Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Multistate Performance Tests (MPT 1 & 2) and the Multistate Essay Examination (MEE 1-6). The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, they are responses which, in the Board's view, illustrate successful answers written by applicants who passed the UBE in Maryland for this session. These answers are reproduced without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

MPT 1

Representative Good Answer No. 1

1. This court should exclude testimony from Doris Gibbs related to Mr. Dobson's silence following a non-accusatory statement because the silence is impermissible hearsay.

Under FRE 801(d)(2), statements made by a party and offered by an opposing party are non-hearsay. Silence may be a statement if it was intended as an assertion. FRE 801(a). If the silence is offered as an admission, where a party's silence indicated the party's manifestation that it adopted the statement or believed it to be true, then the silence may be admissible as non-hearsay. *Reed v. Lakeview Advisers LLC.* For a statement to be acquiesced by silence, four conditions are required: "(1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded." *Id.*

In the instant case, plaintiff seeks to exclude testimony that Ms. Gibbs stated, "We have all been clumsy before. I bet that you were trying to get to the store quickly. And I would guess, like most of us, you were on your phone at the time," and that Mr. Dobson did not respond. Mr. Dobson's silence in response to Ms. Gibbs's statement was not intended as an assertion or a manifestation that Mr. Dobson believed the statement to be true, which therefore makes the statement and its following silence inadmissible hearsay.

The circumstances are not that a party in Mr. Dobson's position would likely have responded if untrue. Unlike in *Reed*, the case which promulgated the four-part test for acquiescence by silence, Ms. Gibbs' statement was made in a non-accusatory way. In *Reed*, the suit was for wrongful termination as age discrimination, and the statement which Margaret Reed acquiesced by silence was an accusatory statement explaining that "[Ms. Reed] know[s] that [she] [was]n't doing [her] job competently." *Reed.* The statement was made by the HR director, Beth Adler, an obvious opponent in litigation. Beth Adler made an accusation against Margaret Reed to which a reasonable person, if they disagreed, would have responded. Here, Ms. Gibbs was a longtime friend who cared for Mr. Dobson during his recovery. The statement by Ms. Gibbs was made during a dinner in which the Dobson couple shared their thanks with the Gibbs for their assistance during Mr. Dobson's recovery. This is unlike *Hill v. Hill*, where a husband's silence to a wife's accusation that "you are having an affair," was admissible, because there was no accusation by Ms. Gibson and the statement that Mr. Dobson did not respond to was meant to offer understanding of the situation between friends. Ms. Gibson did not accuse Mr. Dobson of any moral or legal wrongdoing, as did husband to wife in *Hill*, nor was she making the type of accusation apparent in *Reed*, and therefore it is reasonable for Mr. Dobson to not respond.

Further, it is not clear whether there was any litigation which had begun between Mr. Dobson and his employer, although a dispute regarding appropriate accommodations for his injuries certainly had arisen. A reasonable explanation for Mr. Dobson's silence, apart from that it was a non-accusatory statement from a caring friend which did not merit response, is that Mr. Dobson's employment discrimination attorney advised him not to discuss the case.

Additionally, it is not clear that Mr. Dobson heard and understood the statement. While Ms. Gibbs thought he did, because he put his drink down and looked at her, they were in the dining room of a loud restaurant. In loud

situations with many people present, someone who is silent may not necessarily be expected to respond. *State v. Patel*. In *Patel*, the statement was made at a party attended by over 100 people. It is not clear how many people were in the dining room, but there was usual background conversation which may have obstructed Mr. Dobson's ability to clearly hear Ms. Gibbs.

Because the statement by Ms. Gibbs was non-accusatory, nor a passing of moral judgment, and Mr. Dobson may not have clearly heard it, a reasonable person in Mr. Dobson's position would not have responded if the statement were not true. Therefore, Mr. Dobson's silence cannot be admitted as a non-hearsay statement by a party. Ms. Gibbs statement, and Mr. Dobson's non-response, are both inadmissible hearsay.

In the alternative, this court should exclude Ms. Gibbs' statement and Mr. Dobson's non- response as substantially more misleading and confusing than probative under FRE 403. Ms. Gibbs statement being repeated at trial, lacking the care and nurturing nature it had when it was first stated, and Mr. Dobson's silence, lacking the context that the statement was made in a loud dining room, is substantially more misleading and confusing than it is probative. Unlike in *Reed*, where the interaction was between two parties to the case,

here, the interaction was between two close friends, one who has no relation to the case other than as caretaker to Mr. Dobson's injuries. The probative value of the statement, as compared to that at issue in *Reed*, is therefore much lower. While it may tend to prove acquiescence with the statement--that Mr. Dobson was in a hurry, or on his phone, at the time he fell--the value of that inference is substantially outweighed by the risk of misleading or confusing the jury.

2. The deposition testimony of Dr. Miller in a prior case should be excluded because Mr. Dobson lacked the opportunity to develop the testimony since he did not have a substantially similar interest in asserting the extent of his injuries in the accommodations case.

Under FRE 804(b)(1), former testimony is not excluded by the rule against hearsay where the declarant is unavailable if the testimony was given at a lawful deposition, whether during the current proceeding or a different one, and the testimony is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination. "[T]he party against whom the evidence was previously introduced must have had 'a similar, not necessarily an identical, motive to develop the adverse testimony in the prior proceeding.'" *Thomas v. Wellspring Pharmaceutical Co.,* quoting *Jacobs v. Klein.* The two-part test requires determining "whether the questioner is on the same side of the same issue at both proceedings, and whether the questioner had a substantially similar interest in asserting that side of the issue." *Jacobs.*

In *Thomas*, the introduction of trial testimony by Dr. Shaw in a subsequent trial against a different plaintiff but involving the same claim for relief was permitted. However, integral to the admissibility of Dr. Shaw's testimony was that the testimony was generic in nature -- it was not specific to either plaintiff, but rather to the types of side effects that may be expected with the medication that was at issue in both cases. *Thomas.* Each party would have had the exact same interest in cross-examining Dr. Shaw regarding the extent of the side effects was debilitating. This is unlike the instant case because, though both cases involve the same plaintiff, Mr. Dobson, the issues, and motivations are different, and the previous testimony was at deposition, rather than at trial. The focus of Attorney Chen's cross-examination in the deposition was the adequacy of accommodations because Mr. Dobson's injuries were not at issue and attacking the credibility of the doctor. Attorney Chen then concluded stating he would "ask the rest of [his] questions at trial." Neither the source nor cause of Mr. Dobson's injuries are at issue in the case against the employer. Therefore, Attorney Chen made a strategic decision not to cross-examine Dr. Miller about those issues. However, cross-examination in this case would certainly have centered on the cause and extent of Mr. Dobson's injuries.

Though opposing counsel may argue that the issue is not whether Mr. Dobson did develop the testimony, but whether he had the opportunity to develop the testimony, there is not clear case law regarding where there are separate issues with strategic decision by different counsel. Rather, opposing counsel rests its argument on *State v. Williams*, where deposition of an unavailable witness from a "related civil case" was permitted in a criminal case where same counsel represented the defendant in both cases. The issues from the civil and criminal case are not clear, but it is reasonable to distinguish an attorney who is representing a client with similar issues, witnesses, and motivations in each case, from an attorney with a limited and narrow scope of representation. Counsel in the tort case did not have the opportunity to cross examine Dr. Miller regarding the extent of injuries, and counsel in the employment discrimination case did not have the motive to cross examine Dr. Miller on those issues. Dr. Miller is now unavailable, and his deposition should not be admitted under FRE 804(b)(1).

In the alternative, this court should exclude Dr. Miller's previous testimony as substantially more prejudicial than probative under FRE 403. Unlike in *Thomas*, where Dr. Shaw's testimony was general in nature and the motives for cross-examination were the same, Dr. Miller's testimony, and the cross-examination, were very limited to the issues in the employment discrimination case: the sufficiency of the accommodations. It would be unfairly prejudicial to Mr. Dobson for Dr. Miller's limited deposition to be entered because Attorney Chen did not cross-examine about the issues irrelevant to the case. Further, Dr. Shaw's testimony was in trial whereas Dr. Miller's was at deposition which Attorney Chen clearly stated he would explore further issues at trial. Therefore, Dr. Miller's previous testimony is more unfairly prejudicial than probative.

3. Brooks Real Estate Agency's (hereinafter "BREA") insurance policy should be admitted for the limited purpose of proving that BREA exercised control of the sidewalk.

Under FRE 411, liability insurance is not admissible to prove negligence or fault, but may be admitted to prove agency, ownership, or control. Mr. Dobson seeks to admit BREA's insurance policy for the limited purpose of proving a fact in issue, namely that BREA did have ownership or control over the sidewalk upon which Mr. Dobson slipped. The policy is not being offered to prove negligence or another wrongful act.

Opposing counsel is anticipated to argue that the insurance policy will be inadmissible under FRE 403 because its probative value is outweighed by its risk of confusing the jury. However, because control of the sidewalk is at issue in this case, and the insurance policy is strong probative evidence of this fact, the probative value of the insurance policy covering the sidewalk does outweigh any likelihood to confuse the jury. In the alternative, the court should admit the policy with a limiting instruction that will completely cure any likelihood to confuse the jury. The instruction should state, with deference to this court's preferred wording, that "The jury has heard evidence that BREA has a liability policy which insures the sidewalk where Mr. Dobson slipped. The existence of an insurance policy may be considered only to establish whether BREA owned or controlled the sidewalk, and not to establish negligence or liability on the part of BREA." Further, the policy should be redacted to the extent that it includes any policy limits figures, to avoid the risk of unfair prejudice to BREA.

BREA's insurance policy should be admitted for the limited purpose of proving ownership and/or control of the sidewalk.

Representative Good Answer No. 2

MEMORANDUM

To: Samantha Burton From: Examinee Applicant Date: July 27, 2023

Re: Legal Argument Section of Motion in Limine

Dear Ms. Burton: Below please find the argument section to the motion in limine you intend to file for our client, Mr. Dobson for the case of *Dobson v. Brooks Real Estate Agency.*

III. Legal Argument

In accordance with the Franklin Rules of Evidence (FRE), applicable law and cases of Franklin, Doris Gibbs' testimony should be found inadmissible because of issues of hearsay, irrelevance, and undue prejudice; Dr. Miller's deposition testimony should be found inadmissible **BECAUSE XX**; and evidence of Brooks Real Estate Agency's ("Brooks") insurance policy should be found admissible for the sole purpose of proving ownership. The analysis and reasoning for each determination is discussed below in detail.

A. Doris Gibbs' Testimony is Inadmissible BECAUSE it is Hearsay not subject to any Hearsay Exceptions, and the Testimony Itself is Irrelevant and Poses a Risk of Misinterpreting the Ultimate Issue of this Case.

Ms. Gibbs' testimony should be excluded for two reasons: a) it is considered hearsay and no exceptions to hearsay apply and b) the testimony is irrelevant and, even if the judge determines the testimony relevant, the probative value is outweighed by the high danger of misleading the jury and confusing the issues.

I. Mr. Dobson's silence is not a "statement" for purposes of FRE 801.

Ms. Gibbs' testimony should be excluded because Mr. Dobson (the opposing party) never made a statement; as such, Ms. Gibb's testimony would be defined as hearsay not subject to any exclusions and would thus be inadmissible.

According to FRE 801(d)(2)(B), an opposing party's statement is considered "non-hearsay" and thus may be admissible if the statement is offered against an opposing party and is one the party manifested that it adopted or believed to be true. A "statement" includes a person's oral assertion, written assertion, or nonverbal conduct, *if the person intended it as an assertion*. FRE 801(a). Silence alone, however, does not automatically make a statement. In order for a statement to be acquiesced by silence, four preconditions must be met: (1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded. Reed v. Lakeview Advisers.

Although Mr. Dobson remained silent during his conversation with Ms. Gibbs, his silence should not be taken as an assertion for the purposes of a "statement." Here, there is no doubt that Mr. Dobson heard the statement, nor is there any doubt that he failed to respond. However, given the circumstances, it is unlikely that Mr. Dobson understood the statement, and that the circumstances were such that a person in Mr. Dobson's position would likely have responded if the statement were not true.

In State v. Patel, the court acknowledged that "context" was "exceedingly important in determining whether a party acquiesced to a statement by silence." For example, the court in that case found that because the defendant was at a loud party with over 100 people, it was unclear whether the defendant heard or understood the statement. Further, even if he had, because the defendant was at a large social event with several people around, it would be unreasonable to expect that a person in the defendant's circumstances would necessarily respond. Similarly, when Ms. Gibbs and Mr. Dobson were talking, they were at a public place- a restaurant, where there was usual background conversation in the restaurant. Because of this, and because Ms. Gibbs only "*thought* he (Mr. Dobson) was listening," it remains unclear whether Mr. Dobson actually heard or understood the statement. It is highly likely that Ms. Gibbs' words were drowned out by conversations of tables next to them. Further, in the only two cases that found that the person had heard or understood the statement (Reed and Hill), the conversation was direct - between only the speaker and the person who "acquiesced" the statement as true, with no other people around. This further emphasizes the point that due to the atmosphere of the restaurant - with conversations of other tables and being in public, it is hard to prove that Mr. Dobson heard or understood the statement.

The content of Ms. Gibbs' statement was that Mr. Dobson was clumsy, walking in a hurry, and on his phone. While the argument still stands that Mr. Dobson would not be expected to respond to this due to the atmosphere(the fact that he was in public restaurant, surrounded by others in conversation), one might argue that the situation here differs too greatly from that in Patel such that the holding from Patel cannot be used for reasoning in the case here. In Patel, the person was at a social party where everyone was mingling with over 100 people. Here, it is unclear how many people exactly were at the restaurant, but it is unlikely that the tables mingled with each other. The discrepancy may lead to the conclusion that the atmosphere *alone* cannot justify Mr. Dobson's silence. However, because "context" is given as a whole, there are other circumstances that suggest someone in Mr. Dobson's position would not necessarily be expected to respond.

Another context clue that is important is the "seriousness" of the conversation. For example, in Hill v. Hill, the court found that during a serious conversation between a husband and wife about their marriage, a husband acquiesced to the accusation of "you are having affair" through his silence. The court in Reed used the Hill court's reasoning, alluding to the seriousness of the conversation as a reason to find that a person in the defendant's position would be expected to respond. In Reed, the court found that because the defendant was having a serious conversation with her boss, during a meeting about termination, and in an office setting, anybody in Reed's position would be expected to respond to any negative accusations.

These cases, however, are distinguishable from the present case. In the present case, nothing about the conversation suggested a serious manner. In fact, the conversation was during dinner between neighbors and friends. Further, Ms. Gibbs even stated that her statements to Mr. Dobson were not said in an "accusatory" way, but rather as a "statement of fact and understanding." The fact that Ms. Gibbs was not meaning to be accusatory is key. A statement of fact itself does not necessarily warrant a response, whereas an accusation would (a person who is being accused would be expected to deny it). As such, because Ms. Gibbs' statement was more fact than accusation, a person in Mr. Dobson's position would not be expected to necessarily respond.

As such, because the third element is not met - that is, the circumstances fail to show that a person in Mr. Dobson's position would have responded - Ms. Gibb's statement cannot be acquiesced by Mr. Dobson's silence. Therefore Ms. Gibb's statement remains hearsay and is therefore inadmissible.

II. Even if the court should find Mr. Dobson's silence as a "statement," it should be excluded because it is irrelevant, and its probative value is substantially outweighed by the danger of confusing the issues.

Even if the trial court finds that Mr. Dobson's silence constituted a "statement" under FRE 801(a), nevertheless, Ms. Gibb's testimony should be excluded because it is irrelevant and has a danger of confusing the issues. On its face, Ms. Gibb's testimony about Mr. Dobson's "statement" is irrelevant. The issue in this case is Brooks' failure to meet its duty of properly maintaining its sidewalk. Relevant evidence should relate in some kind to Brooks' negligence. Mr. Dobson's "statement" that he was in a hurry and that he was on his phone is irrelevant to Brooks' failure to maintain the ice on the sidewalk. As such, the evidence should not come in at trial because it is irrelevant to the ultimate issue in the case.

Even if the evidence is considered "relevant," FRE 403 states that the court may still exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Here, introduction of Mr. Dobson's "statement" (through the testimony of Ms. Gibbs) creates a high danger of misleading the jury away from the ultimate issue of the case: that Brooks was negligent in failing to maintain its sidewalks and rid them of ice.

If the trial court finds that Mr. Dobson's silence constituted a "statement," Mr. Dobson would be admitting that a) he was trying to get to the store quickly and b) he was on his phone at the time. File, p. 6. Even if these

statements were true, they fail to address the underlying issue that Brooks was in fact negligent in failing to remove ice from their sidewalks. Bringing in Ms. Gibb's testimony and Mr. Dobson's "statement" has a high risk of confusing the jury and misleading them into thinking the issue is whether Mr. Dobson's fall was his fault when in fact the issue is ultimately dependent on Brooks' negligence in getting rid of the ice on their sidewalks.

Further, the court has held that "Rule 403 allows the judge to prohibit only the use of evidence that is *unfairly* prejudicial, that is, evidence that allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference." Reed. As the Advisory committee Note to Rule 403 states, this includes any evidence that may lead to confusion of issues. (Note that, because of the holding in Smith v. State, this court may rely on the Advisory Committee Notes in relying on the FRE). Admitting Mr. Dobson's statement increases the risk of confusing the jury on the ultimate issue and may lead them to make an impermissible inference. As stated before, the ultimate issue is that Brooks acted negligently in failing to maintain their sidewalks and free it from ice. However, admitting this statement may lead the jury to improperly infer that Mr. Dobson's fall was his fault rather than Brooks'. But the way Mr. Dobson walked on the sidewalk is irrelevant: there was still ice on the sidewalk, and it was Brooks' duty ensure that their sidewalks were safe and free of ice.

Therefore, for the reasons discussed above, Ms. Gibb's testimony regarding Mr. Dobson's "statement" (rather, lack thereof) should be excluded from trial.

B. The Deposition Testimony of Dr. Miller is Inadmissible because the motive and opportunity of the prior testimony of Dr. Miller is inconsistent with the motive and opportunity of the present case

Dr. Miller's testimony does not fall under FRE 804(1)'s exceptions because there was not a similar motive or opportunity from her testimony in the previous case compared to the present case.

According to FRE 804(1), an exception to hearsay includes former testimony by a witness that is now unavailable. In order for the former testimony of an unavailable witness to be admitted, the party who wishes to offer the testimony must show (1) that the witness is currently unavailable; (2) the former testimony was given as a witness at a trial, hearing, or lawful deposition, and (3) that the testimony is being offered against a party who had - or in a civil case, whose predecessor in interest - had a similar motive and opportunity to develop the challenged testimony at the earlier proceeding.

Here, it is clear that Dr. Miller is unavailable due to her unfortunate death. Further, there is no dispute that Dr. Miller's prior testimony was given during a lawful deposition. In Thomas v. WellSpring Pharmaceutical, the court acknowledged that if the party against whom the evidence is now being admitted is the *same* party against whom the evidence was previously introduced, the only question is whether the party had the same opportunity and motive to develop the testimony. Here, it is obvious that Mr. Dobson was the party against whom the evidence was previously introduced. Similarly, Mr. Dobson is the SAME party against whom the evidence is now being admitted. Therefore, whether or not Dr. Miller's testimony is admissible falls on whether there was a similar motive and opportunity in the previous proceeding.

I. Similar Motive.

In Jacobs v. Klein, the court developed a two-part test to address "similar motive:" (1) whether the questioner is on the same side of the same issue at both proceedings, and (2) whether the questioner had a substantially similar interest in asserting that side of the issue. Here, neither prong is met. Although Mr. Dobson was on the same side in both proceedings (plaintiff), the ISSUE is substantially different. In the previous case, the issue was employer accommodations in accordance to Franklin's Disability Act. The present case, however, is related to the source and cause of Mr. Dobson's injuries through Brooks' negligence. Additionally, the questioner's interest in the first case varied significantly from the interest in the second case, for the same reasons stated previously.

As such, motive is not present.

II. Similar Opportunity

In State v. Williams, the court looked to whether the party in the earlier case had the opportunity to develop the testimony. In Thomas, the court held that there was no indication that the defendant was denied the opportunity to attempt to undermine the witness or his testimony by asking any questions. However, Thomas is distinguishable because there was the SAME counsel representing defendant in both cases. Here, different counsel representing Mr. Dobson in his two cases

In the first case, Chen made the strategic decision not to examine Dr. Miller about her opinion about the extent of the injuries because his focus at the deposition was on the level of accommodations. However, defense counsel here would likely act questions about the extent of the injuries as they are much more relevant.

Therefore, there is no opportunity.

Because there was no opportunity and no motive, the former testimony hearsay exception is not applicable. As such, the doctor's testimony should be excluded.

C. The Insurance Policy on the Property of the Brooks Real Estate Agency is Admissibility because it determines Brooks' ownership and control over the sidewalk that Mr. Dobson fell on.

The insurance policy of Brooks is admissible for the purposes of proving Brooks' ownership of the sidewalk. Although proof of insurance is normally inadmissible to prove negligence or fault, the rule against admissibility of liability insurance is limited. FRE 411. More specifically, evidence of insurance may be admitted to prove any fact *other than* fault or lack of fault. For example, evidence of the insurance may be admitted for the purpose of proving a witness' ownership or control.

In the present case, Brooks claims that it does not control the sidewalk and therefore has no responsibility for clearing it of ice. However, according to the Brooks' insurance policy, the property insurance on Brooks' building "explicitly covers sidewalks adjacent to the property." Therefore, evidence of insurance is admissible exclusively for the purpose of rebutting Brooks' claim that they do not own and are not responsible for clearing the sidewalk adjacent to the building (the one in which Mr. Dobson fell on).

As always, even if the evidence is relevant, the evidence must additionally pass through the FRE 403 balancing test. Here, the probative value of the liability insurance is huge: it explicitly answers, without a doubt, that Brooks owns the sidewalk that Mr. Dobson fell on. There is little danger to the prejudicial value, other than the fact that it shows Brooks did in fact own the sidewalk. Though it is prejudicial to Brooks, as courts as held, minimal prejudice is to be expected to the party against whom evidence is admitted. However, it is only evidence that is *unfairly* prejudicial that the judge has discretion to exclude. Reed. Seeing as there is no unfair prejudice, this evidence is not only relevant, but highly probative and therefore should be admitted.

For the reasons above, this court should find that evidence of the insurance policy is admissible for the sole purpose of proving Brooks' ownership.

Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MPT 2

Representative Good Answer No. 1

TO: Anthony Martin From: Examinee Date: July 25, 2023

Re: Advice Letter regarding Martin's Legal Rights

Dear Mr. Martin,

Upon reviewing relevant statute and case law, we believe you have a strong case to (1) keep the dog, Ash, (2) get a refund from Shafer, and (3) have Shafer pay for Ash's surgery.

1. CAN MARTIN KEEP ASH?

Short Answer: Yes, under the Franklin Pet Act (Pet Act), since Martin notified Schafer within 180 days of purchase that Ash had a congenital defect, Martin can request as a remedy that retain Ash.

A purchaser of an animal has a remedy if (1) within 14 days following a sale of an animal, a licensed vet certifies such animal to be unfit for purchase due to illness or presence or (2) within 180 days following the sale a licensed vet certifies such animal as unfit for purchase due to congenital malformation that adversely affects the health of an animal (Pet act).

If the Pet act applies, the purchaser can (1) return animal and receive a refund and reasonable vet costs, (2) return animal and receive an exchange of animal and reasonable vet costs, or (3) retain animal and receive reimbursement from pet dealer for vet services from a licensed vet of purchaser's choosing for the purpose of curing or attempting to cure the animal (Pet Act).

In Martin's case, since Martin has grown attached to Ash and wants to keep Ash, we recommend that Ash request option 3 as a remedy under the pet act since it allows Martin to keep his dog.

However, under the Pet Act, a pet dealer may contest a demand for refund, exchange, or reimbursement, and in which case the dealer, Shafer may require the purchaser, Martin, to produce the animal, Ash for inspection by licensed vet of dealer's choice (Pet Act).

a. The Pet Act applies due to ambiguity in Shafer's contract.

The Pet Act applies to the current situation because even though Schafer's contract is unambiguous as to the timeline for reporting a congenital defect, remedies are not provided and hence the remedies are ambiguous or nonexistence and then relevant statutes must be used to fill those gaps.

To interpret written contract, one first review language and apply unambigous terms unless the unambigous terms conflict with relevant statutes. Further, if contract terms are ambiguous, the ambiguity is resolved with relevant statutes (Cohen v Dent).

If a contract contains ambiguous terms, a court must construe it most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language (O'Day v Schmidt). In Cohen v Dent, the contract between dealer and purchaser of a dog was ambiguous as to the start date for the one-year remedy if the dog has a congenital condition and fails to address refunds or monetary damages but requires a buyer to choose a remedy (Cohen). Hence, since the Dent contract is ambiguous, a court rejected Dent's claim that the contract bars recovery by the purchaser of a dog with hip dysplasia (Cohen).

So, at present, Schafer's contract does state a timeline for raising defect concerns but not the available remedies. Schafer requires that the dog can be returned within 48 hours of purchase for a replacement if the dog is unable to be a companion or provide in writing within 24 hours of a diagnosis of a congenital defect that is found the

dog being one year old to Schafer. However, no remedies are provided once the defect is provided to Schafer. Hence, to fill the gaps and ambigous nature surrounding remedies, Franklin courts will apply relevant statutes such as the Pet Act.

More specifically, the Franklin Pet Act (Pet Act) governs sale of household pets, including dogs and provides purchasers with a remedy if they provide a certification by a licensed vet about the animal's condition (Cohen). And if a contract between seller and buyer of an animal is ambiguous, the Pet Act is a relevant statute that applies (Cohen). In Cohen v Dent, the purchaser of a dog with hip dysplasia had a right to keep the dog under the Pet Act and further that the seller pay for surgery needed to correct the hip because the contract was so ambiguous (Cohen).

The contract between Schafer and Martin does require that Martin notify Schafer in writing of the defect and Martin only called orally, yet this is likely sufficient to put Schafer on notice of the defect because to notify in writing within 24 hours is a hard standard to meet since mail does not arrive within 24 hours and so email is the only option besides via orally.

Therefore, since the contract between Schafer and Martin do not include remedies for finding a defect within 180 days, the Pet Act applies, and hence Martin can keep Ash, as well as seek further remedy as discussed below.

2. Can Martin have Shafer pay for Martin's dog, Ash's, surgery which costs over $8,000? Yes, under the Pet Act, a remedy for a defective dog purchased is that a reimbursement may be obtained for subsequent surgeries.

As stated in question 1, the Pet Act applies due to the contract failing to provide remedies for the identification and notice to Schafer of a defect before the dog turns 1 year old.

Under the Pet Act, a purchaser of an animal has a remedy if within 180 days following the sale a licensed vet certifies such animal as unfit for purchase due to congenital malformation that adversely affects the health of an animal (Pet act) and the purchaser as a remedy may retain the animal and receive reimbursement from the pet dealer for vet services from a licensed vet of purchaser's choosing for the purpose of curing or attempting to cure the animal (Pet Act).

Since after one month of getting Ash, Martin noticed issues with Ash, Martin took Ash to a licensed Vet, Dr. Turner who diagnosed Ash with a liver dysfunction or also called a congenital defect of the liver. Further the vet said that since the diagnoses was relatively early a surgical remedy was available that would cost over $8000, not included any post-surgical treatment. Further, Dr. Turner is prepared to sign a form certifying in her opinion that the diagnosis is appropriate, and that surgery and post-surgery is needed. With Dr. Turner's certification that the animal was unfit due to a congenital malformation that adversely affected the health of Ash, the Pet Act not only allows Martin to retain Ash but also recover vet fees due to the defect because the fees are aimed to cure Ash from the liver problem.

3. Can Martin obtain a refund of $2,500 from Shafer, which was the purchase price for Ash?

Short answer: Yes, under the UCC, Martin can obtain a refund from Shafer since he breached his implied warranty of merchantability.

a. The implied warranty of merchantability was not waived by Shafer.

The Pet Act does not limit the rights or remedies that are otherwise available to a purchaser under any other law and hence the UCC may further apply when seeking a remedy for the sale of goods.(Cohen).

Article 2 of the UCC governs the sale of animals (Cohen). Further, dogs fall into the category of goods and pet stores and breeders are "merchants" per the UCC (Cohen).

A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind (UCC). Shafer is a merchant since he is a pet breeder and normally sells dogs.

For goods to be merchantable they must pass without objection in the trade under the contract description and are fit for ordinary purpose for which goods are used. To exclude or modify the implied warranty of merchantability the language must mention merchantability and in case of writing be conspicuous (UCC). Unless otherwise stated all implied warranties are excluded by expressions like "as is," "with all faults or other common language that makes plain no implied warranty exists (UCC).

Within the contract between Martin and Schafer, no terms state that the implied warranty of merchantability is waived rather, Schafer states that he minimizes the potential for defects in good faith, which is not a waiver.

Further, when a buyer before entering contract examines goods or refused to examine goods, there is no implied warrant with regard to defects which an examination would have revealed (UCC). However, Martin may have inspected Ash but the defect would not have been known or realized since it does not appear until Ash ages beyond 8, 10, or 12 weeks or possibly older.

Hence, the implied warranty of merchantability was not waived.

b. Martin received nonconforming goods.

If a buyer accepts goods and gives notification, he may recover damages for nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach (UCC). Damages for breach of warranty is the difference at time and place of acceptance between the value of goods accepted and value they would have had if they had been warranted (UCC).

And as such, a buyer of nonconforming goods may recover for damages for a nonconforming tender if the loss results from the ordinary course of business such as a seller's breach (Cohen). In Cohen, the dog with a hip dysplasia is nonconforming tender (a nonconforming good) because the buyer of the dog did not get what she expected, a healthy dog (Cohen).

A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind (UCC). A sale of an animal creates an implied warranty of merchantability and goods are merchantable if they "pass without objection in the trade under the contract description and are fit for the ordinary purpose for which such goods are used" (Cohen).

In the Cohen case, the certification by a vet that the purchased dog was "unfit for purchase" establishes that the dog could not pass without object and hence not fit for ordinary purpose (Cohen). Like Cohen, Martin obtained a dog from Schafer that was unfit for purchase since it developed a congenital defect and a licensed vet is willing to certify that. Hence, the UCC applies because Schafer breached is implied warranty of merchantability by providing Martin with nonconforming goods.

Further, under UCC 2-714(2), damages for nonconforming goods includes the full purchase price for the animal, on the assumption that no buyer would agree to purchase an animal it knew to have a health defect that might lead to death or require expensive surgery to correct (Dalton). Hence, a claim that the full purchase price is not reasonable is not valid when a breach of warranty exists as a pet seller may claim (Cohen).

Schafer may argue that 2-714(2) is an unreasonable remedy but Schafer knows that a defect is possible and hence the claim for a refund for the purchase price for a dog with a defect is not unreasonable.

Therefore, Martin may recover the purchase price of Ash under the UCC because Schafer breached an implied warranty

4. CONCLUSION

In conclusion, even though Martin only orally notified Schafer of the defect, Martin abided by the contract terms of notifying Schafer within Ash turning 1 year old that the dog had a defect that would prevent Ash from being a companion. And hence, since the Schafer contract did not provide remedies only a timeline on alerting Schafer of a defect, the Pet Act and UCC apply which allow Martin to (1) keep Ash, (2) recover vet costs for curing the defect, and (3) recovering the purchase price of Ash.

Please reach out with any questions.

Thanks,

Examinee

Representative Good Answer No. 2

Law Offices of Bradley Wilson

2405 Main St

Creedence Franklin

Dear Mr. Martin,

I understand that you are looking for legal advice on what rights you have in relation to your dog Ash that you purchased from "The Den Breeder" who is owned by Simon Shafer. I understand your two goals to be (1) Keep Ash, (2) Have Simon Shafer cover the costs of Ash's corrective surgery for his "liver shunt" condition.

Keeping Ash is allowed under the Franklin Pet Purchaser Protection Act (FPPPA) The Franklin pet purchasers protection act allows you the remedy of retaining Ash and receiving reimbursements from the pet dealer for veterinary services from a licensed veterinarian of your choosing for the purposes of curing or attempting to cure Ash's liver shunt. §753.

The Franklin Pet Protection act provides options to pet owners who receive a certification from a licensed veteran Ian within 180 days from the pets purchase that their pet is unfit for purchase due to a congenital malformation that adversely affects the health of the animal. You purchased Ash on June 12th of this year, so you are still within the 180-day limitation of this protection. Both the email from your vet and the provided article consider liver shunts to be congenial defects.

To fully satisfy your requirements of the FPPPA you will need to reach out to your veterinarian and request that she provide you a certification that Ash is unfit for purchase due to a congenital malformation that adversely affects the health of the animal. This does not mean that you are giving Ash up, it is simply paperwork that we need to further your case.

The FPPPA gives pet owners multiple options once they obtain the certification from their vitrain, two options require giving back the animal however FPPA §753(b)(3) allows that you retain Ash and receive reimbursement from The Den Breeder for veterinary services from a licensed vitrain of your choosing to cure or attempt to cure Ash's liver shunt. Although you have the ability to choose the vet you would like to provide Ash's care, if Simon contest's, which is likely to happen based on his behavior so far, Simon can require you to bring Ash to a licensed vet of his choosing to be examined. This will provide a second opinion on if Ash has a Liver Shunt, the vitrain that Simon picks would not be the one actually doing the corrective surgery.

The provisions under FPPPA give you the right to keep Ash and to request that Simon pay. the cost of surgery necessary to correct the liver shunt (Cohen).

The contract signed with The Den Breeder

You provided us with the contract you signed with the Den Breeder when you purchased Ash. This contract will have little to no limitation on what compensation that you can receive from the Den Breeder.

Similar to Cohen V Dent, where the breeder attempted to avoid paying for surgery citing disclaimers in the contract signed for the puppy Simon has refused to pay for Ash's surgery however courts ruled against the breeder and i believe that they will likely rule in your favor as well.

Similarly to the contract in Cohen, the contract Simon had you sign for Ash is ambiguous, meaning that the terms of the contract are not clear. The contract you signed has various dates and timelines but nothing in the timeline is clear telling you what you need to do and when. Since Simon drafted the contract, it will be construed most strongly against him and favorably to you since you had no voice in the selection(O'Day v. Schmidt). The contract Simon contains ambiguities that directly affect what you will be able to recover, it has a disclaimer against genetic or congenital diseases but states that the dog is in good health, then requires you to take Ash to a vet to determine if he has any serious illness, no timeframe is provided for that but you are given the option to return the dog within 48 hours for a replacement dog. The 48-hour timeline is then confused by a one-year limitation for congenital defects. All of this confusion will be construed to your benefit and a court will likely reject any claim that Simon may bring that your contract bars a recovery.

Additionally even if you had gotten Ash examined at the time of purchase, veterinarians are split on if his condition could be adequately diagnosed.

The provisions under FPPPA give you the right to keep Ash and to request that Simon pay. the cost of surgery necessary to correct the liver shunt (Cohen). Since the contract contains significant ambiguity there would not be a waiver of these rights and you may receive the cost of Ash's surgery under FPPPA (Cohen).

In addition to the remedies you have under the FPPPA, you also are covered under the uniform commercial code (UCC) for the purchase of Ash, and can receive damages through both the FPPA and the UCC.

Cohen v. Dent determined that pet owners can recover under both the FPPPA and the Uniform Commercial Code.

Article 2 of the UCC governs the sale of animals. Dogs such as Ash are considered "goods" and breeders are looked at as "merchants". Under the UCC a buyer of a non-conforming good (aka dog) may recover as damages any nonconformity of tender the loss resulting in the ordinary course of events from the sellers breach as determined in any manner which is reasonable" UCC §2-714. Ash is a nonconforming good since you did not get the healthy dog you asked for. (Jackson).

The sale of an animal creates and implied warranty of merchantability. Goods are merchantable if they "pass without objection in the trade or under the contract description and are fit for the ordinary purpose for which such goods are used" UCC §2-314(2)(a), (Cohen). The certification that you. will request from your vet (see above) that Ash is "unfit for purchase" means that Ash could not "pass without objection" and since he is sick Ash is not fit for his purpose as a companion dog that he was purchased for (Dalton).

Your recovery under the UCC may be bared depending on the timeframe that you notified Simon of Ash's diagnosis. Assuming you notified him within the 48-hour window you will be able to fully recover, if you notified him later than that we may face some issues with that one requirement.

Assuming that you notified Simon within the 48-hour window, this would be a breach of warranty case allowing you. to recover under §2-714(2)which gives you the difference at the time you accepted Ash between the value of the dog you accepted and the value that you would have received if Ash was a healthy dog. In cases involving animals the courts have repeatedly refunded the entire purchase price of the animal on the assumption that "no

buyer would agree to purchase an animal if they knew it to have a congenital defect that might lead to death or might require expensive surgery to correct.

Conclusion

You should be able to successfully receive the cost of Ash's surgery and his purchase price back from Ash's breeder using a combination of the FPPPA and the UCC. You. will not have to return Ash, but you may have to subject him to another vet examination from Simon's choice of breeder

Thank you, Examinee

MEE 1

Representative Good Answer No. 1

1a. The first issue is whether the wife will prevail in her negligence claim given that she has been diagnosed with cancer since the local farmer began using GS on his nearby farm.

To prove a negligence claim, a plaintiff must show that the defendant had a duty (meaning they were legally obligated to act with a certain level of care), that the defendant breached that duty (meaning they acted in a way that violated that standard of care), and that breached was the proximate, or "but for" cause and the actual cause of their harm.

Duty is legal obligation for someone to act within a certain standard of care. The wife would have to first establish that the farmer owed a duty of care to her. Generally, someone has the duty to act as a reasonable person would given the circumstances. In some instances, a special relationship will give rise to a higher duty, such as between a parent and child or a doctor and a physician. However, there is no special relationship between the wife and the local farmer. Therefore, in bringing a negligence claim the duty will be that of a reasonable person.

Breach is shown by demonstrating that the defendant violated their duty by failing to act in accordance with that standard. The wife would then have to prove that the local farmer breached that duty to act as a reasonable person under those circumstances would. Here, the local farmer is acting within all of the safety recommendations provided by the health department. Evidence that a defendant acted in accordance with the law is not considered dispositive evidence that the party did not breach. However, it is likely to be considered when determining if the farmer was acting as a reasonable farmer would. The wife, on the other hand, may argue that using GS is unreasonable under any circumstances because of the negative health outcomes which have been heavily studied and, for many years, led to the banning of the toxic chemical.

The wife will also have to prove the third prong of negligence, that the farmer's use of GS was the actual and proximate cause of her injury and harm. Actual cause, otherwise called the "but for" cause means that the injury would not have happened "but for" the defendant actions. Here, cancer rates in the wife's county, where GS the GS ban has recently been lifted, are the same as elsewhere in the state. However, there are several studies linking GS exposure to cancer, however these have been done only in mice. Therefore, the wife may have a difficult time showing that she would not have cancer "but for" the use of GS. Her claim will be strengthened by research done about the connection between GS and cancer and by the fact that she lives less than a mile from where GS is used. The second aspect of causation, proximate causation, is proven when the heard is reasonably foreseeable by the defendant, or the plaintiff is a reasonably foreseeable plaintiff. Here, given that it is known that GS can be extremely harmful e and can remain near ground level for several days in high quantities, and the wife lives so nearby, means that her harm is within the scope of reasonably foreseeable harm of the farmer's activities. Her harm, the cancer diagnosis, is easily demonstrated, but proving that her harm was actually caused by the farmer's use of GS will be more difficult.

2. The second issue is what the husband must prove to establish a successful trespass claim against the local farmer given his severe respiratory problems during the planting season.

To bring a successful trespass claim, the husband must establish that the local farmer intentionally caused contact with his land with disrupted his use and enjoyment of the land.

Trespass is an intentional tort, meaning that the plaintiff must demonstrate not that the defendant intended to cause harm, but that the action itself was intentionally done. Here, this is not difficult for the husband to prove because he is clearly intentionally farming and is intentionally using GS, as demonstrated by the fact that he is a farmer and that he has taken classes on how to use GS.

Secondly, the husband will have to prove that the farmer caused contact with his land. "Contact" in trespass is not limited only to physical contact, but can include when a defendant causes a different kind of disruption of disturbance, such as fumes or smoke. The husband's claim will be weakened by the fact that, as far as the facts discuss, there is no actual contact in the sense that they do not feel or smell the chemical.

Finally, the husband would have to prove that his respiratory issues are actually and proximately caused by the local farmer's use of GS and that those relate to the use and enjoyment of his land. Given that the rate of respiratory illness in the county is higher than the rest of the state and his issues coincide with farming season, he may be able to prove the GS is a "but for" cause. This will also be heled by the information that GS is highly toxic and can be fatal to people in a confined area, where even slight exposure can cause serious respiratory issues. Similar to his wife, he would be a reasonably foreseeable plaintiff.

3. The final issue is, assuming the husband prevails, if the court is likely to enjoin the farmer from using GS within one mile of the couples house given that they are arguing the GS is causing cancer and respiratory issues.

A court is likely to issue an injunction when it is proven necessary to stop imminent and severely dangerous harm. An injunction is a common equitable remedy to claims such as private and public nuisance. In issuing an injunction, the court will conduct a balancing test which takes into account the harm suffered by the plaintiff, the burden on the defendant as a result of the injunction, including the economic burden, and the interests of both the plaintiff and the defendant and the public.

However, in response to a trespass claim, especially where there is no actual contact with the plaintiff's land, it is unlikely that a court would issue an injunction to stop the farmer from using GS. Additionally, the history of GS in the county demonstrates that there is no safer way to use GS and that GS is considered to have both a huge economic and public impact given that it allows the growing of crops. The lack of GS has in the past resulted in a huge economic loss for the county. Given the utility of GS, the economic consequence of an injunction, paired with the low population density and that the claim is trespass, a court is very unlikely to enjoin the farmer.

Representative Good Answer No. 2

1. Whether the wife can prevail in a claim against the farmer for negligence by establishing the farmer's use of GS caused her cancer.

Negligence requires duty, breach, causation, and damages. Where a duty is owed to another, it is generally one of a reasonable person under the same or similar circumstances. In a negligence claim, one must show a duty was owed and that the defendant breached that duty, that is, the defendant acted with lesser care than required. To show causation, a plaintiff must show the defendant was both the actual and proximate cause of their injury. Actual cause means that but for the defendant's act, the plaintiff's harm would not have occurred. Proximate cause means the plaintiff's harm was a reasonably foreseeable consequence of the defendant's act. The plaintiff must then show they suffered damages, which can be demonstrated by physical injury or property damage, for example.

Here, the wife must show the farmer owed her a duty, breached that duty, and thus caused the wife's cancer. The facts indicate this may be hard to do. The wife has a strong argument to the extent her cancer was only diagnosed last year, and that some scientists believe GS exposure likely causes cancer. The farmer here began using GS when the county at issue lifted its ban on the substance two years ago. The main issue for the wife will be proving causation. She can assert the farmer owed her a duty of reasonable care, which he breached by choosing to use risky chemicals, but the farmer will likely assert he did not breach any duty owed as he attended the required safety seminar. Though the question of breach will therefore present a hurdle, even if the wife can establish breach, she will need to prove actual and proximate cause as well, which she very likely cannot do. Nothing can definitively tie the GS use to her cancer, especially given that cancer rates in the county are consistent with the state rate.

The wife likely will not prevail on a negligence claim against the farmer.

2. Whether the husband can prevail on a claim for trespass against the farmer.

Trespass occurs when one physically intrudes upon the land of another. The trespasser need not intend to intrude on another's land, they need only intend for the act that causes the intrusion. The trespasser themselves need not intrude, but may also cause an intrusion amounting to trespass.

Here, it has been established that GS injected into soil eventually rises above ground and can then drift to nearby land up to one mile from each application point. The husband lives less than a mile from several points where the farmer applied GS. He therefore must prove the GS, by way of the farmer's act, has intruded upon his property. Considering the aforementioned facts, coupled with the fact it has been found that GS rises into the upper atmosphere and can remain near ground level for several days in concentrations much higher than the suggested "safe" exposure limit, it is likely the husband could prevail on a trespass claim. He needs to assert the farmer's act of applying GS has physically intruded on his land, which he can show given what is known about GS's properties and its ability to travel to neighboring property or exist in the atmosphere. The husband also will likely be able to show this trespass has caused him harm in the way of his respiratory problems, especially considering the known correlation between these two things and the fact that respiratory problems in the county have increased by 50% since the department lifted the GS ban.

The husband will likely prevail on a claim for trespass against the farmer.

3. Whether the court is likely to grant a permanent injunction in favor of the husband against the farmer to force the farmer to stop using GS within one mile of the couple's home.

To prevail on a permanent injunction, one must show actual success on the merits of their claim, irreparable injury would occur in the absence of the injunction, the balance of equities weighs in favor of granting an injunction, and an injunction would be in the public interest.

Here, assuming the husband prevails on his claim for trespass, the first requirement is met. Next, the husband could show the second requirement is met by the fact he currently suffers from respiratory problems owing to the farmer's use of GS, and that the continued use of GS on the farm, located less than a mile from the husband's house, would likely allow this to amount to an irreparable injury. The third factor is likely trickiest. The husband will assert that GS has been established as a highly toxic substance which, with even slight exposure, can cause serious respiratory problems. The husband will also note he began experiencing severe respiratory problems during the planting season, and that these facts weigh in favor of an injunction. The farmer will assert he needs GS to grow the county's traditional crops, there is a lack of viable substitute crops and a lack of other effective pesticides on the market, that the estimated cost of crop losses to the county (in absence of GS) would amount to $500 million annually, and that the county has a low population density. The farmer may also indicate his inability to use the GS in a further distance from the couple's house given the proximity between his land and

theirs. These facts tend to indicate the balance of the equities, and the public interest, are in favor of the farmer. However, the husband may also assert he and the wife have lived in their home for 10 years, and that it is scientifically proven his respiratory problems, and other peoples as well, are caused by the nearby use of GS. Even so, a court may still find the farmer's argument most persuasive, which would mean the husband could not prevail in obtaining a permanent injunction to enjoin the farmer from using GS withing one mile of the couple's house.

MEE 2

Representative Good Answer No. 1

1) Parent liability to Vanco as a partner

A partnership is formed when two or more parties intend to conduct a business for profit. Parties can be individuals or legal entities. A partnership is determined by looking at the totality of the circumstances. Generally distribution of profits and shared management help to discern partnerships, but distributions can be for other reasons than sharing profits, such as payment of fees, loan obligations, etc. Additionally, where there is a validly formed limited liability company, the members' liability will be limited to the liability of the LLC.

Here, though the two companies have been characterized in the news as "partners in promoting business sustainability," there is no indication that they are partners. Sub is an LLC wholly owned by Parent. Parent sell's plastic to Sub to make shoes, but this is a sale, rather than part of the business management. Further, Parent only sells some of its plastic inventory to Sub, and likely sells plastic to other vendors. Additionally, Sub and Parent each have their own management, and though sub makes distributions to Parent, they are LLC distributions to members, not partnership earnings. Therefore, Parent would not be liable to Vanco as a partner.

2) Is Parent bound by agreement signed by Parent's manager?

There are two types of LCCs: Member-managed, and manager-managed. In a manager- managed LLC, only the manager is able to act as an agent of the LLC. A member cannot act as an agent. There are two types of agency: actual or apparent. For apparent authority, there needs to be a communication by the principal to the third party indicating the agency. But where there is no agency, the theories of ratification and estoppel can apply. When an employee is outside the scope of her duties, the company may not be liable for her as an agent. Here, Greta was not an agent of Sub because she had no standing with Sub. There was also no apparent authority because it was not Sub that held Greta out as an agent. But Sub might have ratified the contract after the fact since there is no indication that it did not stop the contract until it fell on hard times. Lastly, Greta could not bind Parent because 1) she signed for Sub, not Parent, and she was well outside the scope of her duties as an employee of Parent signing for a company she had no connection to.

3) Parent a substitute for Sub - Piercing the corporate veil

When an LLC functions as an alter-ego of a principal, courts may pierce the corporate veil and disregard an entity's limited liability. Courts will look at the totality of the circumstances, but some factors include, insufficient capitalization, substantial control, co- mingling of assets, and disregard for the corporate formalities. Here, the two companies shared personnel and the manager of Parent signed for Sub. Further, Parent shares with Sub in testing and designing new uses for the plastics, and Parent substantially dominates Sub. Therefore, a court would likely allow VanCo to pierce the corporate veil and make Parent liable to Vanco.

Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

Representative Good Answer No. 2

1. The issue is whether Parent is liable to VanCo as a partner of Sub

A partnership exists if there are two or more persons or entities carrying on as co-owners in business together for the purpose of making a profit. A partnership can consist of natural persons or business entities such as LLCs. In determining whether entities are acting as co-owners, a court would examine the circumstances. If both parties have control and a voice over the business arrangement, this would tend to demonstrate co-ownership. Profit sharing is also nearly dispositive of co-ownership. If an entity is found to be a partnership, then both partners are equally liable as partners for partnership obligations.

Here, Parent and Sub are each manager-managed LLCs. They have a close relationship involving the sale of plastics, and have been described as "partners promoting business sustainability." However, although they share some personnel and designing, they do not share the costs for the services they use. They also do not share profits, as Parent alone collects distributions from Sub.

Because Parent and Sub have not formed a partnership, Parent is not liable to VanCo as a partner of sub.

2. The issue is whether Parent is bound by the agreement between Sub and VanCo signed by Parent's manager

In an agency relationship, an agent acts pursuant to the authority granted by the principal and binds the principal with that authority. An agent has actual authority when the principal has authorized her to act with his specific instruction, or as is reasonably necessary to accomplish a specific goal. When an agent enters into a contract with a third party on behalf of the principal, liability for that contract depends on whether disclosure is made of the existence of an agency relationship and the identity of the principal. If both of these are disclosed to the third party, and the agent acts with actual authority, the principal is bound on the contract to the third party and the agent is not bound.

Here, Sub's manager granted actual authority to Parent's manager Greta to sign an agreement with VanCo on Sub's behalf. VanCo knew that Greta was acting as an agent of Sub and not as an agent of Parent because she signed the agreement as "Greta, as agent of Sub." This disclosed to VanCo not only the existence of an agency agreement but also of the identity of the principal - i.e., sub.

Because the agency arrangement was fully disclosed, Parent is not liable or bound by the agreement between Sub and Vanco signed by Parent's manager.

3. The issue is whether the fact that Parent and Sub are separate organizations should be disregarded so that Parent is liable for Sub's obligations to VanCo

Despite the shield afforded by limited liability organization, courts can choose to disregard limited liability in certain circumstances if necessary to achieve justice. A court may choose to pierce the veil if there is some type of overreach or fraud, if there is a disregard and comingling of corporate formalities such that one entity is a "mere instrumentality" or "alter ego" of another, and if piercing the veil is required to overcome injustice to a third party.

Here, Parent and Sub are inextricably linked. They have contracts to sell each other items; they share staff, accounting and governmental relations teams. Parent has significant control over Sub; Parent is the sole member of sub and even selects Sub's manager. Sub's sole purpose is to use the plastic Parent sells to it to create shoes to sell to others. There is probably enough to equal commingling. However, there is no indication that Parent or Sub made any fraudulent statement or misrepresentation. Although VanCo might only be able to be paid if it can reach Parent, nothing Parent or Sub did coerced Vanco into believing Parent would be responsible.

Parent and Sub's existence as separate entities should not be disregarded and Parent should not be liable for Sub's obligations to VanCo.

MEE 3

Representative Good Answer No. 1

1. If the daughter consents to the termination of the trust and the purchase of annuity a (wholly for the benefit of betty), a court may authorize the trustee to terminate the trust and purchase Annuity A.

The statute in this jurisdiction states that a trust may be terminated if all beneficiaries consent if the continuance of the trust is not necessary to achieve any material purpose of the trust. Further, the statute provides that "spend thrift" provisions are not presumed to be a material purpose of the trust.

Here, the testator created the trust specifically to ensure that betty would have sufficient funds and support as necessary for her life. The circumstances now show that the purpose is no longer being met, because paying 80 percent of trust income annually has not provided for her to have sufficient funds. The purchase of annuity A will achieve the purpose laid out by the testator, as it will provide for Betty's care and support for the rest of her life.

Though the statute states a spendthrift provision (a support trust like this one is impliedly spendthrift; it provides for the support of the beneficiary) is not a material purpose, the provision providing for Betty's support is the only meaningful provision in the trust. Though the trust provides for assets to be paid to the testator's daughter, the testator included that to ensure that money did not go to the state, and it is clear that testator's real intentions are to provide for betty.

Thus, because terminating the trust ad purchasing annuity a wholly for betty's benefit complies with the statute requirement that continuance of the trust is not necessary to achieve its purpose, the court may authorize the termination and subsequent purchase of annuity A.

2. If the daughter does not consent to the termination of the trust and the purchase of Annuity B (for the benefit of betty and the daughter) a court may authorize the trustee to terminate the trust and purchase Annuity B.

Under the statute, consent is required of all beneficiaries. Daughter, though estranged, is a beneficiary. Thus, if she does not consent, the statute here provides that the court may still approve termination if the court is satisfied that the trust could have been terminated had all beneficiaries consented and that the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention.

If daughter did consent, the purpose of the continuance of the trust would not be necessary to achieve the material purpose, because as discussed above, the material purpose here is clearly to provide for Betty's support, and the trust no longer does that. Thus, the question becomes whether or not Daughter's interests are protected in accordance with testator's probable intention.

Here, Testator noted in the trust instrument that trust assets should be paid to his daughter. His reasoning for this is clearly that he does not want the assets to pass to the state. It does not appear that testator was particularly concerned with the wellbeing of his estranged daughter. Thus, terminating the trust and purchasing annuity B, which will not only provide for betty but also provide some benefit to Daughter, is clearly within testator's intentions. Though Daughter may receive less, testator did not have any intention that daughter receive a certain amount. Further, daughter's interests are protected under this scheme because annuity B is purchased for both her and Betty's benefit and she would receive some funding.

3. If a court does not authorize the termination of the trust, it may authorize the trustee to pay 100 percent of the trust income to Betty without the daughter's consent.

The issue is whether the payment of trust income to Betty will further the primary purpose of the trust.

The jurisdiction's statute provides that the terms of a trust may be modified because of circumstances unanticipated by the testator only if it will further the primary purpose of the trust. Modification must be made in accordance with Testator's probable intention. There is no requirement that all beneficiaries consent to the modification under the statute.

Here, the testator did not anticipate that nursing home fees would dramatically increase, and that is the reason Betty can no longer afford the fees. The primary purpose of the trust, again, is clearly to provide for Betty's support. And, testator did not appear to want to give a substantial benefit to Daughter, rather, he appeared to want to give her some benefit rather than have his property pass through intestacy to the state. Indeed, testator seemed to think he had "little choice" but to give some property to his daughter.

Thus, paying 100 percent of the income to Betty will result in providing for her support, which is the primary purpose. And, though it will provide no support to Daughter, that appears to be in line with Testator's intentions, because he is estranged from daughter and appeared to only make a gift to her because he did not want his money going to the state. Because the circumstances were unanticipated, the modification furthers the primary purpose of the trust, and the medication is in accordance with testator's intent, the court may allow trustee to pay the trust income to Betty without daughter's consent.

Representative Good Answer No. 2

1. The issue is whether, with the daughter's consent, the court can authorize the trustee to terminate the trust and purchase Annuity A.

Section 1 states that with the consent of all the beneficiaries, the court may conclude that the continuance of the trust is not necessary to achieve any material purpose. Section 3 states that for purposes of Section 1, a spendthrift provision in the trust is not presumed to constitute a material purpose of the trust. And Section 2 states that upon termination of a trust under Section 1, the trustee shall distribute the trust property as agreed by the beneficiaries.

Here, the court would need the consent of all beneficiaries, both Betty and Daughter to act. Betty is considered a beneficiary because she receives a percentage of the trusts income. Daughter is considered a beneficiary because she will receive the principal of the trust.

Additionally, the testamentary trust left by Tom can likely be construed as a spendthrift trust. A spendthrift trust is designed to keep the beneficiary from freely spending the assets of the trust. Here, Tom indicated that "No beneficiary may alienate or assign her interest in this trust, nor shall such interest be subject to the claims of her creditors." This language indicates that Tom intended the trust income to be spent only as he indicated and not be accessible by creditors. Therefore, Tom likely set up a valid spendthrift trust

However, as the statutes indicate, a spendthrift provision is not considered material.

Instead, the material purpose of this trust is to ensure that there is sufficient funds to provide for Betty's care and support for the remainder of her life. Tom designated the remains to go to his daughter because he has "no other relatives" and would rather not let the assets escheat to the state. Therefore, it is likely that the material purpose of the trust is to benefit Betty during her lifetime. Purchase of Annuity A would effectively serve to benefit Betty for her life.

Because termination of the trust would not cut off a material purpose of the trust and would be valid under the applicable statutes, the court could authorize the termination of the trust and purchase of Annuity A.

2. The issue is whether, without the daughter's consent, can the court authorize the termination of the trust and purchase of Annuity B.

Under Section 4, if not all beneficiaries of a trust consent to a proposed termination of the trust pursuant to Section 1, the court may nonetheless approve the termination if the court is satisfied that, if all beneficiaries had consented, the trust could have been terminated under that section, and the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention.

Here, it is likely that the court would be able to act because its actions would not violate the above statute. The court would likely find that if all beneficiaries had consented, the trust could have been terminated. As detailed above, the primary purpose of the trust is to benefit Betty and provide her support and care. Because the trust is now unable to adequately do so, it is likely that the court would find termination appropriate. Further, Annuity B provides for daughter by allotting a cash payment to her, which fulfills the requirements under Section 4.

For these reasons it is likely that the court could authorize the trustee to terminate the trust and purchase Annuity B.

3. The issue is whether, without the daughter's consent, could the court authorize the trustee to pay 100% of the trust income to the Betty.

Income is general proceeds generated from the trust assets. The principal is the assets held within the trust, generally preserved for the benefit of another.

Section 5 indicates that a court may modify the dispositive terms of a trust if, because of circumstances not anticipated by the testator, modification will further the primary purpose of the trust. To the extent practicable, the modification must be made in accordance with the testator's probable intention.

Here, modification of the trust would likely support the testator's probable intention. Tom and Betty were married for 35 years. Tom indicated that he and Betty had a wonderful marriage and that she is the love of his life. His primary intention of the trust was to benefit Betty for the remainder of her life by providing her support and care. Until 2019, the 80% payout from the trust was sufficient to do so. However, after Betty was diagnosed with a health problem she had to move to a nursing home. The cost of the nursing home fees have dramatically increased, a circumstance that Tom did not anticipate.

Because Tom's primary intent was to care for Betty, and not daughter, it is likely that the court will find a modification of the trust that furthers this interest valid. The trust can be interpreted to understand that daughter was not a material beneficiary because Tom only left her assets because "he has no other relatives." Further, granting Betty 100% of the income would not diminish the daughter's principal account, which has been accruing since 20008.

For these reasons, modifying the trust so that 100% of the income benefits Betty will likely be permitted by the court.

Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MEE 4

Representative Good Answer No. 1

Whether Tech Properly Raised SOL Defense

The issue is when the SOL defense must be raised.

The SOL must be raised in the defendant's first answer. Thus, because the defendant failed to mention the SOL in its first answer and instead waited a month to assert it, the SOL defense was not properly raised.

How Court Should Resolve Summary Judgment Motions Re: Contracts Breach

The issue is whether the parties evidence establishes that there was a genuine issue as to the contents of the contract.

Summary judgment is appropriate where one party demonstrates that there is no genuine issue as to a material fact in the case, and that it is entitled to judgment as a matter of law. A genuine dispute is established when each side presents conflicting evidence regarding a key issue, such that the court must allow the issue to be adjudicated at trial. Typically, SJ motions are made after the close of discovery but may be filed earlier than that. The court will generally make its determination in the light most favorable to the nonmoving party. However, the court does not consider the credibility of the evidence, just simply that each side presents a viable argument in their favor pertaining to the issue.

Here, the summary judgment motions partly concern contract terms. There is particular difficulty here because the parties do not have a written contract, only an oral one. Thus, the court is left with having to consider extrinsic evidence to consider the contents of the agreement. On one hand, Tech purports that the agreement only covered voice- recognition software for the combination meals identified by number. It supports this contention with an affidavit from Tech's president, who claims that she and Diner's president agreed to those specific terms, not that the agreement would cover all items on the menu. On the other hand, Diner contends that the company presidents met and entered into an agreement by which the voice-recognition system would cover all menu items, not just combo meals by number. It supports its contention with deposition testimony of 8 witnesses who maintain they were present during the negotiation and witnessed the terms being agreed to. Even though Tech only provides one affidavit and Diner provides testimony from 8 different witnesses, a genuine dispute still arises here. As mentioned, the court need not consider the weight/amount/credibility of the evidence each side presents--there just needs to be a genuine issue raised. Here, there is a genuine issue as to a material fact, i.e., what the contractual terms are. With respect to that particular issue, each side is presenting conflicting information and evidence. As long as each side has presented some evidence in opposition of the other, the court will find a genuine issue and rule that the issue should be litigated.

As a result, the court will likely deny both summary judgment motions as it pertains to breach of contract.

Whether there is any significant action court should take on its own initiative unrelated to merits of parties' motions

The court should not undertake any action unrelated to the merits of the parties' motions. The issue is whether courts may consider their own information in making summary judgment considerations.

The rule is that when presented with a motion for summary judgment, the court must only consider the evidence presented by the parties and determine, based off what they present, whether the sides have presented a genuine issue as to a material fact. The court cannot look to any outside information or evidence it collects on its own accord.

Thus, in determining whether to grant the motions for SJ related to the contract breach, the court may only consider the evidence and pleadings presented to it, i.e., the complaint, the answer, the affidavit Tech attached to its motion for SJ, and the deposition testimony Diner attached to its motion.

Representative Good Answer No. 2

1. SOL as defense

If a defendant wants to assert an affirmative defense, they must do so in their answer or it is deemed to be waived. If the original answer does not include the defense, the defendant may amend their answer within the time frame appropriate for amending such a pleading (21 days as of right, or with court leave which should be given freely when justice so requires) and the court will allow the defense to be asserted.

Here, Tech (T) filed an answer stating an admission of allegations 1-5 and a denial of allegations 6-7. The answer contained no defense of the statute of limitations. T did not amend its answer within the 21-day period under which it was entitled to do so as of right. Instead, T filed a motion one month later which raised the defense for the first time. However, the court should allow T to raise the defense at this time because the 9-day delay is in the interest of justice as it did not significantly prejudice the plaintiff (unlike if T had waited until the close of discovery after Diner(D) spent all that time and money on discovery).

Therefore, while T should have raised the defense in its answer, the court should allow them to amend the answer to raise the defense now in the interest of justice.

2. Summary judgment on issue of contract breach

A summary judgment motion is proper if made at any time before 30 days after the close of discovery and the standard for assessing it is whether there is a dispute of material fact. If there is no dispute of material fact, the summary judgment should be granted and if there is a dispute of material fact, the court should not grant summary judgment but instead allow the issue to go to trial. In assessing a summary judgment motion, the court should consider the motion itself, along with any affidavits or discovery information.

Here, T raised a summary judgment motion based on their assertion that the contract required it to produce software that only recognized “combination meal” orders. This is supported by an affidavit by the president that she and D’s president agreed that the contract would only apply to combination orders. In contrast, D’s summary judgment motion argues the other way; that the terms of the contract covered all menu items. This also had the support of deposition testimony by eight witnesses who testified the agreement covered all menu items. When assessing both motions and all affidavits and discovery information, the court should deny both summary judgment motions. On their face, the conflicting motions assert a dispute of material fact: whether the contract was for all menu items or for combination items only. Since the actual contract is not available since it was merely an oral contract, there exists a dispute of material fact and the case should go to a jury to determine its merits.

3. Court’s independent action

A court, on its own initiative, may dismiss a case if it lacks subject matter jurisdiction over the parties. A federal court can have subject matter jurisdiction either if the complaint asserts a claim under federal law (federal question), or if there is diversity jurisdiction. Diversity jurisdiction requires that the parties are citizens of different states and the amount in controversy exceeds $75,000. A corporation is a citizen of both the state in which it was incorporated and the state where it maintains its principal place of business. If the diversity requirements aren’t met, the court does not have jurisdiction over the case.

Here, D brought this case under diversity jurisdiction. They claim in the complaint that there is complete diversity of citizenship because D is incorporated in state C and T is incorporated in state D. However, in stating the basis

for venue, D also discloses that both D and T have their principal place of business in state A. Thus, there is no complete diversity because both parties have a common state of citizenship. Since the requirements for diversity are not met here, the court may dismiss the case sua sponte.

MEE5

Representative Good Answer No. 1

1. The issue is whether the Supplier has an enforceable interest in the machine.

For a secured party to have an enforceable interest, the secured party's interest must attach to the collateral. An interest attaches to collateral when (1) the secured party gives value to the debtor, (2) the debtor has ownership rights in the collateral, and (3) the debtor authenticates a security agreement that reasonably identifies the collateral, or the debtor receives possession or control of the collateral.

Here, the Supplier (secured party) has given value to the Company (debtor) by delivering the machine to the Company (while retaining title until the Company paid in full). The debtor has an ownership interest in the machine because the debtor has paid a down payment of $6,000 and promised to pay the remaining $24,000 for the $30,000 machine. The debtor and the Supplier authenticated a security agreement that reasonably identifies the collateral because both of them signed a writing that clearly described the machine. Thus, the Supplier's interest attached to the machine, and the Supplier has an enforceable interest in the machine.

2. The issue is whether the Lender has an enforceable interest in the machine.

Based on the rules of attachment listed above, the Lender has given value to the Company by lending the company $1M. The company has ownership in the collateral listed because the company owns its personal property. Both parties signed a loan agreement, however, the loan agreement did not reasonably identify the collateral. The loan agreement stated that the company granted a security interest to lender in "all of Company's personal property." This description is too broad to reasonably describe the collateral. Thus, the Lender's security interest has not attached to the collateral (barring any facts indicating that the lender took possession or control of any collateral). According, the lender does not have an enforceable interest in the machine.

3. The issue is whether BigBank has an enforceable interest in the machine.

Equipment includes goods that are not consumer goods, inventory, or farm products. Equipment are usually items used for a running a business. A security agreement may include a clause that provides that future goods will be subject to the security agreement.

Based on the rules of attachment explained above, BigBank has given value to the company because BigBank lended $750,000 to the company. The Company had ownership interests in the collateral because the company owned its equipment. The Company authenticated a security agreement that reasonably identified the collateral because the company signed a loan agreement that stated that the Company granted a security interest to Bigbank in "all of Company's present and future equipment." Thus, the requirements of attachment have been met.

Since, the machine is not a consumer good, inventory, or a farm product, but rather is used in the Company's business, the machine qualifies as equipment. Further, since the security agreement specifies that Company grants BigBank an interest in the company's present equipment, BigBank's interest has attached to the machine. Thus, Bigbank has an enforceable security interest in the machine.

4. The issue is what the order of priority is for the enforceable interests in the machine.

Perfection generally determines which secured interests have priority. A party can perfect its interest upon attachment by properly filing a financing statement, gaining possession or control over the collateral, or by automatic perfection. Perfected interest have priority over unperfected interests.

Here, Supplier did not file a financing statement, and did not have possession or control over the machine. Although the Supplier had a purchase money security interest (because the supplier sold the machine on credit to the company), the interest did not automatically perfect because it was not a consumer good. Since the supplier did not perfect its interest, the supplier does not have priority over other perfected interest.

Bigbank perfected its interests by filing a financing statement in the proper office on May 4, where it listed the company as the debtor and bigbank as the secured party, and indicated the collateral. Since Bigbank perfected its interest, it has priority over the supplier.

Representative Good Answer No. 2

(1) Enforceable Interests

(1)(a) The issue is whether Supplier has an enforceable interest in the machine.

A secured interest becomes enforceable when a secured party's interest attaches to the collateral that secures the debtor's obligation to perform. Collateral may include goods such as equipment, which describes goods used in operating a business that is not inventory, farm goods, or anything that is consumed or used up. Attachment occurs when (i) the secured party gives something of value to the debtor, (ii) the debtor has rights in the collateral, and (iii) an authenticated, written security agreement is authorized by the debtor, *or* the secured party takes possession or control of the collateral pursuant to an oral security agreement. An authenticated security agreement must (i) be written and retrievable, (ii) authorized by the debtor, and (iii) describe the collateral to which the interest attaches. A debtor may authorize a security agreement by signing it. A super- generic description of the collateral, such as "all of the debtor's personal property," does not meet the third requirement because such a description is insufficient to reasonably identify the collateral, but a description that includes all of the debtor's goods of a particular type is sufficient.

In this case, Supplier retains an interest in the machine by retaining title to it until Company has paid the full $30,000 price over the course of twelve months, thus securing

Company's obligation to pay in full. It has provided value to Company by immediately delivering the machine to Company before the remaining $24,000 had been paid. Company has rights in the collateral because it received the machine immediately. The writing memorializing the agreement is a properly executed authenticated security agreement, because it is a retrievable writing that the debtor authorized by signing it, which describes the machine clearly. A clear description of the machine is likely sufficient to reasonably identify the collateral. Having met these requirements, Supplier's interest in the machine has attached and is enforceable.

(1)(b) The issue is whether Lender has an enforceable interest in the machine.

The same rule for attachment described in part (1)(a) applies to Lender's interest in the machine.

The first two requirements for attachment are met: Lender provided value to Company in the form of $1,000,000, and Company has rights in the collateral because it has possession of its own personal property. The parties memorialized their agreement in a written, retrievable loan agreement, which the debtor authorized by signing it. However, this written agreement only describes the collateral as "all of Company's personal property," which is a super-generic description that is likely insufficient to reasonably identify the collateral. Lender does not have possession of the machine. Therefore, the third requirement for attachment has not been satisfied. Therefore, Lender does not have an enforceable interest in the machine.

(1)(c) The issue is whether BigBank has an enforceable interest in the machine.

The same rule for attachment described in part (1)(a) applies to BigBank's interest in the machine.

BigBank provided value to Company in the form of $750,000, and company has rights in the collateral because the collateral is its own present and future equipment. The loan agreement is written and retrievable, and Company has authorized it by signing it. The collateral description in the agreement, in contrast to Lender's loan agreement is not super generic; "all of Company's present and future equipment," is likely sufficient to reasonably identify the collateral because it specifies goods of a particular type: equipment. The machine is equipment because it is to be used in Company's business,

but is not inventory, a farm good, or a good that gets used up in the course of business. Therefore, all three requirements for attachment have been satisfied, and BigBank has an enforceable interest in the machine.

(2) The issue is whether Supplier's PMSI has priority over BigBank's security interest in the machine.

Priority is determined in part by whether and when a secured party has perfected its interest in the collateral, which gives notice to other creditors of the party's security interest. An interest in equipment may be perfected either by the secured party taking possession of the collateral, or by filing a financing statement with the proper filing office, which must include the names of the debtor and secured party and a description of the collateral. The collateral description may be super generic, but will only cover collateral in which an interest has properly attached. The debtor's signature on an authorized security agreement is sufficient to authorize a financing statement reflecting

the agreement. As between two perfected security interests in the same collateral, the first secured party in time to file or perfect takes priority. A perfected security interest takes priority over a security interest that has not been perfected.

A seller's purchase-money security agreement (PMSI) is a special type of security agreement that occurs when goods are sold on credit, such that the seller retains title to the goods until the buyer has completed its obligation to pay. When a PMSI in equipment is perfected before a debtor-buyer takes possession of the collateral, or 20 days thereafter, the PMSI takes super priority over other perfected security interests.

Here, Supplier has a seller's PMSI in equipment, because it retains title to the machine until Company performs its obligation to pay the remaining $24,000 it owes for the machine. However, Supplier did not perfect its interest because it does not have possession of the machine and has not filed a financing statement reflecting its security interest. Therefore, no super priority applies because there was no perfection before or within 20 days after Company taking possession of the machine.

On the other hand, BigBank did file a financing statement on May 4, which included all required information: the debtor and secured party's names, as well as an identical description of the collateral as appeared in the security agreement. The debtor signed the security agreement, so the financing statement was properly authorized, and it was filed with the proper filing office. Therefore, BigBank's interest in the machine was perfected on May 4.

Because Supplier never perfected its interest in the machine, BigBank's perfected interest in the same takes priority.

Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MEE 6

Representative Good Answer No. 1

1. Adam's statements

Adam's statements are likely admissible. At issue is whether the officer improperly extended the length of the traffic stop as to place Adam in custody.

The Fifth Amendment, incorporated against the states under the Fourteenth Amendment, provides the right against self-incrimination. The Supreme Court has said that this right must be enforced through certain prophylactic rules - namely when a suspect is in custody and subject to police interrogation, they must be made aware of their right to remain silent and their right to have attorney present.

Whether a suspect is in custody and thus entitled to their *Miranda* rights is a two-step inquiry. First, the court will look at whether the defendant has had their freedom of movement restrained or that a reasonable person in their position would not feel free to go. If that part is satisfied, the court will look to how closely the situation resembles the station house interrogation at issue in *Miranda* - the closer the resemblance the more likely the court will find that the defendant was in custody. The Supreme Court has specifically held that routine traffic stops, because of their public nature and that the occupants of the vehicle can expect to be released shortly, is not custody for *Miranda* purposes. An officer, however, is required to use all diligence to resolve the reasons for the stop as quickly as they can, and then to allow the occupants of the vehicle to leave.

Failure to do so may turn a routine traffic stop into a custodial situation.

Here, the officer made a valid stop of the car because it was operating illegally without headlights [any pretext would not make the stop an unreasonable stop under the Fourth Amendment]. Though the officer sought to make the traffic stop appear like a routine stop and release after ticketing, the officer planned to hold the occupants there until arrest. This, however, is irrelevant to the Fifth Amendment analysis. Custody is evaluated objectively from a reasonable person in the defendant's shoes - and if the defendant does not know of the officer's state of mind, it cannot be considered.

The traffic stop at issue was not prolonged beyond a routine stop. In fact, the questioning of Adam was very early in the stop. Thus, the stop was still akin to a routine traffic stop and Adam was not in custody. He therefore cannot make a Fifth Amendment *Miranda* claim.

The interrogation element would likely not be met even if custody was established. Questioning or other tactics amount to an interrogation under *Miranda* if the conduct of the officer is reasonably likely to elicit incriminating information. Here, the officer asked Adam only where he was coming from - which may not be reasonably likely to elicit incriminating information.

2. Ben's statements

Ben's statements are likely not a violation of his *Miranda* rights. At issue is whether Ben received proper warning and whether he was under interrogation.

If an individual is subject to custodial interrogation, *Miranda* provides that they must be warned that (1) they have the right to remain silent; (2) that their statements can be used against them in court; (3) that they have a right to an attorney; and (4) that if they cannot afford an attorney one will be provided to them. These warnings do not require any specific language or words, but the defendant must be made aware of them.

Here, Ben was told only that he had the rights that the Constitution and *Miranda* give him but was not told what those rights were. Not everyone is expected to know Supreme Court case law, and this is almost certainly

insufficient to put him on notice of his rights. Therefore, his *Miranda* rights were violated if he was subject to custodial interrogation.

Ben was definitely in custody because he was being held at the police station house, just as in *Miranda*. Ben, however, likely was not being interrogated. The officer had only told Ben he had certain rights, without citing them expressly, and then asked if he understood. This question is likely not to be found to be reasonably likely to elicit incriminating information standing alone, and thus Ben's statement is admissible. Had the officer asked any further questions prompting Ben to respond, the statements may have then very well been inadmissible.

3. Carl's statements

Carl's statements were likely not obtained in violation of his *Miranda* rights and are therefore admissible. At issue is whether Carl invoked his right to remain silent.

Once the defendant subject to custodial interrogation is properly made aware of their *Miranda* rights, they may waive those rights if that waiver is knowing and voluntary. A waiver will typically be found to be knowing and voluntary so long as the defendant is properly read his rights and does not invoke them. Specifically, the Supreme Court has required that the invocation of the right to remain silent must be unambiguous - such as stating "I am invoking my right to remain silent". Once an unambiguous invocation is made, the police must scrupulously honor it.

Here, Carl never unambiguously or even expressly invoked his right to remain silent. Though he did in fact remain silent for hours of questioning, the right must be invoked through express words. Doing nothing or remaining silent is not enough. Carl's statement is therefore likely admissible against him.

4. Dillon's statements

Dillon's statements were likely not obtained in violation of his *Miranda* rights and are therefore admissible. At issue is whether Dillon was subject to a police interrogation.

The *Miranda* rule was created by the Supreme Court due to the coercive pressures of being interrogated by a police officer - a government agent who typically is armed - in a custodial environment. Questioning that is reasonably likely to elicit incriminating information from somebody who is not a police officer (or even an under cover officer who the defendant does not know is an officer) is therefore not covered under the *Miranda* rule.

Here, Dillon was questioned by his cell mate. Though his cell mate was acting as an agent of the police, the coercive pressures that concerned the Court in *Miranda* were not relevant, and therefore the statements are not inadmissible under the Fifth Amendment.

Representative Good Answer No. 2

1. The 5th Amendment contains a privilege against self-incrimination. Thus, a defendant is allowed to remain silent during police questioning. Under the Exclusionary Rule, a confession obtained in violation of a defendant's *Miranda* rights is inadmissible against him in court--this rule applies to almost all evidence obtained in violation of a defendant's 5th, 6th, and 7th Amendment rights. A police officer must read to the defendant their *Miranda* rights (you have the right to remain silent, anything you say can be used against you, you have the right to an attorney, if you can't afford one then one will be appointed) prior to a custodial interrogation, or else the statements are excluded. A custodial interrogation requires both custody and interrogation. Custody is when a reasonable person in the defendant's shoes would not feel free to leave--the closer it is to an arrest, the more likely it is custody. An interrogation is any police words or conduct they should know is reasonably likely to elicit incriminating statements. After being read their *Miranda* rights, a defendant has four options: (1) do nothing and stay silent, to which the court will not presume an invocation of the rights or a waiver and the police can

continue questioning; (2) unambiguously and clearly invoke the right to remain silent, to which the police must scrupulously honor the invocation by ceasing questioning until a reasonable period of time has passed;(3) unambiguously and clearly invoke the right to counsel, to which the police must cease all questioning until counsel has arrived; or (4) waive their rights, to which the police can continue questioning them.

Here, Adam's statement was obtained in violation of *Miranda.* The police officers were lawfully allowed to make the traffic stop based on reasonable suspicion of a traffic violation (even if it was pretextual), and the questioning and frisk was lawful because it was based on reasonable suspicion of criminal activity and Adam being armed and dangerous due to the bulge in his jacket. The officer then made statements to Adam indicating he was not free to leave until the ticket is issued. A reasonable suspect in that situation would not feel that their freedom of movement is restricted because this is a common situation where a person is not necessarily free to leave while the police tickets and checks the license for validity after a traffic violation. It means nothing that Officer One wanted to arrest Adam--he lawfully stopped him and needed to get him a ticket and check the license and so he stated that Adam can't leave because he was doing what is normally done at a traffic stop. Additionally, this is nothing like a traditional arrest because the officer clearly indicated that Adam would be free to leave after the ticket was issued, and he said this two times. Thus, because there was no custody, Adam's statement saying that he wants a lawyer does not create an invocation of the right to counsel, and the questioning and statement obtained afterwards does not violate his *Miranda* rights. Thus, the incriminating statement will not be suppressed.

2. Ben's statement made to Officer Two will be not suppressed. First, Ben was clearly in custody because he was arrested along with the other four men. However, the officer did not properly read him his *Miranda* rights. It does not matter that Ben said he understands them, because he could not have understood what Officer Two was saying his rights

were. The reading of one's *Miranda* rights need not be verbatim, but they do need to state all four rights. Here, Officer Two did not do so, so Ben had nothing to waive. However, Officer did not conduct an interrogation--he did not ask any questions or do any specific conduct that are likely to elicit incriminating statements except take Ben into a room, which is not enough. Ben then made these statements spontaneously out of his own free will. Thus, they are admissible.

3. Carl's statements to Officer Three are admissible. Officer Three clearly read Carl all of his rights and Carl read them himself and stated he understood. Then Carl remained silent for two hours, which as stated above, is neither a waiver or invocation. Officer Three was correct to not assume that this was a waiver, so the questioning following it was permissible. Because Carl then responded to the question, his statement is admissible.

4. The *Miranda* rule only applies to conduct by police officers because it was created to counteract the coercive nature of police interrogation. Thus, any statement obtained by a jailhouse informant is admissible, even if at the direction of the police. Here, although Dillon had not been read his *Miranda* rights and the officer thought he already had been read them, the statement is admissible because it was obtained through the acts and conduct of an inmate, not a law enforcement officer.