauthorized entries into a debtor’s residence. *See* White & Summers, *supra*, § 25-7, at 220. Here, because the repossession took place at a business rather than at a home, the public policy against intrusion upon a debtor’s solitude and safety is less compelling.

Second, although Debtor was not present, Debtor’s employee was and Debtor’s employee objected to the repossession. White and Summers state: “An opposition to the entry or seizure, however slight and even though merely verbal, normally results in a breach of the peace. The law should not make a debtor physically confront a reposessor in order to sustain a claim of breach of the peace.” White & Summers, *supra*, § 25-7, at 221. On the other hand, some courts have held that oral protest alone does not unequivocally preclude self-help repossession. *See Clarin v. Minnesota Repossessors, Inc.*, 40 UCC Rep. Serv. 2d 316 (8th Cir. 1999) (no breach of peace where repossession took place in parking lot of debtor’s place of work, notwithstanding debtor’s initial oral protest). The Eighth Circuit in *Clarin* acknowledged that the “[c]ourts are divided on the issue of whether an unequivocal oral protest amounts to a breach of the peace.” *Id.* at 318. Moreover, the employee’s protest was less significant than the debtor’s own protest would have been.

Apart from the oral protest, the facts do not suggest that entry was otherwise obtained by a breach of the peace. The reposseors did not attempt repossession during regular business hours; they did not pick the lock or break a door down or otherwise damage Debtor’s business; the reposseors walked past the employee through an open door; the employee at first objected loudly, but later was quiet as the repossession proceeded; the employee did not physically attempt to halt the repossession or call law enforcement authorities; there was no threat of violence; Bank’s representative did not use a ruse or stealth to gain entry, but honestly stated the purpose of the visit.

Point Two: The right of redemption cannot be waived in the security agreement, and Debtor (30-35%) was entitled to redeem the collateral by tendering fulfillment of all obligations before Bank had disposed of the collateral. Debtor had to tender the entire loan balance due because the security agreement contains an acceleration clause. Bank’s refusal to accept a tender of the full balance due violated Debtor’s rights.

Section 9-623 of the UCC provides that a debtor may redeem collateral “at any time before a secured party has disposed of collateral or entered into a contract for its disposition under Section 9-610.” To redeem the collateral, debtor must tender “fulfillment of all obligations secured by the collateral” as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition.

The right to redeem collateral is a mandatory right that may not be waived in the security agreement. *See* UCC § 9-602(11). As a result, the clause in the security agreement purporting to waive Debtor’s right of redemption is ineffective. A waiver of Debtor’s right to redeem is effective only

if it is done “by an agreement to that effect entered into and authenticated after default.” UCC § 9-624(c). There was no such agreement here. Thus, Debtor was entitled to redeem the collateral at the time he attempted to do so, because it was “before [the] secured party had disposed of the collateral . . . under Section 9-610.” UCC § 9-623.

To redeem the collateral, a debtor must “tender fulfillment of *all* obligations secured by the collateral.” UCC § 9-623. (emphasis added). Where, as here, the security agreement contains an acceleration clause, this would include the entire balance due on the loan. In addition, the redemption amount must include “the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, [the secured party’s] reasonable attorneys’ fees and legal expenses.” UCC § 9-623.

In this case, Debtor’s initial tender of the amount of his arrearage in monthly payments was inadequate to redeem the collateral. When Debtor later offered to tender the full amount due, Bank made it clear that it would not accept any redemption. Bank based its refusal on the redemption waiver clause in the security agreement. But Part 6 of Article 9 deems such clauses unenforceable. In short, Bank’s refusal to allow Debtor to redeem was a violation of Debtor’s rights.

Point Three: Debtor is entitled to the remedies provided in UCC Sections 9-625 and 9-627.
(30-35%) Debtor may be able to recover damages if the repossession is found to be unlawful. It may also be able to challenge the imposition of a deficiency judgment.

Sections 9-625(a) and (b) of the UCC provide: “If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain . . . disposition of collateral. . . . A person is liable for damages in the amount of any loss caused by a failure to comply with this article.”

A commercially reasonable sale under § 9-610 has already taken place. Thus, Debtor now must seek to recover from Bank for “any loss caused by a failure to comply” with Article 9. Presumably, this would include any loss attributable to the failure of Bank to allow Debtor to redeem and may include any loss attributable to improper repossession (assuming that Debtor can prove a breach of the peace was committed).

The collateral in this case—stove, refrigerator, freezers, and microwave oven for use in Debtor’s restaurant business—would be classified as “equipment” (“used or bought for use primarily in business”) under § 9-102(33). In the case of business equipment, Article 9 provides no clear guidance on the question of measuring damages for “any loss caused by a failure to comply with this article.”

White and Summers state that a debtor’s “loss” for these purposes “is probably the difference between the net amount actually realized on resale and the amount that would have been realized had the creditor complied with the Code’s requirements.” James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 25-11, at 931 (4th ed. 1995) (interpreting old § 9-507). The new Code states expressly, however, that damages should also include, in appropriate cases, such consequential losses as those caused by the “debtor’s inability to obtain . . . alternative financing.”

UCC § 9-625(b). Some commentators endorse the possibility of punitive damages. *See* B. Clark, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 4.12[2], at 4-175 (1988).

In addition, UCC § 9-626 authorizes denial of a deficiency judgment when the creditor has failed to comply with Article 9's rules concerning the "collection, enforcement, disposition or acceptance" of collateral. Article 9 adopts the so-called "rebuttable presumption" rule: Where the creditor has violated a relevant rule, the creditor will not be allowed to obtain a deficiency judgment unless the creditor proves that the amount that "would have been realized" if the creditor had acted properly "is less than" the amount to which the creditor was entitled. UCC § 9-626(a)(4). However, reduction of a deficiency appears to preclude a debtor from also recovering actual damages. *See* UCC § 9-625(d).

In this case, Debtor might argue that consequential damages should include damages for loss of business opportunity, because Bank's wrongful repossession and/or refusal to permit redemption resulted in the closure of Debtor's business. Consequential damages must be reasonably foreseeable under the traditional rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854). It is arguably foreseeable to the creditor that an improper refusal to allow redemption of essential kitchen equipment may result in substantial business losses to a restaurant operation. In addition, Debtor might argue that Bank's refusal to allow redemption interfered with Debtor's ability to secure alternative financing because it deprived Debtor of the collateral necessary for an alternative loan.

On the other hand, apart from these consequential damages, it will be difficult for Debtor to establish any loss. The sale of the kitchen equipment was commercially reasonable, and there is no evidence that Bank's wrongful conduct affected the price it received for the equipment. Consequently, Bank may well be able to establish that it is entitled to a deficiency judgment, despite its violations of Article 9.

Debtor had the absolute obligation to mitigate his damages. If he had enough money to pay off the balance and Bank's expenses, then he naturally had enough money to appear at Bank's foreclosure sale and buy the equipment back at the sale. Debtor would still have damages for interim loss of business, his own expenses, attorneys' fees, etc., but Debtor may be unable to recover for permanent loss of business.