



February 2013 MEE Questions and Analyses



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* Used as one of the six questions on the February 2013 Uniform Bar Examination in Alabama, Arizona, Colorado, Idaho, Missouri, Nebraska, North Dakota, and Utah.

Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2013 MEE. Each test includes nine 30-minute questions; user jurisdictions may elect which of the nine questions they wish to use. (Jurisdictions that administer the Uniform Bar Examination [UBE] use a common set of six MEE questions as part of their bar examinations.) In the actual test, the questions are simply numbered rather than being identified by area of law. The instructions for the test appear on page iii. For more information, see the *MEE Information Booklet*, available on the NCBE website at www.ncbex.org.

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

The subjects covered by each question are listed on the first page of its accompanying analysis, followed by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Federal Civil Procedure question on the February 2013 MEE tested the following area from the Federal Civil Procedure outline: VI.E., Verdicts and judgments—Effect; claim and issue preclusion. Subject matter outlines are included in the *MEE Information Booklet*.

Description of the MEE

The MEE consists of nine 30-minute essay questions, any of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use a common set of six MEE questions as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. The areas of law that may be covered by the questions on any MEE are Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments and Bank Deposits and Collections; Secured Transactions). Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

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

Instructions

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

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

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

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

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

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your 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.

Answer all questions according to generally accepted fundamental legal principles unless your jurisdiction has instructed you to answer according to local case or statutory law. (UBE instructions: Answer all questions according to generally accepted fundamental legal principles rather than local case or statutory law.)

February 2013 MEE

▶ *QUESTIONS*

Real Property

Contracts

Constitutional Law

Secured Transactions

Federal Civil Procedure

Agency

Evidence

Trusts and Future Interests

Negotiable Instruments

REAL PROPERTY QUESTION

In 2008, a landlord and a tenant entered into a 10-year written lease, commencing September 1, 2008, for the exclusive use of a commercial building at a monthly rent of \$2,500. The lease contained a covenant of quiet enjoyment but no other covenants or promises on the part of the landlord.

When the landlord and tenant negotiated the lease, the tenant asked the landlord if the building had an air-conditioning system. The landlord answered, "Yes, it does." The tenant responded, "Great! I will be using the building to manufacture a product that will be irreparably damaged if the temperature during manufacture exceeds 81 degrees for more than six consecutive hours."

On April 15, 2012, the building's air-conditioning system malfunctioned, causing the building temperature to rise above 81 degrees for three hours. The tenant immediately telephoned the landlord about this malfunction. The tenant left a message in which he explained what had happened and asked the landlord, "What are you going to do about it?" The landlord did not respond to the tenant's message.

On May 15, 2012, the air-conditioning system again malfunctioned. This time, the malfunction caused the building temperature to rise above 81 degrees for six hours. The tenant telephoned the landlord and left a message describing the malfunction. As before, the landlord did not respond.

On August 24, 2012, the air-conditioning system malfunctioned again, causing the temperature to rise above 81 degrees for 10 hours. Again, the tenant promptly telephoned the landlord. The landlord answered the phone, and the tenant begged her to fix the system. The landlord refused. The tenant then attempted to fix the system himself, but he failed. As a result of the air-conditioning malfunction, products worth \$150,000 were destroyed.

The next day, the tenant wrote the following letter to the landlord:

I've had enough. I told you about the air-conditioning problem twice before yesterday's disaster, and you failed to correct it. I will vacate the building by the end of the month and will bring you the keys when I leave.

The tenant vacated the building on August 31, 2012, and returned the keys to the landlord that day. At that time, there were six years remaining on the lease.

On September 1, 2012, the landlord returned the keys to the tenant with a note that said, "I repeat, the air-conditioning is not my problem. You have leased the building, and you should fix it." The tenant promptly sent the keys back to the landlord with a letter that said, "I have terminated the lease, and I will not be returning to the building or making further rent payments." After receiving the keys and letter, the landlord put the keys into her desk. To date, she has neither responded to the tenant's letter nor taken steps to lease the building to another tenant.

On November 1, 2012, two months after the tenant vacated the property, the landlord sued the tenant, claiming that she is entitled to the remaining unpaid rent (\$180,000) from September 1 for the balance of the lease term (reduced to present value) or, if not that, then damages for the tenant's wrongful termination.

Is the landlord correct? Explain.

CONTRACTS QUESTION

On January 2, a boat builder and a sailor entered into a contract pursuant to which the builder was to sell to the sailor a boat to be specially manufactured for the sailor by the builder. The contract price was \$100,000. The written contract, signed by both parties, stated that the builder would tender the boat to the sailor on December 15, at which time payment in full would be due.

On October 15, the builder's workers went on strike and there were no available replacements.

On October 31, the builder's workers were still on strike, and no work was being done on the boat. The sailor read a news report about the strike and immediately sent a letter to the builder stating, "I am very concerned that my boat will not be completed by December 15. I insist that you provide me with assurance that you will perform in accordance with the contract." The builder received the letter on the next day, November 1.

On November 25, the builder responded to the letter, stating, "I'm sorry about the strike, but it is really out of my hands. I hope we settle it soon so that we can get back to work."

Nothing further happened until December 3, when the builder called the sailor and said, "My workers are back, and I have two crews working overtime to finish your boat. Your boat is task one. Don't worry; we'll deliver your boat by December 15th." The sailor immediately replied, "I don't trust you. As far as I'm concerned, our contract is over. I am going to buy my boat from a shipyard." Two days later, the sailor entered into a contract with a competing manufacturer to buy a boat similar to the boat that was the subject of the contract with the builder.

The builder finished the boat on time and tendered it to the sailor on December 15. The sailor reminded the builder about the December 3 conversation in which the sailor had announced that "our contract is over," and refused to take the boat and pay for it.

The builder has sued the sailor for breach of contract.

1. What was the legal effect of the sailor's October 31 letter to the builder? Explain.
2. What was the legal effect of the builder's November 25 response to the sailor's October 31 letter? Explain.
3. What was the legal effect of the sailor's refusal to take and pay for the boat on December 15? Explain.

CONSTITUTIONAL LAW QUESTION

AutoCo is a privately owned corporation that manufactures automobiles. Ten years ago, AutoCo purchased a five-square-mile parcel of unincorporated land in a remote region of the state and built a large automobile assembly plant on the land. To attract workers to the remote location of the plant, AutoCo built apartment buildings and houses on the land and leased them to its employees. AutoCo owns and operates a commercial district with shops and streets open to the general public. AutoCo named the area Oakwood and provides security, fire protection, and sanitation services for Oakwood's residents. AutoCo also built, operates, and fully funds the only school in the region, which it makes available free of charge to the children of its employees.

A family recently moved to Oakwood. The father and mother work in AutoCo's plant, rent an apartment from AutoCo, and have enrolled their 10-year-old son in Oakwood's school. Every morning, the students are required to recite the Pledge of Allegiance while standing and saluting an American flag. With the approval of his parents, the son has politely but insistently refused to recite the Pledge and salute the flag at the school on the grounds that doing so violates his own political beliefs and the political beliefs of his family. As a result of his refusal to say the Pledge, the son has been expelled from the school.

To protest the school's actions, the father walked into the commercial district of Oakwood. While standing on a street corner, he handed out leaflets that contained a short essay critical of the school's Pledge of Allegiance policy. Some of the passersby who took the leaflets dropped them to the ground. An AutoCo security guard saw the litter, told the father that Oakwood's anti-litter rule prohibits leaflet distribution that results in littering, and directed him to cease distribution of the leaflets and leave the commercial district. When the father did not leave and continued to distribute the leaflets, the security guard called the state police, which sent officers who arrested the father for trespass.

1. Did the son's expulsion from the school violate the First Amendment as applied through the Fourteenth Amendment? Explain.
2. Did the father's arrest violate the First Amendment as applied through the Fourteenth Amendment? Explain.

SECURED TRANSACTIONS QUESTION

On June 1, a bicycle retailer sold two bicycles to a man for a total purchase price of \$1,500. The man made a \$200 down payment and agreed to pay the balance in one year. The man also signed a security agreement that identified the bicycles as collateral for the unpaid purchase price and provided that the man “shall not sell or dispose of the collateral until the balance owed is paid in full.” The retailer never filed a financing statement reflecting this security interest.

The man had bought the bicycles for him and his girlfriend to use on vacation. However, shortly after he bought the bicycles, the man and his girlfriend broke up. The man has never used the bicycles.

On August 1, the man sold one of the bicycles at a garage sale to a buyer who paid the man \$400 for the bicycle. The buyer bought the bicycle to ride for weekend recreation.

On October 1, the man gave the other bicycle to his friend as a birthday present. The friend began using the bicycle for morning exercise.

Neither the buyer nor the friend had any knowledge of the man’s dealings with the retailer.

1. Does the buyer own the bicycle free of the retailer’s security interest? Explain.
2. Does the friend own the bicycle free of the retailer’s security interest? Explain.

FEDERAL CIVIL PROCEDURE QUESTION

Mother and Son, who are both adults, are citizens and residents of State A. Mother owned an expensive luxury car valued in excess of \$100,000. Son borrowed Mother's car to drive to a store in State A. As Son approached a traffic light that had just turned yellow, he carefully braked and brought the car to a complete stop. Driver, who was following immediately behind him, failed to stop and rear-ended Mother's car, which was damaged beyond repair. Son was seriously injured. Driver is a citizen of State B.

Son sued Driver in the United States District Court for the District of State A, alleging that she was negligent in the operation of her vehicle. Son sought damages in excess of \$75,000 for his personal injuries, exclusive of costs and interest. In her answer, Driver alleged that Son was contributorily negligent in the operation of Mother's car. She further alleged that the brake lights on Mother's car were burned out and that Mother's negligent failure to properly maintain the car was a contributing cause of the accident.

Following a trial on the merits in Son's case against Driver, the jury answered the following special interrogatories:

Do you find that Driver was negligent in the operation of her vehicle? Yes.

Do you find that Son was negligent in the operation of Mother's car? No.

Do you find that Mother negligently failed to ensure that the brake lights on her car were in proper working order? Yes.

The judge then entered a judgment in favor of Son against Driver. Driver did not appeal.

Two months later, Mother sued Driver in the United States District Court for the District of State A, alleging that Driver's negligence in the operation of her vehicle destroyed Mother's luxury car. Mother sought damages in excess of \$75,000, exclusive of costs and interest.

State A follows the same preclusion principles that federal courts follow in federal-question cases.

1. Is Mother's claim against Driver barred by the judgment in *Son v. Driver*? Explain.
2. Does the jury's conclusion in *Son v. Driver* that Mother had negligently failed to maintain the brake lights on her car preclude Mother from litigating that issue in her subsequent suit against Driver? Explain.
3. Does the jury's conclusion in *Son v. Driver* that Driver was negligent preclude Driver from litigating that issue in the *Mother v. Driver* lawsuit? Explain.

AGENCY QUESTION

Over 5,000 individuals in the United States operate hot-air balloon businesses. A hot-air balloon has four key components: the balloon that holds the heated air, the basket that houses the riders, the propane burner that heats the air in the balloon, and the propane storage tanks.

The owner of a hot-air balloon business recently notified several basket and burner manufacturers that she or her agent might be contacting them to purchase baskets or burners. The owner did not specifically name any person as her agent. Basket and burner manufacturers regularly receive such notices from hot-air balloon operators. Such notices typically include no restrictions on the types of baskets or burners agents might purchase for their principals.

The owner then retained an agent to acquire baskets, burners, and fuel tanks from various manufacturers. The owner authorized the agent to buy only (a) baskets made of woven wicker (not aluminum), (b) burners that use a unique “whisper technology” (so as not to scare livestock when the balloon sails over farmland), and (c) propane fuel tanks.

The agent then entered into three transactions with manufacturers, all of whom had no prior dealings with either the owner or the agent.

(1) The agent and a large manufacturer of both wicker and aluminum baskets signed a contract for the purchase of four aluminum baskets for a total cost of \$60,000. The agent never told the manufacturer that he represented the owner or any other principal. The contract listed the agent as the buyer and listed the owner’s address as the delivery address but did not indicate that the address was that of the owner rather than the agent. When the baskets were delivered to the owner, she learned for the first time that the agent had contracted to buy aluminum, not wicker, baskets. The owner immediately rejected the baskets and returned them to the manufacturer. Neither the owner nor the agent has paid the basket manufacturer for them.

(2) The agent contacted a burner manufacturer and told him that the agent represented a well-known hot-air balloon operator who wanted to purchase burners. The agent did not disclose the owner’s name. The agent and the burner manufacturer signed a contract for the purchase of four burners that did not have “whisper technology” for a total price of \$70,000. The burner contract, like the basket contract, listed the owner’s address for delivery but did not disclose whose address it was. The burners were delivered to the owner’s business, and the owner discovered that the agent had ordered the wrong kind of burners. The owner rejected the burners and returned them to the manufacturer. Neither the owner nor the agent has paid the burner manufacturer for the burners.

(3) The agent contracted with a solar cell manufacturer to make three cells advertised as “strong enough to power all your ballooning needs.” The agent did not tell the manufacturer that he was acting on behalf of any other person. One week after the cells were delivered to the agent, he took them to the owner, who installed them and discovered that she could save a lot of money using solar cells instead of propane to power her balloons. The owner decided to keep the solar cells, but she has not paid the manufacturer for them.

Assume that the rejection of the baskets and the burners and the failure to pay for the solar cells constitute breach of the relevant contracts.

1. Is the owner liable to the basket manufacturer for breach of the contract for the aluminum baskets? Is the agent liable? Explain.
2. Is the owner liable to the burner manufacturer for breach of the contract for the burners? Is the agent liable? Explain.
3. Is the owner liable to the solar cell manufacturer for breach of the contract for the solar cells? Is the agent liable? Explain. (Do not address liability based upon restitution or unjust enrichment.)

EVIDENCE QUESTION

A woman who owns a motorized scooter brought her scooter to a mechanic for routine maintenance service. As part of the maintenance service, the mechanic inspected the braking system on the scooter. As soon as the mechanic finished inspecting and servicing the scooter, he sent the woman a text message to her cell phone that read, “Just finished your service. When you pick up your scooter, you need to schedule a follow-up brake repair. We’ll order the parts.”

The woman read the mechanic’s text message and returned the next day to pick up her scooter. As the woman was wheeling her scooter out of the shop, she saw the mechanic working nearby and asked, “Is my scooter safe to ride for a while?” The mechanic responded by giving her a thumbs-up. The woman waved and rode away on the scooter.

One week later, while the woman was riding her scooter, a pedestrian stepped off the curb into a crosswalk and the woman collided with him, causing the pedestrian severe injuries. The woman had not had the scooter’s brakes repaired before the accident.

The pedestrian has sued the woman for damages for his injuries resulting from the accident. The pedestrian has alleged that (1) the woman lost control of the scooter due to its defective brakes, (2) the woman knew that the brakes needed repair, and (3) it was negligent for the woman to ride the scooter knowing that its brakes needed to be repaired.

The woman claims that the brakes on the scooter worked perfectly and that the accident happened because the pedestrian stepped into the crosswalk without looking and the woman had no time to stop. The woman, the pedestrian, and the mechanic will testify at the upcoming trial.

The pedestrian has proffered an authenticated copy of the mechanic’s text message to the woman.

The woman plans to testify that she asked the mechanic, “Is my scooter safe to ride for a while?” and that he gave her a thumbs-up in response.

The evidence rules in this jurisdiction are identical to the Federal Rules of Evidence.

Analyze whether each of these items of evidence is relevant and admissible at trial:

1. The authenticated copy of the mechanic’s text message;
2. The woman’s testimony that she asked the mechanic, “Is my scooter safe to ride for a while?”; and
3. The woman’s testimony describing the mechanic’s thumbs-up.

TRUSTS AND FUTURE INTERESTS QUESTION

Ten years ago, Settlor validly created an inter vivos trust and named Bank as trustee. The trust instrument provided that Settlor would receive all of the trust income during her lifetime. The trust instrument further provided that

Upon Settlor's death, the trust income shall be paid, in equal shares, to Settlor's surviving children for their lives. Upon the death of the last surviving child, the trust income shall be paid, in equal shares, to Settlor's then-living grandchildren for their lives. Upon the death of the survivor of Settlor's children and grandchildren, the trust corpus shall be distributed, in equal shares, to Settlor's then-living great-grandchildren.

The trust instrument expressly specified that the trust was revocable, but it was silent regarding whether Settlor could amend the trust instrument.

Immediately after creating the trust, Settlor validly executed a will leaving her entire estate to Bank, as trustee of her inter vivos trust, to "hold in accordance with the terms of the trust."

Five years ago, Settlor signed an amendment to the inter vivos trust. The amendment changed the disposition of the remainder interest, specifying that all trust assets "shall be paid upon Settlor's death to University." Settlor's signature on this amendment was not witnessed.

A state statute provides that any trust interest that violates the common law Rule Against Perpetuities "is nonetheless valid if the nonvested interest in the trust actually vests or fails to vest either (a) within 21 years of lives in being at the creation of the nonvested interest or (b) within 90 years of its creation."

Recently, Settlor died, leaving a probate estate of \$200,000. She was survived by no children, one granddaughter (who would be Settlor's only heir), and no great-grandchildren. The granddaughter has consulted your law firm and has raised four questions regarding this trust:

1. Was Settlor's amendment of the inter vivos trust valid? Explain.
2. Assuming that the trust amendment was valid, do its provisions apply to Settlor's probate assets? Explain.
3. Assuming that the trust amendment was valid, how should trust assets be distributed? Explain.
4. Assuming that the trust amendment was invalid, how should trust assets be distributed? Explain.

NEGOTIABLE INSTRUMENTS QUESTION

A chef entered into a contract with a repairman pursuant to which the repairman agreed to repair the chef's commercial oven for \$10,000. The repairman agreed to accept as payment a negotiable promissory note for \$10,000 payable two months after its issuance.

After the repairman worked on the oven, the chef gave him a \$10,000 note as payment for the work. As agreed, the note was signed by the chef as maker, was payable to the order of the repairman, was payable in two months, and fulfilled all criteria for negotiability.

The next day, the repairman sold the note to a buyer for \$9,500. To effectuate the sale, the repairman wrote "no warranties" on the back of the note, signed his name immediately below that, and handed the note to the buyer. The buyer bought the note in good faith and without knowledge of any facts relating to the work that the repairman had performed for the chef.

Later, the buyer gave the note to his niece as a gift. To effectuate the gift, the buyer handed the note to the niece but did not indorse it.

Shortly thereafter, the chef discovered that the repair work had been done improperly and the oven still did not function correctly. The chef tried repeatedly to get the repairman to return to correct the repair work, but the repairman ignored all the chef's calls.

On the note's due date, the niece contacted the chef and demanded that he pay the amount of the note to her. The chef refused and told the niece that he would not pay the note because the repairman did not properly repair the oven.

1. What are the niece's rights against the chef? Explain.
2. What are the niece's rights against the repairman? Explain.
3. What are the niece's rights against the buyer? Explain.

February 2013 MEE

▶ *ANALYSES*

Real Property

Contracts

Constitutional Law

Secured Transactions

Federal Civil Procedure

Agency

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Trusts and Future Interests

Negotiable Instruments

REAL PROPERTY ANALYSIS

(Real Property I.D.1.a, 4. & 5.)

ANALYSIS

Legal Problems

- (1) Does the tenant have a defense to the landlord's action for unpaid rent based on constructive eviction?
- (2) Does the tenant have a defense to the landlord's action for unpaid rent based on the tenant's surrender of the premises?
- (3) What, if anything, may the landlord recover from the tenant for the period after the tenant vacated the building?

DISCUSSION

Summary

Under the common law, the tenant does not have a defense to the landlord's action for unpaid rent based on constructive eviction. Constructive eviction is based on the tenant proving that (1) the landlord breached a duty to the tenant, (2) the breach caused a loss by the tenant of the substantial use and enjoyment of the premises, (3) the tenant gave the landlord adequate notice and opportunity to repair, and (4) the tenant vacated the leased premises. Here, there was no constructive eviction because, although the tenant vacated and gave the landlord adequate notice, the landlord breached no express or implied duty to the tenant to repair the premises.

The tenant does not have a defense based on the landlord's acceptance of his surrender of the premises; a landlord's retention of keys does not constitute an acceptance of the tenant's surrender unless the landlord so intended, and here, the landlord's statements to the tenant at the time of the surrender of the keys do not evidence the intent to accept the tenant's surrender.

Under the common law, a landlord has no duty to mitigate damages but also cannot sue for rents due in the future. Under this approach, the landlord can sue only for past-due rents. Using this approach, on November 1, the landlord could recover all the rent past due (i.e., rent for September and October) but could not recover for rents due in the future. However, some courts have authorized recovery for future rent minus the fair market rental value of the premises. It is thus possible that the landlord could recover damages equal to the amount of rent due from September 1 to the end of the six-year lease term (\$180,000) minus the property's fair-market rental value over that same period.

Point One (45%)

The tenant was not constructively evicted, because the landlord had no duty to repair the commercial premises that were the subject of the lease.

The landlord and the tenant entered into a term-of-years lease because the lease specified both a beginning and an ending date. HERBERT HOVENKAMP & SHELDON F. KURTZ, *THE LAW OF PROPERTY* 256 (5th ed. 2001). Although a term-of-years lease normally cannot be terminated by the tenant prior to the end of the term, a tenant may terminate a term-of-years lease if the tenant

Real Property Analysis

is constructively evicted. *See id.* at 286–88. Typically, as here, a claim of constructive eviction is made as a defense to a landlord’s action for damages or unpaid rent.

In order to establish a constructive eviction, the tenant must prove that the landlord breached a duty to the tenant, such as a duty to repair, and that the landlord’s breach caused a loss of the substantial use and enjoyment of the premises. The tenant must also show that he gave the landlord notice adequate to permit the landlord to meet his duty to the tenant and that the tenant vacated the leased premises. *Id.*; *see also* JOHN G. SPANKLING, UNDERSTANDING PROPERTY LAW § 17.04 (2d ed. 2007).

Under the common law, there was no implied duty on the part of a landlord to repair leased premises; such a duty arose only if expressly set forth in the lease. SPANKLING, *supra*, § 17.02[B]. Here, the written lease contained no term requiring the landlord to repair the air-conditioning. Even if the conversation created a lease term that the building had air-conditioning, that itself should not create a duty for the landlord to repair it.

Over the past several decades, courts have generally implied a duty to repair in *residential* leases either as part of a revised constructive eviction doctrine or based on an implied warranty of habitability. JOSEPH W. SINGER, PROPERTY 469–70 (3d ed. 2010). This shift has been justified based on the economic disparity between the typical landlord and tenant as well as the fact that residential tenants generally lack both the authority to authorize repairs to common areas of a building and the incentive to make repairs that will ultimately benefit the landlord.

However, courts have been more reluctant to imply a duty to repair in *commercial* leases, a context in which the tenant is often a valuable business and in a better position to assess and make repairs than is the landlord. *But see, e.g., Davidow v. Inwood North Professional Group*, 747 S.W.2d 373 (Tex. 1988). When courts have implied a duty to repair in a commercial lease, it is typically when the repair has been mandated by public authorities and involves work so substantial that it would not ordinarily fall within the tenant’s common law repair duty and/or the value of the repair would primarily inure to the landlord’s reversionary interest. *See Brown v. Green*, 884 P.2d 55 (Cal. 1994); Eugene L. Grant et al., *The Tenant as Terminator: Constructive Eviction in Modern Commercial Leases*, 2 THE COMMERCIAL PROPERTY LEASE ch. 15 (ABA 1997). Some courts have also permitted constructive eviction claims by commercial tenants of office buildings based on repairs required in common areas of the building. *See id.*; *Echo Consulting Services, Inc. v. North Conway Bank*, 669 A.2d 227 (N.H. 1995).

Here, the tenant is the owner of a valuable manufacturing operation and is the exclusive occupant of the building, the repair has not been mandated by public authorities, and the repair is not structural. To the contrary, the repair involves a feature of the building of unusual importance in the tenant’s manufacturing operation, and the tenant is likely far more knowledgeable than the landlord about the air-conditioning specifications necessary for the manufacture of the tenant’s product.

Based on these facts, it is unlikely that a court will find that the tenant in this case was constructively evicted. Although the tenant can show that he gave adequate notice to the landlord of the air-conditioning malfunction and vacated the premises, the lease was commercial, and it did not contain any promises or covenants by the landlord except a covenant of quiet enjoyment; a covenant of quiet enjoyment does not entail any repair obligations.

[NOTE: An examinee’s conclusion is less important than his or her demonstrated awareness of the elements of constructive eviction and the need to imply a repair duty for such a defense to be viable here. Although the implied warranty of habitability is not available to this tenant, Texas, Minnesota, and Massachusetts imply a warranty of suitability in commercial leases in limited circumstances, and an examinee might argue that this warranty should apply

here. If an examinee concludes that this warranty applies, he or she should discuss the other requirements for constructive eviction.

If the examinee wrongly concludes that the first element for a constructive eviction has been met, the examinee will then have to discuss the remaining three elements in order to conclude that the tenant can claim constructive eviction. The tenant would have a strong argument that the second element—substantial interference with the use and enjoyment of the premises—also is met. As indicated above, the landlord was aware that a functioning air-conditioning system was vital to the tenant’s manufacturing operations. The facts further indicate that the system had failed three times in the past few months. The landlord may try to argue that the malfunctions did not substantially interfere with the tenant’s use of the premises because the malfunctions caused the temperature to climb above 81 degrees for only a short period of time—3 hours, 6 hours, and 10 hours, respectively—on each occasion. The tenant will argue, however, that the landlord was aware that the tenant’s manufacturing operations could tolerate temperatures above 81 degrees for no more than 6 hours. The final malfunction exceeded that limit, destroying \$150,000 worth of the tenant’s products.

The tenant would also have a strong argument that the third element is met: notice and opportunity to cure. The tenant notified the landlord of the problem immediately upon the system’s first malfunction and did so again when it malfunctioned a second time and then a third time. The landlord might argue that there was insufficient time to cure the problem because the system corrected itself within a few hours on the first and second times. Although the malfunction lasted more than 10 hours the third time, the landlord might argue that the time period was insufficient to get a repair person on the premises. A court would be likely to find this argument unpersuasive, however, because the landlord could have attempted to correct the problem after the first and second malfunctions.

Assuming that the landlord was given sufficient notice and opportunity to cure, a court would be likely to conclude that the tenant also satisfied the final element of vacating the premises within a reasonable time. The landlord might argue that the tenant remained in the premises for almost four months after the air conditioning first failed, which would suggest that the problem was not so severe as to have constructively evicted the tenant. The tenant will argue, however, that he gave the landlord three months to cure the problem after the first two malfunctions threatened (but did not actually harm) his operations. The tenant then moved out shortly after the final malfunction caused temperatures to exceed the tolerance levels of his manufacturing operations.]

Point Two (10%)

The landlord did not accept the tenant’s surrender of the lease.

When a tenant wrongfully moves from leased premises with the intent to terminate the lease, the landlord may either accept the tenant’s surrender of the premises and terminate the lease or hold the tenant to the terms of the lease. *See HOVENKAMP & KURTZ, supra*, at 295–96. Here, the tenant’s only basis for the claim that the landlord accepted his surrender is the landlord’s retention of the keys. Many courts have considered whether a landlord’s retention of keys delivered by a tenant constitutes acceptance of surrender. The weight of the case law holds that retention of the keys alone does not constitute acceptance of surrender without other evidence showing that the landlord intended to accept the surrender. *See generally*, 49 AM. JUR. 2d, *Landlord and Tenant* § 213.

Here, the landlord’s note, saying “I repeat, the air-conditioning is not my problem. You have leased the building, and you should fix it,” strongly suggests that the landlord did not intend

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to accept the tenant's surrender. The tenant might argue that the landlord's failure to make a similar statement when the keys were sent to her a second time and she retained them evidences a change of heart. However, it is likely that a court would find that the landlord's retention of the keys represented a decision to safeguard the keys, not to accept the tenant's surrender.

[NOTE: An examinee should receive credit for arguing the other way with a well-reasoned argument.]

Point Three (45%)

Under the common law, the landlord had no duty to mitigate damages. Additionally, a landlord was not entitled to recover unpaid rents due in the future but was only entitled to recover rents in arrears at the time of the commencement of the suit. Applying the common law here, the landlord could recover \$5,000, the amount of rents due at the commencement of the suit (\$2,500 for September and the same for October). Today, some courts allow the landlord, under certain circumstances, to sue the tenant for damages (not rent) equal to the difference, if any, between the unpaid promised rent for the balance of the term (here \$175,000) and the property's fair rental value for the balance of the term.

Under the common law, because a lease was viewed as a conveyance instead of a contract, a landlord had no duty to mitigate damages resulting from a tenant's wrongful termination of a lease. A landlord could thus recover *the full value* of rents that were due and unpaid at the time of the suit. However, under the common law, a landlord could not sue a tenant for rents due in the future because there was always a possibility that the tenant might pay the rent when it was due. See SINGER, *supra* at 462. Thus, using the common law approach, on November 1, the landlord could only recover the full value of the two months' rent actually due and unpaid, i.e., \$5,000 for September and October.

Some courts have rejected the no-mitigation-of-damages rule based on efficiency concerns and society's interest in assuring that resources remain in the stream of commerce rather than lying vacant, *see id.* at 464–65, and allow landlords to sue tenants who have wrongfully terminated a lease for damages equal to the difference between the unpaid rent due under the lease and the property's fair market rental value. Other courts have abandoned the no-recovery-for-future-rent rule. These courts, responding to the fact that a tenant may well disappear or be judgment-proof by the time a lease term is concluded, have allowed a landlord to collect damages equal to the value of rent over the entire lease term minus the property's fair rental value when a tenant has wrongfully terminated a lease and unequivocally shown an intention not to return to the premises or pay future rent. Under this approach, a landlord receives approximately the same amount he would have received were there a duty to mitigate damages. See *Sagamore Corp. v. Willcutt*, 180 A. 464 (Conn. 1935).

Here, because the tenant returned the keys to the landlord and said, "I will not be returning to the building or making further rent payments," the landlord could establish abandonment and an intention not to return. It is thus possible that the landlord might recover damages in the amount of \$5,000 (for the months of September and October) plus the present value of \$175,000 minus the fair market rental value of the property over the remaining months of the lease.

CONTRACTS ANALYSIS

(Contracts II.; IV.E.)

ANALYSIS

Legal Problems

- (1) What was the legal effect of the sailor's October 31 letter to the builder?
- (2)(a) What was the legal effect of the builder's November 25 response to the sailor's October 31 letter?
- (2)(b) What was the legal effect of the sailor's refusal to take and pay for the boat on December 15?

DISCUSSION

Summary

This is a sale of goods governed by the Uniform Commercial Code. Because the sailor had reasonable grounds for insecurity about the builder's ability to deliver the boat in a timely manner when the sailor learned about the strike on October 31, the sailor was legally justified in sending the letter to the builder seeking adequate assurance of the builder's performance pursuant to the contract. The builder's failure to provide such assurance within a reasonable time operated as a repudiation of the contract. However, the builder was free to retract the repudiation before the sailor either cancelled the contract or materially changed position in reliance on the builder's repudiation. The builder retracted the repudiation when he informed the sailor that the workers were back and that the boat would be delivered by the date stipulated in the parties' contract. Because the sailor had taken no action in response to the original repudiation, he no longer had the right to cancel the contract with the builder. The sailor's subsequent statement that "our contract is over" may have constituted repudiation by the sailor. In any event, when the sailor failed to perform on December 15, that constituted breach.

Point One (35%)

Because the sailor had reasonable grounds for insecurity with respect to the builder's performance, the sailor's letter to the builder was a justified demand seeking assurance of the builder's performance under the contract; failure of the builder to provide such assurance within a reasonable time constituted repudiation of the contract.

The sailor was legally justified in sending the letter to the builder on October 31. Contract parties are entitled to expect due performance of contractual obligations and are permitted to take steps to protect that expectation. UCC § 2-609 states that "[w]hen reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance" Here, the sailor learned on October 31 that the builder's workers were on strike. This gave the sailor reasonable grounds for insecurity about the builder's ability to complete performance on time and thus gave the sailor the right to seek adequate assurance from the builder. Because the sailor's demand for assurance was justified, the builder was required to provide assurance that was adequate under the circumstances within a reasonable time (not to exceed 30 days) or be held to have repudiated the contract. UCC § 2-609(4).

Point Two(a) (30%)

The builder did not, within a reasonable time, provide the sailor adequate assurance of due performance; this failure to provide assurance constituted a repudiation of the contract.

Because the sailor, with legal justification (*see* Point One), demanded from the builder assurance of due performance, the builder's failure to provide such assurance within a reasonable time was a repudiation of their contract. *See* UCC § 2-609(4) ("After receipt of a justified demand[,] failure to provide within a reasonable time not exceeding thirty days . . . assurance of due performance . . . is a repudiation of the contract."). On October 31, the sailor requested that the builder provide adequate assurance regarding the completion of the boat by December 15. The builder did not respond to the sailor's letter until November 25—nearly a month later. Even if that response had been given in a reasonable time, it nonetheless did not provide assurance of due performance. It simply stated, "I'm sorry about the strike, but it is really out of my hands. I hope we settle it soon so that we can get back to work." Therefore, the builder's November 25 response did not provide adequate assurance in response to the sailor's justified request. Thus, the builder had repudiated the contract.

Point Two(b) (35%)

Although the builder repudiated the contract with the sailor, the builder probably retracted that repudiation on December 3 and the sailor was no longer entitled to cancel their contract. Thus, the sailor's failure to perform the sailor's obligations under the contract constituted a breach.

The builder's failure to provide adequate assurance of performance constituted a repudiation of their contract (*see* UCC § 2-609(4)), but the builder was free to retract that repudiation until the sailor cancelled the contract or materially changed his position or indicated by communication or action that the sailor considered the repudiation to be final. *See* UCC § 2-611(1) ("Until the repudiating party's next performance is due, he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.").

Here, the facts state that before the builder's December 3 telephone call to the sailor, the sailor did nothing in response to the builder's repudiation, such as contracting with a third party for a boat. The builder's December 3 call, informing the sailor that the boat would be timely delivered, probably constituted a retraction of the repudiation because it clearly indicated to the sailor that the builder would be able to perform. UCC § 2-611(2). Thus, after being so informed, the sailor did not have the right to treat their contract as cancelled. UCC § 2-611(3). Accordingly, the sailor's failure to perform the sailor's obligations under the contract by taking the boat and paying for it constituted a breach of the contract.

CONSTITUTIONAL LAW ANALYSIS

(Constitutional Law IV.A., F.2.b. & e.)

ANALYSIS

Legal Problems

- (1) Does AutoCo's operation of a "company town" result in its actions counting as those of the state for purposes of constitutional analysis?
- (2) Does the expulsion of a schoolchild for failure to recite the Pledge of Allegiance violate the First Amendment as applied through the Fourteenth Amendment?
- (3) Does the arrest of a pamphleteer in connection with violation of an anti-littering rule, where the littering is done by the recipients of leaflets distributed by the pamphleteer, violate the First Amendment as applied through the Fourteenth Amendment?

DISCUSSION

Summary

The First Amendment, as applied through the Fourteenth Amendment, applies only to state action. It does not typically govern private actors. However, courts have found state action where the private actor has exercised a "public function," such as running a privately owned "company town," as AutoCo has done here. Thus, First Amendment protections apply. By requiring the son to participate in a mandatory Pledge of Allegiance ceremony, AutoCo has compelled the expression of political belief in violation of the First Amendment as applied through the Fourteenth Amendment. The father's arrest in connection with breaching the anti-litter rule also violated the First Amendment as applied through the Fourteenth Amendment. Although state actors can regulate the incidental effects of speech on the public streets on a content-neutral basis, this power is limited and cannot extend to punishing a distributor of literature because of littering by third parties.

Point One (30%)

AutoCo's operation of a company town (including a school) makes it a state actor under the public function strand of the state action doctrine.

The individual rights protections of the Constitution apply only where there is "state action"—either direct action by the government or some action by a private party that is fairly attributable to the government. As a general rule, the actions of a private company like AutoCo or of a private school like the school operated by AutoCo would not constitute state action, and the protections of the Constitution (in this case the First Amendment) would not apply.

However, there are situations in which the actions of a private actor are attributed to the state. One such situation is when the private actor undertakes a public function. There are not many bright-line rules in the Supreme Court's state action doctrine, but one of them is this: Where a private actor undertakes a "public function," the Constitution applies to those actions. Where a corporation operates a privately owned "company town" that provides essential services typically provided by a state actor, the public function doctrine applies and the Constitution

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binds agents of the town as if they were agents of the government. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946). Here, AutoCo does more than own the town; it provides security services, fire protection, sanitation services, and a school. Thus the actions of AutoCo constitute state action and are governed by the Fourteenth Amendment.

Point Two (35%)

The son's expulsion for failure to recite the Pledge of Allegiance violates the First Amendment as applied through the Fourteenth Amendment as a compelled expression of political belief.

As explained in Point One, the First Amendment applies to the school as a state actor.

Although children in public schools (and in schools subject to the First Amendment like the Oakwood school) have some First Amendment rights, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), schools have greater leeway to regulate the speech of students and teachers than the state would have outside the school context. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007). However, the Supreme Court has long held that public schools may not force their students to participate in a flag salute ceremony when it offends the political or religious beliefs of the students or their families. *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a mandatory public school flag salute ceremony); *see also Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled expression of political belief on state-issued license plates).

In this case, the school requires its students to participate in a flag salute and Pledge of Allegiance ceremony and punishes them when they refuse to participate. Pursuant to this policy, the school has expelled the son. This expulsion violates the First Amendment ban on compelled expression.

Point Three (35%)

Because the father was distributing leaflets in a traditional public forum, his trespass arrest violated the First Amendment as applied through the Fourteenth Amendment.

As explained in Point One, AutoCo is treated as a state actor. Thus, Oakwood's commercial district is treated as government-owned property for purposes of the First Amendment. Thus, the leafleting here is subject to the First Amendment because it is an expressive activity. *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1939). When expression takes place on government-owned property, government regulation of the expression is assessed under the public forum doctrine. Public streets and sidewalks have long been held to be the classic example of a "traditional public forum" open to the public for expression. *Hague v. CIO*, 307 U.S. 496, 515–16 (1939). Because the father was distributing leaflets while standing on a street corner in the commercial district, his expressive activity occurred in a traditional public forum.

When a state tries to regulate expressive activity in a traditional public forum, it is prohibited from doing so based on the expressive activity's content unless its regulation is narrowly tailored to achieve a compelling governmental interest ("strict scrutiny"). In this case, however, AutoCo is regulating the father's expressive activity on the ostensibly neutral ground that his expressive activity has produced litter and made the street unsightly. When a state tries to regulate expressive activity without regard to its content, intermediate scrutiny applies. Under intermediate scrutiny, the true purpose of the regulation may not be the suppression of ideas (if so, then strict scrutiny applies), the regulation must be narrowly tailored to achieve a significant

governmental interest, and it must leave open ample alternative channels for expressive activity. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Here, the application of the ordinance to the father will fail for two reasons. First, the Supreme Court has held that the government's interest in keeping the streets clean is insufficient to ban leafleting in the public streets, as the government power to regulate with incidental effects on public sidewalk speech is very limited. *See, e.g., Schneider*, 308 U.S. at 162 (leafleting/littering). Second, the regulation (a blanket ban on distribution that results in littering) is not narrowly tailored to protect expression. A narrowly tailored alternative would be prosecution only of people who litter. Moreover, the effect of the littering rule is likely to be a ban on all leafleting, thus eliminating an entire class of means of expression. This raises the possibility that there are not "ample alternative channels of communication" open to the father as required under the Court's standard of review for content-neutral regulation of speech.

[NOTE: Some examinees might argue that this is a "time, place, and manner" restriction, and that AutoCo might have greater latitude to regulate the public sidewalks under this theory. This argument is incorrect for two reasons. First, the Supreme Court has held that the power to regulate speakers through littering laws is very limited, for the reasons given and in the cases cited above. But more generally, a "time, place, and manner" restriction involves the shifting of speech from one time and place to another or to another manner; here, there is no shifting, but a direct punishment for expressive activity (albeit one couched in content-neutral terms). In addition, some examinees might read the ordinance to be, in effect, a total ban on leafleting, since most leafleting will produce some litter. Those examinees might note that the Court has required total bans on an entire mode of expression to satisfy strict scrutiny and analyze the father's prosecution here accordingly. *See United States v. Grace*, 461 U.S. 171, 177 (1983) (invalidating ban on display of signs on public sidewalks surrounding U.S. Supreme Court; "[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest").]

SECURED TRANSACTIONS ANALYSIS

(Secured Transactions II.D., E.; IV.A., B., C.)

ANALYSIS

Legal Problems

- (1) Is a purchase-money security interest in consumer goods perfected even though there has been no filing of a financing statement?
- (2) Does a person who buys consumer goods for personal use take those goods free of a prior perfected purchase-money security interest in the goods?
- (3) Does a person who receives consumer goods as a gift take those goods subject to a prior perfected security interest in them?

DISCUSSION

Summary

The retailer's security interest in the bicycles was perfected, even though no financing statement was filed, because it was a purchase-money security interest in consumer goods. A purchase-money security interest in consumer goods is automatically perfected upon attachment.

The buyer is not subject to the retailer's security interest in the bicycle that the buyer bought from the man. Because the bicycle was consumer goods in the hands of the man, and the retailer never filed a financing statement covering the bicycle, the retailer's security interest is not effective against someone, like the buyer, who bought the bicycle for value, without knowledge of the retailer's security interest, and for personal use.

On the other hand, the retailer's security interest continues in the bicycle given to the friend, because the friend did not give value for the bicycle or buy it in the ordinary course of business.

Point One (35%)

The retailer's security interest in the bicycles attached on June 1. Because this interest was a purchase-money security interest in consumer goods, it was automatically perfected when it attached.

The retailer's security interest in the bicycles attached on June 1 when the man bought the bicycles (acquiring rights in the collateral), signed a security agreement containing a description of the collateral, and received value from the retailer (by being given credit with which to purchase the bicycles). UCC § 9-203(a) & (b).

Despite the retailer's failure to file a financing statement, its security interest was perfected. Pursuant to UCC § 9-309(1), a security interest is automatically perfected upon attachment if the goods are "consumer goods" and the security interest is a "purchase-money security interest."

In this case, the bicycles sold by the retailer to the man were consumer goods at the time of sale. The bicycles were "goods" because they were "movable when a security interest

attaches.” UCC § 9-102(a)(44). They were also consumer goods because they were “bought for use primarily for personal, family, or household purposes.” UCC § 9-102(a)(23).

The retailer’s security interest in these consumer goods was also a “purchase-money security interest.” A purchase-money security interest is an interest that secures a debt that was incurred in order to “enable the debtor to acquire rights in or the use of the collateral.” UCC § 9-103(a), (b)(1). Here, the man incurred an obligation to the retailer to purchase the bicycles, so the security interest he gave the retailer to secure that obligation was a purchase-money security interest.

Because the retailer’s security interest was a purchase-money security interest in consumer goods, it was automatically perfected on June 1, when the interest attached to the bicycles.

Point Two (35%)

The buyer took the bicycle free of the retailer’s security interest because (i) the retailer did not file a financing statement covering the bicycle, (ii) the bicycle was “consumer goods,” and (iii) the buyer bought the bicycle for value, without knowledge of the retailer’s security interest, and for personal use.

A security interest continues in collateral, even after a sale or other disposition of that collateral, unless the creditor authorized the disposition “free of the security interest” or another Article 9 exception applies. UCC §§ 9-201(a) and 9-315(a)(1).

However, a buyer of goods, like the buyer here, can take free of a prior security interest in those goods under certain circumstances. *See* UCC §§ 9-317(b) (buyers who give value and receive delivery of goods without knowledge of an unperfected security interest in the goods) and 9-320(a) & (b) (buyer in ordinary course of business; buyer of consumer goods in a consumer-to-consumer transaction who gives value). In this case, the retailer’s security interest was perfected when the buyer purchased the bicycle, so UCC § 9-317(b) does not protect the buyer. The buyer also is not a protected “buyer in ordinary course of business” because he did not purchase from a person who is in the business of selling bicycles. *See* UCC § 1-201(b)(9).

The buyer can, however, qualify for the protection of UCC § 9-320(b). That section provides that a buyer of goods from a person who used them for personal, family, or household purposes takes free of a perfected security interest in the goods if (1) the buyer had no knowledge of the security interest, (2) the buyer gave value for the goods, (3) the buyer purchased the goods primarily for personal, family, or household purposes, and (4) the purchase occurred before the filing of a financing statement covering the goods.

The buyer met all of these criteria. The man used the bicycle for personal purposes. The buyer purchased the bicycle from the man, and the buyer had no knowledge of the retailer’s security interest. The buyer gave value (\$400) for the bicycle, and he bought it “primarily for personal, family, or household purposes,” as he planned to use it for recreation, which is a personal rather than a business use. Finally, no financing statement had been filed. Therefore, under UCC § 9-320(b), the buyer took free of the retailer’s security interest.

Point Three (30%)

The retailer’s security interest continues in the bicycle that the man gave to the friend. Thus, the retailer can recover the bicycle from the friend because the friend did not give value for the bicycle or buy it in the ordinary course of business.

Secured Transactions Analysis

As noted in Point Two, the retailer did not authorize the man to dispose of the bicycle. Consequently, the retailer's security interest continued in the bicycle even after the man transferred ownership of the bicycle to the friend. *See* UCC §§ 9-201(a) and 9-315(a)(1). The retailer's security interest in the bicycle will be effective against the friend unless some other provision of Article 9 allows the friend to take the bicycle free of that security interest.

Unfortunately for the friend, there is no Article 9 provision that allows him to take free of the retailer's interest. The friend's basic problem is that he is not a buyer of the bicycle—he received the bicycle as a gift and did not give value for it. Thus, the friend is not protected by any of the applicable exceptions. *See* UCC §§ 9-317(b) (protecting *buyers* who give value for goods subject to an unperfected security interest), 9-320(a) (protecting *buyers* in ordinary course of business), and 9-320(b) (protecting *buyers* of consumer goods who give value).

In short, the retailer's security interest continues in the bicycle that the man gave to the friend. The friend took the bicycle subject to that security interest.

FEDERAL CIVIL PROCEDURE ANALYSIS

(Federal Civil Procedure VI.E.)

ANALYSIS

Legal Problems

- (1) Does a judgment in a prior action preclude a nonparty from suing the same defendant on a closely related claim when the nonparty and the original plaintiff are in a family relationship?
- (2) Does a judgment rendered in an earlier action preclude a nonparty from litigating an issue that was actually decided in the first suit?
- (3) May a nonparty to an earlier action invoke the judgment in that action to preclude a party to the prior action from relitigating an issue that the party had a full and fair opportunity to litigate in the earlier action?

DISCUSSION

Summary

Pursuant to the doctrines of claim preclusion (*res judicata*) and issue preclusion (collateral estoppel), a judgment is binding on the parties thereto. In the absence of privity, nonparties to a prior suit cannot be bound by a judgment rendered in their absence. Thus, in the absence of privity, a nonparty to the first suit is not precluded from presenting her claim in a second suit even if it is factually related to the claims and defenses presented in the first suit; nor is she bound by determinations of issues made in the first suit. A family relationship, without more, does not support a finding of privity. For this reason, Mother, as a nonparty, is not bound by the judgment in the Son-Driver action. She may bring her separate claim for damage to her car, and she is not precluded from litigating the question of whether she was negligent in the maintenance of her car.

Driver, on the other hand, could be precluded from relitigating the issue of her negligence pursuant to the doctrine of non-mutual issue preclusion (also called non-mutual offensive collateral estoppel), which allows a nonparty to a prior action to invoke issue preclusion to prevent a party to that prior action from relitigating determinations of issues made therein. However, Mother may be prevented from invoking non-mutual collateral estoppel in this case because she could easily have joined her claim in the prior action but did not do so.

[NOTE: Federal common law governs the preclusive effect of a judgment rendered by a federal court sitting in diversity. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). But the *Semtek* Court concluded that federal common law, in this context, incorporates the preclusion law of the state in which the rendering federal court sits (unless the state law is incompatible with federal interests), *id.* at 508–09. Thus, State A's preclusion law determines the preclusive effect of the judgment rendered in Son's suit against Driver. The problem says that State A preclusion law is identical to federal preclusion law, so the following analysis utilizes general principles of preclusion drawn from Supreme Court case law (announcing federal preclusion rules) and the Restatement (Second) of Judgments.]

Point One (35%)

Under the doctrine of claim preclusion, the judgment rendered in the first action does not preclude Mother, a nonparty, from suing Driver for the damage to her car because the judgment binds only parties or those in privity with them, and Mother and Son are not in privity.

Driver may contend that the doctrine of claim preclusion (*res judicata*) precludes Mother from presenting a claim arising from the same nucleus of facts that was presented in the first action brought by Son. According to the doctrine of claim preclusion, “when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’” *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted).

However, the doctrine of claim preclusion does not apply to Mother on the facts of this problem. First, Mother was not a party to the earlier case. “It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982). This rule reflects our “deep-rooted historic tradition that everyone should have his own day in court.” *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citation omitted) (superseded by statute on other grounds). Since Mother was not a party to the first suit, she is not bound by the judgment unless an exception to the general rule applies.

Mother might be bound by the prior judgment if she were considered to have been sufficiently in privity with Son that Son represented her interests in that action. “A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party.” RESTATEMENT (SECOND) OF JUDGMENTS § 41(1). But there is no suggestion in the facts of the problem that Son, who is an adult, purported to represent Mother’s interests in the first suit. “[C]lose family relationships are not sufficient by themselves to establish privity with the original suit’s party, or to bind a nonparty to that suit by the judgment entered therein” *Cuauhtli v. Chase Home Finance LLC*, 308 Fed. Appx. 772, 773 (5th Cir. 2009) (citation omitted); *accord* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4459 (2d ed. 2002).

In *Taylor v. Sturgell*, *supra*, the Supreme Court identified other special circumstances in which nonparties may be bound by a prior judgment—when a nonparty consents to be bound; when a nonparty is in a pre-existing substantive legal relationship with a party (such as preceding and succeeding property owners); when a nonparty assumed control of the prior litigation; when a party seeks to relitigate through a proxy; or where a special statutory scheme seeks to foreclose successive litigation by nonparties. *See Taylor*, 553 U.S. at 893–95. None of these circumstances exists here.

Because Mother was not a party to the first suit and is not in privity with Son, who is an adult, the judgment in the first action does not preclude her from bringing her own claim against Driver.

Point Two (35%)

Under the doctrine of issue preclusion, the judgment rendered in the first action does not preclude Mother, a nonparty, from litigating the issue of her negligence in maintaining her car’s

brake lights because the judgment binds only parties or those in privity with them, and Mother and Son are not in privity.

By its affirmative response to a special interrogatory, the jury in the first action expressly concluded that “Mother negligently failed to ensure that the brake lights on her car were in proper working order.” Driver may attempt to invoke the doctrine of issue preclusion to preclude Mother from relitigating this issue in the second action.

[I]ssue preclusion arises in a second action on the basis of a prior decision when the same ‘issue’ is involved in both actions; the issue was ‘actually litigated’ in the first action, after a full and fair opportunity for litigation; the issue was ‘actually decided’ in the first action, by a disposition that is sufficiently ‘final,’ ‘on the merits,’ and ‘valid’; it was necessary to decide the issue in disposing of the first action, and . . . the later litigation is between the same parties or involves nonparties that are subject to the binding effect or benefit of the first action Once these requirements are met, issue preclusion is available not only to defend against a demand for relief, but also as offensive support for a demand for relief. Issue preclusion, moreover, is available whether or not the second action involves a new claim or cause of action.

18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416 at 392–93 (2d ed.); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

Here, several of the elements necessary for issue preclusion are present. The same issue is involved in both actions—the issue of Mother’s negligence in failing to maintain the brake lights on her car. That issue was actually litigated in the first action and decided by the jury. There is nothing to suggest anything less than a full and fair opportunity to litigate. The judgment disposing of the issue was final.

Nevertheless, the judgment will not preclude Mother from relitigating the issue for two reasons. First, Mother was not a party to the first action and, as explained above, Mother and Son are not in privity. Therefore, she cannot be denied an opportunity to litigate the issue of her negligence. Second, it does not appear that the jury’s decision as to Mother’s negligence was necessary to the prior judgment against Driver. Nothing suggests that the finding on Mother’s negligence had any bearing on the outcome of the first action.

Point Three (30%)

Under the doctrine of non-mutual issue preclusion, the judgment rendered in the first action might preclude Driver from relitigating the issue of her negligence. However, Driver has a strong argument that such a result would be inconsistent with the policy against offensive use of non-mutual estoppel when the non-party plaintiff easily could have joined as a plaintiff in the first action.

Because Son already convinced the jury in the first action that “Driver was negligent in the operation of her vehicle,” Mother may wish to invoke the doctrine of non-mutual issue preclusion to prevent Driver from relitigating the question of her negligence. As noted above, “issue preclusion arises in a second action on the basis of a prior decision when the same ‘issue’ is involved in both actions; the issue was ‘actually litigated’ in the first action, after a full and fair opportunity for litigation; the issue was ‘actually decided’ in the first action, by a disposition that is sufficiently ‘final,’ ‘on the merits,’ and ‘valid’; it was necessary to decide the issue in disposing of the first action” 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416 at 392 (2d ed.); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27.

Here, these basic requirements for issue preclusion are met. First, the same issue is involved in both suits: whether Driver was negligent in the operation of her car. Second, this issue was actually litigated and decided in the first action; the jury answered a special interrogatory raising this very question. There is nothing to suggest that Driver lacked a full and fair opportunity to litigate the issue. Since a judgment was rendered against Driver for the injuries Son sustained as a result of Driver's negligence, resolution of the issue was necessary to dispose of the first action. Driver was a party to the first action, so she may be bound by the judgment.

[NOTE: Traditionally, issue preclusion required mutuality—both the party asserting issue preclusion and the party against whom issue preclusion was asserted were bound by the prior judgment. Under the traditional mutuality rule, Mother could not assert issue preclusion against Driver because Mother would not be bound by the judgment if Driver sought to rely on it. *See* Point One. There is no mutuality between Mother and Driver with respect to the prior judgment.

This traditional mutuality requirement has been abandoned in most jurisdictions. The Supreme Court rejected a strict mutuality requirement in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (non-mutual defensive collateral estoppel used by a defendant to preclude a plaintiff from relitigating a claim the plaintiff previously litigated), and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (non-mutual offensive collateral estoppel used by a plaintiff to preclude a defendant from relitigating a claim the defendant previously litigated). In *Parklane Hosiery*, the Court concluded (as a matter of federal preclusion law) that trial courts should have “broad discretion” to determine whether or not to permit a plaintiff to invoke non-mutual issue preclusion. “The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.” *Id.* at 331.

The *Parklane Hosiery* decision identified a number of circumstances that might make it unfair to allow a plaintiff to invoke non-mutual issue preclusion (non-mutual offensive collateral estoppel in the traditional terminology) against a defendant. In particular, the *Parklane Hosiery* court suggested that issue preclusion may not be appropriate if the plaintiff in the second action “could easily have joined in the earlier action.” *Id.* Prohibiting plaintiffs from using non-mutual estoppel under such circumstances would promote judicial efficiency by encouraging plaintiffs to join the prior action. It would also discourage plaintiffs from staying out of prior litigation in order to secure, in effect, two bites at the apple: using the prior litigation offensively if the defendant loses and forcing the defendant to litigate a second time if the defendant wins the prior action.

An exceptional exam answer might therefore argue that non-mutual issue preclusion should be denied on these facts. Son and Mother both reside in State A; since they are related, they know each other well, and Son was driving Mother's car when the accident occurred. They could have sued together, and Rule 20 of the Federal Rules of Civil Procedure would have authorized joinder of their claims because those claims arose from the same transaction or occurrence and raised a common question of law or fact. FED. R. CIV. P. 20(a). The facts do not suggest that Mother had any reason not to join Son's suit other than a desire to see how Son's action concluded before bringing her own claim. *Cf. Nations v. Sun Oil Co. (Del.)*, 695 F.2d 933, 938 (5th Cir. 1983) (concluding that plaintiff “was entitled to await the development of his injuries and their predictable consequences”). Because it appears that Mother may be a “wait-and-see” plaintiff who could easily have joined the original action, a trial court might disallow, as a matter of discretion, her use of non-mutual issue preclusion.]

AGENCY ANALYSIS

(Agency I.; II.)

ANALYSIS

Legal Problems

- (1) Is the principal or the agent, or both, liable on contracts with a third party when the principal is an “undisclosed principal”?
- (2) Is the principal or the agent, or both, liable on contracts with a third party when the principal is “partially disclosed” or an “unidentified principal”?
- (3) Is the principal or the agent, or both, liable on contracts with a third party for the purchase of goods when the agent exceeded his authority but the principal nonetheless accepts the goods?

DISCUSSION

Summary

The agent, but not the owner, is liable to the basket manufacturer because the owner is an undisclosed principal and the agent acted without actual or apparent authority. Both the agent and the owner, however, are liable on the burner contract because the owner is an unidentified principal and the agent had apparent authority to enter into that contract. With respect to the solar cells contract, whether the owner is liable depends upon whether a court would follow the Second or Third Restatement of Agency, which take different positions on the effect of the ratification of a contract by an undisclosed principal. Under either, the agent would also be liable on the contract, as he was a party to the contract.

[NOTE: The contracts that are the subject of this question are contracts for the sale of goods and, therefore, are governed by Article 2 of the Uniform Commercial Code. Article 2, however, does not contain agency rules. Accordingly, common law concepts of agency are applicable. UCC § 1-103(b).]

Point One (35%)

The agent, but not the owner, is liable to the basket manufacturer. The agent had no actual authority to enter into the contract to buy aluminum baskets, and because the owner was an undisclosed principal, the manufacturer had no reason to believe that the agent had apparent authority. Furthermore, the manufacturer had no reason to believe that the agent was not contracting for his own benefit.

An agent acting on behalf of a principal can bind the principal to contracts if the agent has either actual or apparent authority. An agent has actual authority when contracting on behalf of his principal if he “reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.” RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006). Here, the agent was told to buy only wicker baskets, not aluminum baskets. Thus, when he contracted with the basket manufacturer to buy aluminum baskets, he had no actual authority to do so.

Agency Analysis

An agent acts with apparent authority “when a third party [with whom the agent acts] reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” *Id.* § 2.03. Here the owner notified basket manufacturers that she or her agent might contact them to purchase baskets, but that notification did not specifically name the agent or any other person as the owner’s agent. Furthermore, the basket manufacturer had no prior dealings with the agent or the owner or any reason to think that the agent was acting for the benefit of anyone but himself. Thus, there is no basis to conclude that the basket manufacturer thought that the agent had apparent authority to act for the owner.

Generally, when an agent acts on behalf of an undisclosed principal and the agent lacks authority to enter into the contract, the agent is liable on the contract as a party to the contract, but the principal is not liable. This rule is consistent with the third party’s expectations. “The third party expected the agent to be a party to the contract because the agent presented the deal as if he were acting for himself. Moreover, if the third party is unaware of the principal’s existence, the third party must be relying on the agent’s solvency and reliability when entering into the contract.” *See* ROBERT W. HAMILTON, JONATHAN R. MACEY & DOUGLAS K. MOLL, CORPORATIONS, INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 34 (11th ed. 2010). *See also* RESTATEMENT (THIRD) OF AGENCY § 6.03, cmt. c. Furthermore, because the third party has no idea that the agent is acting or is seemingly acting on behalf of another, there is no reason to believe that the third party would be expecting an undisclosed principal to be liable on the contract. *Id.*

Point Two (35%)

Because the owner is an unidentified (as opposed to undisclosed) principal, both she and the agent (as a party to the contract) probably are liable on the contract with the burner manufacturer.

When the agent contracted with the burner manufacturer, he did not have actual authority to do so, as the owner had expressly restricted the agent’s authority to purchase only burners with “whisper technology.” *See* Point One. However, the agent may have had apparent authority to buy burners without whisper technology.

An agent acts with apparent authority “when a third party [with whom the agent acts] reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006). The owner indicated that an agent might contact the burner manufacturer. The notice contained no restriction regarding the type of burners that the agent was authorized to purchase. The facts indicate that burner manufacturers regularly receive such notices.

Although the agent told the burner manufacturer that he represented a well-known hot-air balloon operator, he did not disclose the owner’s name. Thus, the owner was a partially disclosed or unidentified principal. *See* RESTATEMENT (SECOND) OF AGENCY § 4(2) (1958) (using term “partially disclosed principal”); RESTATEMENT (THIRD) OF AGENCY § 1.04(2)(c) (2006) (using term “unidentified principal”). An agent for a partially disclosed principal may have apparent authority. RESTATEMENT (SECOND) OF AGENCY § 159 cmt. e (1958). Based upon (1) the notice sent by the owner, (2) the agent’s revelation that he was acting as an agent, and (3) the fact that burner manufacturers regularly receive such notices and sell to agents, the manufacturer may argue that it reasonably and actually believed that the agent was authorized to purchase burners without whisper technology. The manufacturer may also argue that because the agent revealed that he was an agent, his listing of the owner’s address as the delivery address connects the agent to the notice given by the owner. Arguably this distinguishes the burner contract from the basket

contract. Here, there is a strong case to support the conclusion that the agent had apparent authority; if he did, then the owner is liable to the burner manufacturer.

The agent also is liable as a party to the contract because he did not fully disclose his agency relationship. Although he told the burner manufacturer that he represented a well-known hot-air balloon operator, he did not disclose the owner's name. Generally even an authorized agent of a partially disclosed or unidentified principal is liable as a party to a contract with a third person. RESTATEMENT (SECOND) OF AGENCY § 321 (1958) ("unless otherwise agreed"); RESTATEMENT (THIRD) OF AGENCY § 6.02(2) (2006) ("unless the agent and the third party agree otherwise").

Point Three (30%)

Under the Second Restatement of Agency, the owner is not liable on the contract for solar cells because the agent did not have actual or apparent authority and the owner, as an undisclosed principal, cannot ratify the contract. Under the Third Restatement, the owner could be liable, as she ratified the contract. Under either Restatement, the agent is liable as a party to the contract.

The owner is not liable to the solar cell manufacturer for breach of the contract for the solar cells because the agent had no actual or apparent authority to purchase solar cells on the owner's behalf, and the owner, under the Second Restatement of Agency, did not ratify the contract with knowledge of the material facts. Thus, she is not liable as a ratifier of the contract.

The facts state that the agent had authority to purchase only propane fuel tanks. In addition, he had no apparent authority to purchase solar cells. The owner made no manifestations to the solar cell manufacturer that would lead a reasonable person in the manufacturer's position to believe that the agent had the authority to bind the owner to a contract to purchase solar cells. In fact, the agent made no manifestations at all to the solar cell manufacturer. Unlike with the basket manufacturer and the burner manufacturer, the owner did not notify the manufacturer of solar cells that an agent *might* contact it to purchase solar cells. In addition, the solar cells were delivered to the agent and not to the owner's address. In sum, the manufacturer was unaware of any relationship between the owner and the agent. As to the solar cell manufacturer, the owner is an undisclosed principal. There can be no apparent authority in the case of an undisclosed principal because there are no manifestations from the principal to the third person. *See* RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1958) ("there can be no apparent authority created by an undisclosed principal"); RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. f (2006) ("apparent authority is not present when a third party believes that an interaction is with an actor who is a principal").

The owner also did not ratify the contract. Although the owner used the solar cells, generally a principal cannot ratify an unauthorized transaction with a third person "unless the one acting purported to be acting for the ratifier." RESTATEMENT (SECOND) OF AGENCY § 85(1) (1958).

The result differs under the Third Restatement, which expressly rejects the Second Restatement on this issue. The Restatement (Third) of Agency § 4.03 (2006) states, "A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf." According to comment b, "an undisclosed principal may ratify an agent's unauthorized act." Under the Restatement (Third) of Agency rule, the owner probably ratified the transaction. The agent clearly acted on the owner's behalf, and in addition, the owner's conduct in using the solar cells "justifies a reasonable assumption that [she] is manifesting assent that the act shall affect [her] legal relations." *See id.* § 4.01(2).

Agency Analysis

The agent also is liable to the solar cell manufacturer for breach of the contract for the solar cells because he is a party to the contract. The facts indicate that the agent never told the solar cell manufacturer that he represented the owner or any other principal. Consequently, *even if* the agent were authorized (which, as discussed above, he is not), he would be liable as a party to the contract. *See* RESTATEMENT (SECOND) OF AGENCY § 322 (1958); RESTATEMENT (THIRD) OF AGENCY § 6.03(2) (2006). Here, he has no authority or apparent authority and is liable as a party to the contract.

The agent would also be liable under the Third Restatement. Under Restatement (Third) of Agency § 4.02(1) (2006), ratification generally relates back and the transaction is treated as if it were authorized at the time of the transaction. However, this does not relieve the agent of an undisclosed principal who ratifies an unauthorized transaction of liability under the ratified contract. *See id.* § 6.03(2) (authorized agent for undisclosed principal is a party to the contract) and § 4.03 cmt. b (“An undisclosed principal’s ratification does not eliminate the agent’s liability to the third party on the transaction . . .”).

[NOTE: An examinee may discuss the concept of inherent agency power. This concept is recognized by the Restatement (Second) of Agency § 8 A (1958), but the concept is not used in the Restatement (Third) of Agency (2006). Here, there are no facts to support that the agent had inherent authority.

As to contracts with agents for partially disclosed principals (e.g., the contract for the burners), the basic question is whether the acts done “usually accompany or are incidental to transactions which the agent is authorized to conduct.” RESTATEMENT (SECOND) OF AGENCY § 161 (1958). If so, the principal is bound if the other party “reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.” *Id.* The purchase of burners without whisper technology was not authorized, nor was it incidental to an authorized transaction. Therefore, there should not be inherent agency power.

As to contracts on behalf of undisclosed principals (e.g., the other two contracts), the basic question is whether the acts done are usual or necessary in the transactions the agent is authorized to transact. RESTATEMENT (SECOND) OF AGENCY § 194 (1958). The other two contracts seem fundamentally different from the authorized transactions. Therefore, there should not be inherent agency power.

Only minimal credit should be given for discussion of inherent agency power.]

EVIDENCE ANALYSIS

(Evidence H.A.; V.A., B., E., F., J., K.)

ANALYSIS

Legal Problems

- (1) Is the authenticated copy of the mechanic's text message relevant and admissible?
- (2) Is the woman's question, "Is my scooter safe to drive for a while?" relevant and admissible?
- (3) Is the woman's testimony describing the mechanic's thumbs-up relevant and admissible?

DISCUSSION

Summary

The mechanic's text message to the woman is relevant to whether (1) the woman lost control of the scooter due to its defective brakes, (2) the woman knew that the brakes needed repair, and (3) it was negligent for the woman to drive the scooter knowing that its brakes needed repair.

The mechanic's text message is hearsay if it is offered by the pedestrian to prove that the scooter's brakes needed repair. However, it fits the hearsay exception for present sense impressions and probably also fits the exception for business records. The mechanic's text message is not hearsay if it is instead offered by the pedestrian to prove the woman's state of mind (i.e., that she had notice that her brakes needed repair).

The woman's question to the mechanic and his response are also relevant to whether the brakes caused the accident and whether the woman was negligent. The question is not hearsay because the woman did not make an assertion.

The mechanic's thumbs-up response is nonverbal conduct intended by the mechanic as an assertion and is therefore an out-of-court statement. If the woman offers the mechanic's statement to prove that the scooter was actually safe to ride, the woman's testimony about the statement is hearsay.

However, the mechanic's statement is not hearsay if it is offered by the woman to prove her state of mind. Therefore, the woman's question and the mechanic's response are admissible to prove the woman's state of mind.

Point One(a) (20%)

The mechanic's text message to the woman should be admitted because it is relevant.

Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence." FED. R. EVID. 401. "Relevant evidence is admissible," unless it is inadmissible pursuant to some other rule. FED. R. EVID. 402.

The mechanic's text message to the woman, "When you pick up your scooter, you need to schedule a follow-up brake repair. We'll order the parts," is relevant for two reasons. First, this evidence has some tendency to make it more probable that the brakes malfunctioned and

Evidence Analysis

caused the accident. Second, it has some tendency to make it more probable that the woman was negligent in riding her scooter after being told by the mechanic that it required further repair.

Point One(b) (30%)

The mechanic's text message fits either the hearsay exception for present sense impressions or the exception for business records, or it is admissible non-hearsay.

The mechanic's text message is a statement under Rule 801(a) because it is "a written assertion." FED. R. EVID. 801(a). The text message is hearsay if the pedestrian offers it to prove the "truth of the matter asserted in the statement" (i.e., that the scooter's brakes required repair), which resulted in the woman losing control of the scooter and causing the accident. FED. R. EVID. 801(c).

However, the mechanic's text message fits the hearsay exception for "present sense impressions" under Rule 803(1) because it is "[a] statement describing or explaining an event or condition made while or immediately after the declarant perceived it." FED. R. EVID. 803(1). Here, the mechanic's text message described the condition of the scooter immediately after he perceived it during the maintenance service.

The mechanic is a person with knowledge of the condition of the scooter, so if text messages regarding repairs were made and kept by the mechanic in the ordinary course of business, this text message also fits the business records exception. Under Rule 803(6), a business record is a record of an act "made at or near the time by . . . someone with knowledge" and "the record was kept in the course of a regularly conducted activity of a business" and "making the record was a regular practice of that activity." FED. R. EVID. 803(6).

However, the text message is not hearsay if it is instead offered to prove that the woman was negligent because she rode her scooter after the mechanic told her it required repair. If offered for this purpose, it would not be offered for the truth of the matter asserted in the statement, but to show the woman's belief about the condition of the scooter (her state of mind).

Point Two (10%)

The woman's question to the mechanic should be admitted because it is not hearsay.

The woman's question to the mechanic is relevant because, along with the mechanic's thumbs-up response (*see* Point Three), it has some tendency to make it more probable that the woman was not negligent and/or that the scooter brakes did not malfunction and cause the accident. FED. R. EVID. 401. The woman's question does not raise hearsay concerns because it is not an assertion.

Hearsay is defined under Rule 801(a) as "an oral assertion, written assertion, or nonverbal conduct." Although "assertion" is not further defined, "a favorite [definition] of writers in the [evidence] field for at least a century and a half [is that] the word simply means *to say that something is so*, e.g., that an event happened or a condition existed." 2 MCCORMICK ON EVIDENCE § 246 (6th ed. 2006). Under this definition, the woman's question is not hearsay because it is not an assertion.

Point Three(a) (20%)

The mechanic's thumbs-up to the woman is a nonverbal assertion that is relevant, and the woman's testimony about that response is admissible.

Hearsay is defined under Rule 801(c) as a “statement,” that is, “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.” FED. R. EVID. 801(a). Here, when the mechanic responded to the woman’s question (“Is my scooter safe to ride for a while?”) with a thumbs-up gesture, the facts suggest that he intended his nonverbal conduct as an assertion that, in his opinion, the scooter was safe to ride.

The mechanic’s assertion is relevant and admissible to prove that the woman was not negligent because the evidence makes it more probable that, at the time of the accident, she believed that the scooter was safe to ride, despite the fact that the brakes required repair. FED. R. EVID. 401. Admission of the woman’s description of the mechanic’s thumbs-up for this purpose does not raise hearsay concerns because the evidence would not be offered for the truth of the matter asserted, but to show the woman’s belief about the condition of the scooter (her state of mind).

Point Three(b) (20%)

The mechanic’s thumbs-up is relevant to determine whether the scooter’s brakes malfunctioned, causing the accident, but if offered for this purpose it is also hearsay.

The mechanic’s nonverbal assertion is relevant to the determination of whether the scooter’s brakes malfunctioned, causing the accident. However, if offered to prove the “truth of the matter asserted in the statement” (i.e., that the scooter was safe to ride for a while), it is hearsay that does not fit any hearsay exception.

TRUSTS AND FUTURE INTERESTS ANALYSIS

(Trusts and Future Interests I.C.1. & 4., G.; II.F.)

ANALYSIS

Legal Problems

- (1)(a) Was the revocable trust amendable?
- (1)(b) If the trust was amendable, must the amendment have been executed in accordance with the state Statute of Wills in order to be valid?
- (2) If the trust amendment was valid, does the amendment apply to the probate estate assets passing to the trust pursuant to Settlor's will?
- (3) If the trust amendment was valid, should the trust property be distributed to University?
- (4) If the trust amendment was not valid, should the trust property be distributed to Settlor's grandchild (her only heir) or held in further trust in accordance with the terms of the original trust instrument?

DISCUSSION

Summary

A revocable trust is amendable even if the trust instrument does not expressly grant to the trust settlor a power to amend. Both inter vivos trusts and amendments thereto are valid even though not executed in accordance with the requirements applicable to wills.

Under the Uniform Testamentary Additions to Trusts Act, a revocable trust may be amended at any time prior to the settlor's death, and the amendment applies to the disposition of assets conveyed to the trust pursuant to a will even if the will was executed prior to the date of the amendment.

At Settlor's death, trust assets, including probate assets passing to the trust under Settlor's will, would go to University if, as is the case here, the trust amendment was valid. If the amendment was invalid, the trust assets would continue to be held in further trust because there is no violation of the common law Rule Against Perpetuities.

Point One(a) (30%)

Settlor retained the right to amend the inter vivos trust despite her failure to expressly reserve this power.

At issue here is whether a retained power of revocation includes the power to amend, sometimes referred to as the power to modify. The Restatement (Second) of Trusts § 331 cmt. g provides that if a settlor has a power to revoke, that retained power ordinarily includes a power to modify (amend) as well. Comment g also notes that the power to amend includes both a power to withdraw trust assets and a power to "modify the terms of the trust." The Uniform Trust Code, which provides that a power to revoke includes the power to amend, is consistent with this view.

UNIF. TRUST CODE § 602; *accord* RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. The theory is that even though a power to amend was not expressly retained by a settlor, the goal of amendment, assuming the power was not included in the power to revoke, could easily be achieved by first revoking the trust and then creating a new trust with the same terms contemplated by the amendment. To require this would put form over substance.

Thus, by expressly retaining the power to revoke the trust, Settlor retained a power to amend the inter vivos trust despite her failure to expressly reserve this power.

[NOTE: Under the common law, a trust is irrevocable unless the settlor expressly retains a power to revoke the trust. Conversely, under the Uniform Trust Code, a trust is revocable unless the terms of the trust expressly provide otherwise. *See* UNIF. TRUST CODE § 602. The Trust Code's position on revocation follows the minority view in the United States and is inconsistent with prior Restatements of Trusts (*see* Restatement (Second) of Trusts § 330). Here, the trust is revocable because Settlor expressly retained a power of revocation.

The Uniform Trust Code has been adopted in 24 jurisdictions: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.]

Point One(b) (10%)

Settlor's amendment of the trust was valid despite her failure to have her signature to the trust amendment witnessed.

Neither the common law nor state statutes require a trust instrument or an amendment to a trust instrument to be executed in accordance with the formalities prescribed for execution of a will. Indeed, an inter vivos trust that does not involve real estate can be created orally. Under the Uniform Trust Code, the only requirements for creating a valid inter vivos trust are intent, the specification of beneficiaries, and the designation of a trustee. *See* UNIF. TRUST CODE § 402; *accord* RESTATEMENT (THIRD) OF TRUSTS § 13.

Here, the amendment meets the requirements of both the Uniform Trust Code and the common law. Thus, the fact that Settlor's signature was not witnessed when she signed the amendment to the trust does not make the amendment invalid.

Point Two (20%)

Under the Uniform Testamentary Additions to Trusts Act, a revocable trust may be amended at any time prior to the settlor's death, and the amendment applies to probate assets poured into the trust at the settlor's death pursuant to the settlor's will even when the will was executed prior to the date of the amendment.

Historically, property owned by an individual at her death passed to the individual's heirs or to beneficiaries designated in a will executed with the formalities (writing, signing, witnessing) prescribed by state law. However, when a will devises property to the trustee of an inter vivos trust, then the provisions of the trust—which may not have been executed in accordance with the formalities required for wills—effectively determine who will receive the property. Because of this possibility, some early cases held that if an inter vivos trust was not executed with the same formalities required for a valid will, then the trust was ineffective to dispose of probate assets poured into the trust at the settlor's death pursuant to the settlor's will.

This line of cases has been overturned by the Uniform Testamentary Additions to Trusts Act (the Act), now Uniform Probate Code § 2-511. Under the Act, adopted in almost all

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jurisdictions, a testamentary bequest to the trustee of an inter vivos trust established by the testator during his or her lifetime is valid if the trust is in writing, it is identified in the testator's will, and the trust instrument was executed before, concurrently with, or after the execution of the will. *Id.* The Act further specifies that such a bequest is valid even if the trust is amendable or revocable and that a later amendment applies to assets passing to the trust by a previously executed will.

Thus, because the trust amendment is valid, its terms apply to assets received by Bank from Settlor's estate.

Point Three (10%)

If the trust amendment was valid, then the trust assets, including assets passing to the trust under Settlor's will, should go to University.

Under the trust amendment, all trust assets (including the assets of Settlor's probate estate poured into the trust) pass to University. The facts provide no basis for failing to comply with Settlor's stated intentions.

Point Four (30%)

If the trust amendment was invalid, trust assets, including assets received pursuant to Settlor's will, should be held in accordance with the terms of the original trust instrument because those terms do not violate the Rule Against Perpetuities.

Under the dispositive terms of the original trust instrument, Settlor created successive income interests in her surviving children and grandchildren with a remainder interest in her great-grandchildren. Because the trust was revocable, the period during which the common law Rule Against Perpetuities requires that interests vest (i.e., 21 years plus lives in being) began to run from the date Settlor no longer had a power of revocation (here, her death), not the date on which the trust was created. *See* JESSE DUKEMINIER, STANLEY J. JOHANSON, JAMES LINDGREN & ROBERT SITKOFF, *WILLS, TRUSTS, AND ESTATES* 678 (7th ed. 2005).

Under the common law Rule Against Perpetuities, Settlor's trust is thus valid. At the time of Settlor's death, she was survived by no children, one granddaughter, and no great-grandchildren. Because Settlor cannot have more children after her death, the only income beneficiary of the trust is Settlor's surviving granddaughter. This granddaughter is the only person who can produce great-grandchildren of Settlor; thus, all great-grandchildren must, of necessity, be born during the lifetime of Settlor's only surviving granddaughter, who is a life in being. The granddaughter's interest vested at Settlor's death, and the great-grandchildren's interest will vest at the death of the granddaughter. There is no need to wait the additional 21 years permitted under the Rule. Thus, under the common law and the statute given in the facts, the nonvested interest in the great-grandchildren is valid.

[NOTE: Both modern wait-and-see statutes and the Uniform Statutory Rule Against Perpetuities upon which the statute in the facts is modeled provide that before using either reform to validate an otherwise invalid nonvested interest, one should first determine if the nonvested interest violates the common law Rule. If it does not, then there is no need to reform. This proposition, which is applicable in all MEE user jurisdictions that have not simply abrogated the rule, is tested by this problem.]

NEGOTIABLE INSTRUMENTS ANALYSIS

(Negotiable Instruments III.; IV.; V.)

ANALYSIS

Legal Problems

- (1)(a) What rights does a person in possession of a note that has been indorsed in blank by the payee have against the maker of the note?
- (1)(b) Which defenses may the maker of a note raise against a person entitled to enforce it who is not a holder in due course but is a transferee from a holder in due course?
- (2) What rights does a person entitled to enforce a note have against an indorser who transferred it for consideration with no warranties?
- (3) What rights does a person entitled to enforce a note have against a previous holder who transferred it as a gift without indorsing it?

DISCUSSION

Summary

The niece is a holder of the note and is thus a person entitled to enforce it. The chef, the issuer of the note, is obligated to pay it to the niece as the person entitled to enforce it. The niece is not subject to any defense or claim of the chef relating to the improper repair of the oven because the niece has the rights of a holder in due course. When the buyer bought the note from the repairman, the buyer became a holder in due course of the note and thus took it free of any personal defenses the chef had against the repairman. Even though the niece is not herself a holder in due course of the note, the niece succeeded to the buyer's rights as holder in due course and thus took free of the chef's personal defenses.

Because the chef refused to pay the note, the niece can recover from the repairman on the repairman's obligation as indorser. The niece cannot recover on the note against the buyer, however, because the buyer did not indorse the note (and thus incurred no indorser's obligation) and the buyer did not receive any consideration for transfer of the note to the niece (and, therefore, made no transfer warranty).

[NOTE: Although Article 9 of the Uniform Commercial Code governs the sale of promissory notes (a point that might be correctly noted by examinees), that Article does not determine the answer to any of the questions posed.]

Point One(a) (20%)

The niece is the holder of the note and thus may enforce it against the chef, who is the issuer of the note.

The chef is the maker of the note and, thus, its issuer. *See* UCC §§ 3-103, 3-105. The issuer of a note is obligated to pay it in accordance with its terms to a "person entitled to enforce" it. UCC § 3-412. The niece is a "person entitled to enforce" the note. This is because the niece is the holder of the note, and a holder of a note is a person entitled to enforce it. UCC § 3-301. The niece is the holder of the note because (i) the repairman's signature on the back of the note not

Negotiable Instruments Analysis

accompanied by words indicating a person to whom the note was made payable was a “blank indorsement,” which had the effect of making the note a bearer instrument, (ii) anyone in possession of a bearer instrument is a holder of it, and (iii) the niece is in possession of the note. *See* UCC §§ 1-201(b)(21)(A), 3-204, and 3-205. Accordingly, the chef has an obligation to the niece to pay the note in accordance with its terms, and the niece may enforce that obligation.

Point One(b) (40%)

The niece is not a holder in due course of the note, but, because she is a transferee from the buyer, who was a holder in due course, she has the same enforcement rights as the buyer. Because the buyer, as a holder in due course, would have been able to enforce the note against the chef without being subject to defenses or claims arising from the improper repair, the niece has the same rights and will not be subject to the chef’s defenses or claims about the repair.

As noted in Point One(a), the chef has an obligation to the niece to pay the note in accordance with its terms. However, except against a person with the rights of a holder in due course, the chef can raise any defenses or claims in recoupment that he would have if the claim on the note were an ordinary contract claim. UCC § 3-305. Thus, except against a holder in due course, the chef would be able to raise the improper repair as a defense or a claim in recoupment (a claim in response to the niece’s claim).

But claims in recoupment and most defenses cannot be raised against a person with the rights of a holder in due course. Against a holder in due course, the chef can raise only the four “real” defenses listed in UCC § 3-305(a)(1) (infancy; duress, lack of legal capacity, or illegality that nullifies the obligation of the obligor under other law; fraud in the *factum*; discharge in insolvency proceedings), none of which is present here.

The niece is not a holder in due course because she did not take the note for value. *See* UCC §§ 3-302(a)(2)(i) (criteria for holder in due course status) and 3-303(a) (definition of “value”). But this does not mean that the niece is subject to the chef’s claim arising out of the improper repair. The buyer was a holder in due course of the note because he took the note for value (\$9,500), in good faith, and without notice of any facts that would have alerted him to the chef’s defense against the repairman. UCC § 3-302(a)(2). As a holder in due course, the buyer owned the note free of the chef’s claim because that claim did not constitute a “real” defense. UCC § 3-305(b). When the buyer gave the note to the niece, this constituted a “transfer” of the note. *See* UCC § 3-203(a). When a note is transferred, the transferee receives “any right of the transferor to enforce the instrument, including any right as a holder in due course.” UCC § 3-203(b). Under this rule (also known as the “shelter principle”), the buyer transferred his freedom from the chef’s defenses to the niece and the niece can enforce the note free of the chef’s defenses.

Point Two (20%)

Because the chef dishonored the note, the niece can recover from the repairman on the repairman’s obligation as indorser.

The chef’s refusal to pay the note constituted dishonor. *See* UCC § 3-502. The repairman, as an indorser of the note (*see* Point One(a)), incurred the obligations of an indorser under UCC § 3-415(a). When a note has been dishonored, one of the obligations of an indorser is to pay the amount of the note to a person entitled to enforce it. Therefore, the repairman is liable for the amount of the note to the niece, a person entitled to enforce the note (so long as the niece gives proper notice of dishonor to the repairman).

[NOTE: Because the repairman indorsed the note without warranties, there are no transfer warranties. UCC § 3-416 cmt. 5.]

Point Three (20%)

The niece cannot recover on the note against the buyer as either indorser or warrantor because the buyer did not indorse the note and did not receive consideration for transferring the note to the niece.

The buyer did not indorse the note and, therefore, did not incur the obligation of an indorser to pay the note upon dishonor.

The niece cannot recover from the buyer under a transfer warranty theory because transfer warranties are made only by a person “who transfers an instrument for consideration.” Here, the buyer gave the instrument to the niece as a gift. So the buyer made no transfer warranty. UCC § 3-416(a). Therefore, the niece cannot recover from the buyer on that theory.



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