MPT 1
July 2017

***Peek et al. v. Doris Stern and Allied Behavioral Health Services* (July 2017, MPT-1)**

The client, Rita Peek, is the named plaintiff in a federal class action brought pursuant to 42 U.S.C. § 1983. The complaint alleges that the defendants, who have contracted with the county to provide probation services, have discriminated against female probationers by failing to provide court-ordered counseling in a timely manner. Peek was convicted in Union County district court of a misdemeanor and sentenced to 10 months in jail, with the jail sentence stayed on the condition that she successfully complete 18 months of probation. The district court imposed certain conditions of probation, including receiving mental health counseling. At a recent case- management conference, the federal judge raised the issue of whether the defendants are state actors and requested simultaneous briefing on that sole issue. Examinees' task is to draft the argument section of the plaintiffs' brief, following office guidelines and persuading the court that under the relevant tests and approaches, the defendants are state actors and therefore subject to suit under 42 U.S.C. § 1983. The File contains the instructional memorandum, the firm's guidelines for drafting simultaneously filed persuasive briefs, the sentencing order, a memo to the file, and excerpts from the deposition transcript of one of Allied's employees. The Library contains the relevant Franklin statutes on probation and a case from the U.S. Court of Appeals.

Peek et al. v.

Doris Stern and Allied Behavioral Health Services

ARGUMENT

Legal Standard

Under section 1983, individuals have a cause of action against "persons acting under color of state law who have violated rights guaranteed by the United States Constitution." *Lake* (citing *Buckley*). Although typically the Constitution applies only to states and not to private actors, constitutional standards will be imposed on private actors when "it is fair to say that the state is responsible" because "the private actor was [essentially] a state actor." *Lake.* The critical inquiry is whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood.* In the instant case, the court is assessing whether Defendants Doris Stern and Allied Behavioral Health Services (hereinafter collectively "Allied"), a private company offering mental health services, has acted so as to acquire the status of a state actor through the services it provides to county probationers, such as Plaintiff Rita Peek and the plaintiff class of similarly situated women.

When courts assess whether a private entity has acted under color of state law such that the private actor may be treated as a state actor, they are guided by a three-prong test. Courts consider:

(1) whether the private actor was engaged in a traditionally public function delegated by the state;
(2) whether the state has exercised its coercive power or provided significant encouragement to a private actor; and
(3) whether there is a close nexus between the State and the challenged action.

This is a totality of the circumstances test, where no single criteria is dispositive. *Lake*. Typically the first two prongs are treated as separate or alternative tests, and the third prong is a further requirement under either test. *Lake.* Accordingly, Plaintiff's brief will address each of these tests in turn and give final consideration to the nexus factor.

Because Plaintiff can easily demonstrate that (1) providing services for criminals is a

traditional public function; (2) the state has exercised power over Allied and encouraged and approved its conduct; and (3) there is a close relationship between the State and the discriminatory conduct of Allied that Plaintiffs challenge, this Court should not hesitate to find that Allied is a state actor who is bound by the Constitution and may be sued under section 1983.

I. Defendants Doris Stern and Allied Behavioral Health Services are subject to suit under 42 USC 1983 because the private entity is acting under color of state law by providing probationary criminal services, which is traditionally a public function.

The first test for whether a private act is really state action is whether the private actor engaged in a public function delegated by the state. In assessing this factor, courts often compare the challenged activity to other acts that have previously been deemed to be traditional public functions. *See Lake* (collecting cases and acts that are examples, and not examples, of public functions). Some examples of activities that have been held to be public functions include operating an election, running a post office, or providing for public safety through fire protection. While there is no direct authority to determine whether offering mental health services to individuals on probation is a state function, it is sufficiently comparable to many of these activities. Just as the state is the one to run a post office, the state is the one to operate courts, run prisons, and handle probation. It would be illogical to suggest that this is not a state function; after all, the state does not allow any group to decide to hold court and penalize individuals for their wrongful conduct. It does not allow private people to decide to imprison others or mandate them to attend counseling.

Some examples of non-public functions include things like operating hospitals, public utilities, or schools. Defendant will likely argue that "over the years," the government has lessened its control over prison and probation services and allowed private entities to take responsibility for some subsets of the function. This is partially true, as the State of Franklin now contracts with private entities to deliver food to prisoners, for example. *Lake.* However, it has only done so since 2013 when the State of Franklin decided for the first time that counties could contract with private entities. And it was not until 2014 that the state began to contract with one entity, Allied, for probation services. This suggests that on the whole probation services is still a traditional public function, not something where the state has given up control to private entities.

It is useful to compare this case to actual court decisions, as opposed to a laundry list of activities deemed state action. In *Lake*, the circuit court of appeals found that the defendant, who had contracted with the state to operate the state-run lottery, was not a public function because "many entities" provide similar activities like racetracks, casinos, and sweepstakes. But this is not such a case. There is no evidence that there are multiple private companies in charge of providing mandatory services to probationers. While there are numerous private entities that provide mental health services, there are not numerous private entities providing probation services. Defendant has proffered no evidence of there being several private companies that provide services to probationers. On the contrary, Peek's sentencing order did not give her any choice in choosing a mental health counseling provider; it mandated that she undergo treatment with Allied and Allied alone. It is thus clear that the government has not given up control for "private organizations [to]... initiate[] and perform[] these functions." *Lake*.

Also apposite is the case of *West v. Atkins* from the United States Supreme Court. In *West*, the Supreme Court held that a privately employed doctor was nonetheless a state actor in his capacity of providing medical care to inmates in a state prison. Because the state is required to provide medical care to its prisoners, the doctor "became a state actor... when the doctor contracted with the state to provide that care." The parallel to the instant case is noteworthy; here, we have a privately employed mental health counseling company that is providing required care to probationers. Defendant may argue that the state has no obligation to provide mental health counselling to probationers, but this is unavailing. Though it has no legal duty to offer such care, the state has effectively required it by imposing it as a condition of probation. At that point, when the state contracts with private entities like Allied to provide that care, the private entities become state actors. They are not providing discretionary services but instead are providing services for mandatory conditions of probation orders.

In *Camp v. Airport Festival* (15th Cir. 2011), the court found that a private nonprofit entity can be found to be a state actor even when they are directing the state what to do, as opposed to accepting direction from the state. In that case, a private entity had organized an aviation festival, which surely seems like a non-government function. And yet the court there held that the private entity was a state actor because the festival organizers were instructing the police regarding arrests. Though Allied does not directly tell the state what to do and how to handle probationers, it does submit reports to the state on a quarterly and annual basis. By reporting whether or not the probationers have met the conditions of

probation, Allied is arguably telling the state whether or not the probationer has complied or ought to be penalized for a failure to comply.

II. Further evidence of Defendants' status as state actors can be found in the fact that the state has exercised its power over the private entity by doing more than merely regulating Allied's conduct and instead excessively entangling private and state conduct by affirmatively approving Allied's quarterly reports.

The second test does not look backward to consider the whether the state function is traditional, and instead looks to the present conduct to see if the state is exercising power over the state actor or if there is excessive entanglement between the state and the private entity. While the mere existence of a contract or regulation is not enough to convert a private actor into a state actor, it is a factor courts consider when assessing the coercion and entanglement factors. Here, Allied has done more than merely contract with the government. The government has such power and control over Allied, and pursuant to that power has so entangled the operations of the private probation company with the state courts and government, that Allied constitutes an arm of the state.

A. The state has exercised its coercive or influential power over Allied, converting the private actor into a public actor, through its regulatory scheme combined with the sentencing court's directives about what kind of counseling services will be provided to probationers.

Defendant will likely argue that even the "state's extensive regulation" of Allied is not enough to make it a government actor. For example, the state's general regulation of the field of education was not enough to make a private school subject to the First Amendment in connection with discharging an employee in *Rendell-Baker*, a U.S. Supreme Court case. While this is true, there is more than mere regulation happening here. The state has not just regulated the general conduct of Allied, which would be permissible, but it has "regulate[d], encourage[d], and [essentially] compel[led]" the private action. *Lake*. James Simmons, the director of Allied's Probationary Services Unit, testified at his deposition that Allied must meet the requirements set by state law, which sets minimum qualifications for Allied employees. This sort of compliance with a generic state regulation is largely inconsequential. But the state does more than merely regulate

Allied; through the courts, it determines what kind of counseling services Allied can provide to probationers. The sentencing court is effectively telling the private entity how to provide care, which would typically be something a mental health counselor would use his own discretion to do. This undoubtedly constitutes significant influence, and arguably rises to the level of coercive influence.

Also apposite to this issue is Franklin Criminal Code 35-211, which governs probationary services. This code provision requires that private companies who may provide probationary services need to be nonprofits; need to receive approval from the County Probation Officer; and need to employ people with bachelor's degrees, among other conditions. This is a pervasive scheme of regulation such that it is appropriate for the Court to find that the state has exerted significant coercion and influence over the private entity Allied.

B. Even if the state's regulations do not constitute coercive power, the state's approval of Allied's private conduct, including its quarterly reports, constitutes a pervasive entanglement between the private actor and the state.

Assuming, arguendo, that the Defendants are correct that the state never "required, recommended, or even knew about this [private] action," *Lake,* Plaintiff can nonetheless establish that the state is so entangled with the private entity so as to justify treating the private entity as a state actor. As the U.S. Supreme Court stated in *Brentwood*, "the nominally private character of [Defendant's entity]" is not enough to "overcome the pervasive entanglement with public institutions." *Brentwood*; *Lake.* Allied cannot hide behind the fact that in name alone it is a private actor. Instead, this court must permeate the shield of its status as a private entity and instead look to its conduct and the circumstances. As the age-old adage says, "actions speak louder than words." The state action here, which is so entangled with Allied's conduct, speaks louder than the fact that Allied is, in name, a private nonprofit instead of a state actor.

For example, in the *Brentwood* case the defendant was a private Association that regulated interscholastic athletic competitions. But when the Association violated plaintiff's First and Fourteenth Amendment rights, it was treated as a state actor by virtue of the fact that the State Department of Education (an arm of the state) had adopted the Association's rules. This was enough for the relationship between the government and

private entity to be so pervasively entangled that the private entity is treated as a state actor. In the instant case, the State County Probation Officer approves and adopts the counseling waiting list that Allied reports to it each quarter. The County Probation Officer has consistently approved the counseling waiting lists that Allied submits showing that 90% of female probationers do not even start, let alone complete, counseling within their probation terms, as compared to 75% of male probationers. While Allied does not deal with the county "day to day" according to Mr. Simmons's testimony, Allied does deal with the state regularly by submitting at least 4 quarterly reports and one annual report. It also interacts regularly with probationers, who the county sends to them. Surely Allied gets a batch of probationers from the state more than 4 times a year. Because the state has sent Allied many of its clients in the form of probationers, and has given Allied its "stamp of approval," there is pervasive entanglement sufficient to hold Allied to be a state actor.

In *Camp*, the court found extensive entanglement because of the way the state's services (police and first responders) were turned over to the private entity and given to the entity for its use. Similarly, in the case at hand, there is extensive entanglement because the state provides majority of the funding for the probationary services Allied is offering. While Allied as a whole receives about 40% of its funding from public sources, 100% of its funding for the probationary program comes from Union County and the fees probationers must pay pursuant to their sentencing orders. Defendant likely will attempt to argue that the probationary division of Allied gets funding not just from the state but from private individuals; yet these private individuals are only paying these fees to Allied pursuant to the court's mandates. As such, it is as though 100% of the funding comes from the state. The fact that Allied's probation division gets all its funding from the state demonstrates that there is improper entanglement. Though the state does not pay Allied's employees directly, the simple fact that they get their paychecks from a nonprofit does not change the fact that the money they are receiving is directly handed to Allied from the state. This is pervasive entanglement.

In conclusion, the relationship between the State and Allied is much more than a mere contract. The State is not merely hiring a private entity to deliver food to its prisoners. *See Lake*. Instead, the government has involved itself in the governance of the Defendant's entity and even approves the Defendants' conduct. Allied was formed in 1975 and had a board of 9 members, none of whom were affiliated with the state. They were community and business leaders, religious leaders, and active citizens. But as soon as 2013 rolled around and the State started to contract with Allied, there were two board positions

created to essentially make room for the state to participate in Allied's governance. Today two out of the 11 board members are affiliated with the state, one being a county judge and one being a director of public health services. It is true, as defendant argues, that the board requires a majority to vote, so the state employees who serve on Allied's board cannot influence Allied by a vote alone. But the presence of a county judge is particularly significant and excessively entangled, given that other citizens and community members are likely to trust his judgment and follow his advice.

III. Finally, there is a substantially close connection between the state and the challenged action such that it is fair to treat Allied as the state itself, given that the State sends probationers to Allied and is on notice of the discriminatory practices from the regular reports Allied submits.

The final factor is whether there is a "close nexus between the State and the challenged action" such that it would be fair to treat the seemingly private conduct as public. *Brentwood.* This is not a high standard; there must simply be a nexus, meaning a connection, between the state and the challenged action. This just requires that the State played some "role" in the offending conduct.

The state played a role here because under Franklin Criminal Code section 35-210, the court can suspend the jail sentence in lieu of probation, which may include various conditions. Some of those conditions may include mental health counseling. Although the criminal code does not mandate sending the probationers to Allied, this is what the court does in its sentencing orders. Furthermore, the state is on notice of, and played a role in, the discriminatory procedures of Allied by regularly approving the lists submitted by Allied that noted how many women were on the waitlist for probationary services. Plaintiff Peek and her class of similarly situated individuals have charged that the Defendants discriminated against women based on their gender. Plaintiffs have alleged that this plan of services disproportionately denies probation services to women as compared to men.

Conclusion

As established by the above facts and law, Defendants Doris Stern and Allied Behavioral Health Services are acting under color of state law. To allow them to evade responsibility for their actions, and to dodge the mandates of the Constitution intended to serve citizens

like Plaintiff, would not only be inequitable but would be directly contrary to the law of Franklin and the Supreme Court of the United States. Because Allied is effectively a state actor, Plaintiff is therefore protected from harm by this private-turned-public actor, and Defendants are subject to suit under section 1983.

MPT 2
July 2017

In re Zimmer Farm (July 2017, MPT-2)

In this performance test, examinees work in the office of the Hartford County Attorney. The president of the county board has received complaints about activities at the farm owned by John Zimmer and his son Edward. The Zimmers raise apples and strawberries for sale but have also begun operating a bird sanctuary on the farm. Residents in the adjacent housing developments are complaining about the smells and noise from the birds and also object to the crowds and loud music at the four "bird festivals" that the Zimmers held on their farm in the past year. Examinees' task is to prepare an objective memorandum analyzing whether the Hartford County zoning code can be applied to shut down the bird rescue operation and stop the festivals. As part of completing the task, examinees must also address whether the Franklin Right to Farm Act affects the county's ability to enforce its zoning ordinance with respect to the Zimmers' activities. The File contains the instructional memorandum, an email from a complaining resident, and the investigator's report about the Zimmers. The Library contains an excerpt from the Hartford County Zoning Code, excerpts from the Franklin Agriculture Code that contain the Franklin Right to Farm Act, a Senate Committee report about the Act, and three appellate court cases, two from Franklin and one from Columbia.

QUESTION 1

Question Presented

Whether the Zimmers' bird rescue operation is permitted under the county zoning ordinance.

Short Answer

Probably not, since the operation itself is neither "agricultural use" nor "intended to add value to agricultural products" produced on the premises.

Analysis

The Zimmer farm is zoned A-1, for agricultural use. The use of an A-1 district is restricted to "agricultural use" or a short list of incidental uses, including packaging and "agricultural accessory use" that is intended to "add value to agricultural products produced on the premises." Title 15, s. 22(a).

"Agricultural use" is defined to mean "any activities conducted for the purpose of producing an income or livelihood" from one or more of a number of listed agricultural products, which include crops, livestock, beehives, poultry, and nursery plants. Title 15, s. 22(b)(2). "Agricultural accessory use" is defined as either a seasonal farm stand or certain "special events." Title 15, s. 22(b)(3).

Mr. Zimmer's bird rescue operation does not constitute an "agricultural use" as defined by Title 15. Ms. Abernathy's investigation suggested that Edward "does not sell the birds, does not make any profit from the operation, and does not intend to do so," and that his goal is to "care for the birds until they can be released back to the wild," unless they cannot be rehabilitated. *Abernathy Memo,* at 3. "Agricultural use" requires that the activities be "conducted for the purpose of producing an income or livelihood," and since Mr. Zimmer does not intend to produce either an income or a livelihood from the bird rescue operation, said operation does not constitute "agricultural use." Title 15, s. 22(b) (2). (Title 15 does not here define what constitutes a "livelihood," but it is unlikely that word would be defined so as to refer to an entirely charitable purpose such as this operation, and is probably intended more to refer to subsistence farming).

The bird rescue operation is also not "incidental processing, packaging, storage, transportation, distribution," or "sale" related to the agricultural products produced on the

premises. Although the strawberry and apple farms on the site do appear to be permitted "agricultural use," the bird rescue operation is distinct from the fruit farms, and is thus not "intended to add value" to products produced on the premises.

The bird rescue operation is also not an "agricultural accessory use," since those are limited to seasonal farm stands, that are "used for the sale of one or more agricultural products produced on the premises," nor is it a "special event" of any kind.

The facts suggest that Edward is running the operation out of a charitable desire to care for the birds: he is a trained veterinary assistant, and our investigator suggested that he "loves to rescue birds." However admirable it might be, the rescue operation is not "agricultural use" or an activity intended to add value to agricultural products produced on the site, and is therefore not permitted on A-1 land, absent some exception to the zoning requirements not found in the library.

QUESTION 2

Question Presented

Whether the Zimmers' festivals are permitted under the county zoning ordinance.

Short Answer

Possibly, though it would depend on what a court believed to be the actual purpose of the festivals. The festivals would be constrained to no more than three a year, however.

Analysis

"Special events" are a specific subset of "agricultural accessory use" permitted on land that has been zoned A-1 under Title 15 of the Hartford County Zoning Code.

"Agricultural accessory use" is permitted on A-1 land insofar as it is "intended to add value to agricultural products produced on the premises or to ready such products for market." Title 15, s. 22(a)(2). "Special events" constitute agricultural accessory use, "provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises." Title 15, s. 22(b)(3)(b).

The Zimmers apparently had the idea for the festivals as a kind of "agritourism," a practice which "uses entertainment and public educational activities to market and sell agricultural

products." *Abernathy Memo,* at 4. The Zimmers do sell agricultural products at these festivals -- they sell apples and strawberries, and at least some of the events at the festival are related to the apples and strawberries they sell. (A local chef offered sessions on baking with fruit, and the "cookbooks" sold may have been related to the products). *Id.* Further, the flyer exhorted people to come to the festival to "[b]uy apples and discover the best recipes for baking with fruit," which suggests that the purpose of the festival was to sell the apples produced on the farm. *Id.*

That said, the festivals were marketed as "Fall Bird Festival[s]," and the first stated purpose on the flyer was to "[s]upport injured birds." *Id.* Edward Zimmer gave a one-hour program about birds on each day of the festivals, sold "bird-related" souvenirs, and solicited donations for the upkeep of the operation. These factors suggest that the purpose of the festivals was to promote and sustain the bird rescue operation, and are thus not "directly related to the sale or marketing" of the apples and strawberries produced on the premises.

Absent additional facts or discovery, it is impossible to state with certainty how a court would rule on this issue. Nevertheless, the Zimmers will at least be able to make a colorable argument that the festivals were "special events" intended to sell and market the fruit produced on the site, with the bird-related branding and events functioning primarily as a marketing technique for the farm rather than as the actual purpose of the festivals. The fact that they apparently explicitly thought of the festivals as a form of "agritourism" supports this interpretation.

Regardless, however, the "special events" provision limits these events to "three or fewer per year," such that the Zimmers' decision to host four in 2016 violated the zoning code. If Ms. Wendell's fear that the Zimmers may host festivals "every month" is well-founded, this would certainly violate the zoning code and render these festivals something other than "special events." Thus, even if the bird festivals can continue in their present form, their frequency will need to be diminished, which might help to mollify the Zimmers' neighbors.

QUESTION THREE

Question Presented

Whether the FRFA affects the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals.

Short Answer

FRFA will not affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation. It may affect the county's ability to enforce the ordinance against the festivals, but probably will accord with the interpretation of the ordinance.

Analysis

The Franklin Right to Farm Act is directly concerned with limiting the rights of neighbors to sue farmowners in nuisance theories, which is not directly applicable to this instance, where the question relates to zoning ordinances, not nuisance suits. However, where a county's zoning ordinances undermine the purpose of the FRFA, the Act preempts the zoning ordinances, and the ordinance is ineffective. FRFA, s. 4. A local government's effort to use an ordinance to prevent what neighbors believe to be a nuisance is "the very sort of enforcement action that FRFA is designed to prevent." *Shelby Township,* at 9. Thus, if the FRFA applies to either the bird rescue operation or the festivals, it will preempt the otherwise applicable zoning ordinances and prevent enforcement thereof.

FRFA protects "farms" and "farm operations" from nuisance suits or preempted local ordinances. "Farms" are various pieces of personal and real property "used in the commercial production of farm products." FRFA, s.2(a). "Farm operations" are the "operation and management of a farm, or an activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products." FRFA, s.2(b). "Farm products" does not appear to be defined under FRFA.

Two cases further point to how the court might rule on the application of FRFA to the Hartford County zoning ordinances in question. In *Wilson v. Monaco Farms*, the Franklin Court of Appeals held that mere expansion of an existing farm's operations did not prevent a dairy farm from being protected from nuisance suits according to FRFA.

In *Koster v. Presley's Fruit*, the Columbia Court of Appeals held that the production of wooden pallets for use in harvesting peaches produced on the farm was not protected by the Columbia Right to Farm Act, which appears to be similar to the FRFA. The production of pallets was held not to be protected by the relevant act because said wooden pallets, even though used in the farming operation as a whole, was not a "farm product," such that their manufacture was not protected by the CRFA.

The bird rescue operation is not obviously a "farm" or "farm operation" under FRFA. The birds and their associated housing are probably not "used in [or connected to] the commercial production of farm products." Although "farm products" are not defined, the birds are not used in any "commercial" sense, given that Edward does not derive any profit from them, nor does he sell them to anyone else.

The festivals themselves might constitute an "activity that occurs on a farm in connection with the commercial production" of farm products to the extent that, as discussed above in the previous question, the festivals are found by a court to be primarily related to the sale of apples and strawberries, with the bird-related branding serving primarily as marketing. However, in the event that a court does find these festivals to be primarily related to "commercial production of farm products," it is likely to find that the festivals also do not violate the county zoning ordinance, as written, so the FRFA would not preempt the zoning ordinance, since both would allow the festivals.

The only potential point of conflict would be the ordinance's restriction on the number of festivals (three or fewer a year) -- if the bird festivals are a protected farm operation, then a restriction on their number may be held to undermine the purpose of the FRFA, which desires to protect farm operations. Given that they are new, however, it is unlikely they will fall under the FRFA's protections against nuisance suits, which protect farm operations that existed "before a change in the land use or occupancy of" neighboring land -- the bird festivals started last year, whereas the land has been residential for longer than that.

Finally, note that ordinarily, when a statute's text is unclear, the court may "refer to the purpose of the legislation and the legislative history of the statute, such as legislative committee reports, to aid [it] in interpreting the text." *Koster*, at 12. (Note that this authority is from a neighboring state, Columbia, and not Franklin. Although this is a common rule, in the event that Franklin has enacted some form of unusual rule relating to the use of legislative history, this would not apply.) The Senate committee report related to the FRFA stated that the act "protects those who farm for a living," and that the protection "applies to those who make their living farming," though "not to those with gardens for personal use." Sen. Rep., at 7. Finally, the Committee declared that "it is this state's policy to conserve, protect, and encourage the development and improvement of its agricultural land for the commercial production of food and other agricultural products." *Id.*

These factors do not clearly embrace the uses to which the Zimmers have put their farm. The

report is primarily concerned with commercial farming, and it is difficult to see how the bird rescue operation functions as "commercial farming." It is possible that if the bird festivals are found to be primarily related to the sale of the apples and strawberries, the festivals might relate to commercial agriculture, but in that event, the zoning ordinance would allow them anyway such that the FRFA would have no preclusive effect. The Senate Committee does mention that the loss of habitats for wildlife is one of the concerns that motivated the FRFA, but this is only a single, passing reference, and is far removed from the general tenor of the report. *Id.*

Accordingly, it is not likely that a court would find either of the bird-related activities to be exactly what was contemplated by FRFA, and would thus not be inspired to interpret the statute broadly in defense of the bird operations. The bird rescue operation itself is almost certainly not protected by FRFA, and the festivals are only protected to the extent that they are held to be primarily a means of selling apples and strawberries, with the bird-related accoutrement relegated primarily to branding.

MEE Question 1

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

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

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

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

1) Nationally, accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. About 15% of these accidents are caused by mortars misfiring in the course of professional fireworks displays, and some of these accidents occur despite compliance with governmental fireworks regulations.

2) Even with careful use by experts, fireworks mortars can still misfire.

3) Although a state statute requires a "safety zone" of 500 feet from the launching site of fireworks when those fireworks are launched on land, the statute does not refer to fireworks launched on water. Neither the homeowners association nor the fireworks company established such a zone.

4) The average fireworks-to-shore distance for this display was 1,000 feet. The woman's dock is 450 feet from the location of the fireworks barge; at only three other points on the lake is there land or a dock within 500 feet of the fireworks barge location.

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

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

1. Fireworks displays are not an abnormally dangerous activity and thus are not subject to strict liability.

2. Based on the evidence submitted, a reasonable jury could not conclude that the conduct of the fireworks company was negligent.

3. The misfiring mortar was not the proximate cause of the husband's injuries.

4. The homeowners association cannot be held liable for the fireworks company's acts or omissions.

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

(1) Abnormally Dangerous Activity

The first issue is whether a fireworks display is an abnormally dangerous activity. Abnormally dangerous activities are subject to strict liability. For an activity to be deemed "abnormally dangerous," the activity must: (1) present a serious risk of harm, (2) the serious risk of harm cannot be mitigated by following safety procedures, and (3) the activity is not a routine/common activity. Common examples include the use of poisonous/hazardous gasses and explosives.

Here, a court could find that fireworks displays present a serious risk of harm, because the plaintiffs established that accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. Additionally, a court could find that the serious risk of harm posed by fireworks displays cannot be mitigated by following safety procedures, because the plaintiffs established that even with careful use by experts, fireworks mortars can still misfire. In addition, plaintiff's showed that about 15% of the accidents referenced above are caused by mortars misfiring in the course of professional fireworks displays, and that some of these accidents occur despite compliance with governmental fireworks regulations. Finally, the court could find that fireworks displays with mortars are not routine, common activities performed by individuals, because most individuals do not fire off fireworks, especially mortars, on a regular or routine basis. So, because all three elements are met, the court was incorrect in holding that fireworks displays are not abnormally dangerous activities subject to strict liability.

(2) Negligence

The second issue is whether a reasonable jury could conclude that the conduct of the fireworks company was negligent. In order to show negligence, a plaintiff must prove: (1) duty, (2) breach, (3) causation (both actual and proximate), and (4) damages.

Duty

The standard duty is a duty of reasonable care. This duty requires that individuals act as a reasonably prudent person would act under similar circumstances. The duty of reasonable care is owed to anyone foreseeably harmed by a defendant's conduct. Foreseeability is often measured by whether the plaintiff was within the "zone of danger" posed by the defendant's activity. A duty of reasonable care also extends to rescuers who come to the

plaintiff's aid. Here, the fireworks company owed a duty of reasonable care to all individuals within the zone of danger posed by their fireworks activity, and any rescuers that come to the aid of plaintiffs harmed. The woman was at the end of her dock 450 feet from the fireworks, so the company owed her a duty of care as a foreseeable plaintiff. In addition, the fireworks company owed a duty of care to the husband because he was injured in the process of coming to the woman's aid. So, the fireworks company owed a duty to both the woman and her husband.

Breach

Breach is established by showing that the defendant failed to meet their duty of care. Alternatively, breach may be shown through the theory of negligence per se, if a defendant violates a statute intended to protect against a specific class of people from a specific type of harm, and that violation causes injury to those persons. Here, negligence per se is inapplicable, because the state statute requiring a safety zone of 500 feet from the launching site of fireworks does not refer to fireworks launched on water, and here the fireworks were launched from a barge on the water. So, plaintiffs must show that defendant breached the duty of care. Even though the statute is not applicable for the theory of negligence per se, it could be used to demonstrate an industry standard for establishing safe zones around a fireworks launching site. Here, the fireworks company failed to establish any safety zone around the barge, and launched fireworks within 450 feet of the woman's dock. So, a reasonable jury could conclude that the fireworks company breached the duty of care by failing to establish an appropriate safety zone around the launch site.

Cause

In order to be liable for negligence, a defendant's actions must both actually and proximately cause the plaintiff's injuries. Actual cause is shown by determining whether "but-for" the defendant's conduct, plaintiff would not have been injured. Proximate cause is a measure of foreseeability. If the plaintiff's injury is a foreseeable result of defendant's action, proximate cause may be shown so long as there are no superseding unforeseeable causes that break the causal chain between the defendant's conduct and the plaintiff's injury. Here, the fireworks display actually caused the woman's injuries because she was struck and severely injured by flaming debris caused by a mortar striking her dock. In addition, the fireworks display proximately caused the woman's injuries because an errant mortar or flaming debris landing on or near individuals watching the display is the precise, and foreseeable, risk of

launching fireworks. So, a reasonable jury could find that the fireworks company's actions both actually and proximately caused the woman's injuries.

Damages

Finally, a plaintiff must prove damages. Physical injuries are damages recognized by the law. Here, the woman suffered physical injury when she was hit by flaming debris, and her husband sustained a serious fracture while rushing to help her. Thus, a reasonable jury could conclude that the woman and her husband suffered damages. Since a reasonable jury could find all the elements are negligence present, a reasonable jury could conclude that the conduct of the fireworks company was negligent and the court was incorrect in directing a verdict for the company.

(3) Proximate Cause

The third issue is whether the misfiring mortar was the proximate cause of the husband's injuries. As explained above, proximate cause is a measure of foreseeability. If the plaintiff's injury is a foreseeable result of defendant's action, proximate cause may be shown so long as there are no superseding unforeseeable causes that break the causal chain between the defendant's conduct and the plaintiff's injury. Here, it is foreseeable that an individual may rush to the aid of their family member if they witness their family member being physically injured by an exploding mortar. In addition, it is foreseeable that an individual rushing to their family member's aid may trip, fall, and suffer injury while rushing to their family member's aid. So, the court improperly concluded that the misfiring mortar was not the proximate cause of the husband's injuries.

(4) Homeowners Association Liability

The fourth issue is whether the homeowners' association can be held liable for the fireworks company's acts or omissions. In general, employers are liable for their employee's actions within the scope of employment, and are not liable for an independent contractor's actions. However, some duties are nondelegable, and thus the employer may still be held liable for an independent contractor's actions. Nondelegable duties include maintaining a safe and secure environment. Here, the fireworks company was an independent contractor hired by the homeowners association to put on the fireworks display. Generally, the homeowners association would not be liable for the firework company's torts as independent contractors.

However, since launching fireworks is an abnormally dangerous activity that disrupts the safety and security of individuals in the association, the homeowners association could not delegate this duty to the fireworks company. So the court erred in finding that the homeowners association cannot be held liable for the fireworks company's acts or omissions.

MEE Question 2

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

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

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

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

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

1. Can the bank maintain a suit in federal court against State A for damages? Explain.

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

3. Is the State A statute unconstitutional? Explain.

(1) Whether the Eleventh Amendment provides State A immunity from suit by the bank.

The Eleventh Amendment provides a state immunity from being sued in its own state court or in federal court by an individual for damages. This does not prevent another state or the United States government from suing a state in its own state court or in a federal court.

A corporation can sue and be sued like an individual, so it is considered an individual for the purposes of the Eleventh Amendment. Here, the bank is a corporation - incorporated and headquartered in State B. The bank is suing State A for $2 million in damages as compensation for its lost profits. This lawsuit is plainly not allowed under the Eleventh Amendment because the bank cannot sue State A in federal court for damages. Thus, the lawsuit cannot be maintained in federal court against State A for damages.

(2) Whether the Eleventh Amendment provides that the bank can maintain a suit in federal court against the Superintendent of Banking to enjoin her from enforcing the State A statute.

The Eleventh Amendment does not prevent an individual from suing a state actor in their official capacity for an injunction. As such, the bank can maintain a suit in federal court against the state Superintendent of Banking for an injunction to prevent her from taking any action to enforce the allegedly unconstitutional State A statute against it.

Whether a federal court would have jurisdiction over the bank's claim.

There are two ways to get into federal court - federal question jurisdiction and diversity jurisdiction. An action can be brought under federal question jurisdiction if it arises under the laws, statutes, or Constitution of the United States. Here, and as explained under question 3 below, the bank can allege that the statute is unconstitutional under the Dormant Commerce Clause - which is a cause of action arising under the U.S. Constitution. Therefore, a federal court would have jurisdiction over their action.

(3) Whether State A's banking I.D. verification law violates federalism or the Dormant Commerce Clause.

Federalism

As a threshold matter, in general, a state can pass regulation regarding banking laws as long as federal law does not preempt it. Here, there is no federal statute that governs the terms on which a bank may offer funds transfer services to its business customers or the

security measures that banks must implement in connection with such services. The matter is governed entirely by state law, so there is no preemption of State A's banking I.D. verification law.

Dormant Commerce Clause

Under the Dormant Commerce Clause, a state cannot regulate interstate commerce in a way that discriminates against out-of-state businesses unless Congress consents. For a state law regulating commerce to be valid it must: (1) not discriminate against out-of-state businesses; (2) not be an undue burden on interstate commerce; and (3) not regulate wholly extraterritorial conduct.

The first requirement is that the state law must not discriminate against out-of-state businesses. Here, State A's banking law likely passes this test. State A recently passed a law requiring all banks that offer funds transfer services to State A businesses to use biometric identification (e.g., fingerprints or retinal scans) to verify payment orders above $10,000. Here, State A requires all banks -- not just State A banks and not just banks outside of State A -- to use the biometric identification. Since the law applies to banks in State A and banks in other states alike, this requirement is met.

The second requirement is that the state law must not be an undue burden on interstate commerce. This requirement is not met. Implementation of biometric identification for this bank's business customers in State A would require the bank to reprogram its entire U.S. electronic banking system at a cost of $50 million. The burden is so great that the bank has had to stop allowing its business customers in State A to make electronically initiated funds transfers and is forgoing an estimated profit of $2 million in State A through loss of those customers. While the state wants to ensure that electronic payment orders actually originate from their customers and not from thieves, experts dispute whether biometric identification is significantly better than other security techniques. The bank’s security experts do not believe that biometric identification is a particularly reliable security system and the State A legislature decided to require it after heavy lobbying from a State A-based manufacturer of biometric identification. In balancing these considerations, it appears there is an unconstitutional undue burden placed on banks in interstate commerce by State A's law.

The third requirement is that the regulation must not regulate wholly extraterritorial conduct. This requirement is met because Bank A's law applies to both banks within and outside of

State A alike, thus not only regulating conduct outside of State A.

Since State A's law fails to meet the undue burden prong of the Dormant Commerce Clause test, the law is unconstitutional.

MEE Question 3

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

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

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

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

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

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

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

1. As between the bank and the finance company, which (if either) has a superior right to the claims against the retail stores for the money the retail stores owe the manufacturer for clothing they bought on credit before February 1? Explain.

2. Are the retail stores correct that they have no obligations to the bank and that paying the manufacturer will discharge their payment obligations? Explain.

I. Priority over Garment Manufacturer Accounts

Bank has priority over the Finance Company ("FC") because Bank perfected its interest prior to FC. This is a security agreement. Security agreements are generally governed by UCC Article Nine. Perfection occurs when a security interest attaches to the item in which there is security and a filing is made with the appropriate state agency. Attachment occurs when there is (1) an agreement to enter into a security agreement (2) value is given by the debtor and creditor, and (3) the debtor has a right to some interest in the collateral. The collateral is the item which is held for security. The debtor is the party agreeing to surrender an item for lack of repayment. The creditor is the party lending the money to debtor. Collateral can exist in both goods (tangible movable objects) and intangible goods. Intangible goods are accounts (money owed to a company), investments, and general intangibles (such as patents), among other items.

In this case, Bank and FC are creditors. The debtor is the garment manufacturer ("manufacturer"). The collateral is the account receivable of manufacturer. Therefore, Article Nine of the UCC governs this contract.

Additionally, there is attachment by both the Bank and FC. FC's security interest attached on February 1 when manufacturer entered into a transaction with FC pursuant to which the manufacturer sold to FC all of the manufacturer's outstanding rights to be paid by retail stores for clothing. The transaction was memorialized in a signed writing that described the payment rights that were being sold. Thus, there was an agreement to enter into a security contract (evidenced by the signed contract), there was a benefit received by the creditor (right to account receivable) and debtor (money loan), and the debtor had a right to the account receivable being used as collateral. However, FC never perfected its interest. To perfect most security interests, an appropriate filing with the appropriate state agency must be made. In this case, FC never filed a financing statement. Because it never filed a financing statement, it never perfected its security interest in manufacturer's accounts.

On March 15, Bank's security interest attached. Manufacturer agreed to borrow money from Bank. Bank took a security interest in "present and future accounts" to secure the manufacturer's obligation to repay the loan. There is an agreement to enter into a security contract. Additionally, there is a value received by both debtor (loan) and creditor (right to accounts receivable). Further, the debtor had a right to receive payment on its accounts,

since FC’s interest was not perfected, and transferred its interest in the payments to Bank. Therefore, Bank's security interest attached. Future interest clauses are valid under UCC Article Nine and cause no issues in this case.

Further, Bank perfected its interest on March 15 by filing a properly completed financing statement in the appropriate filing office. The financing statement must adequately define the collateral. Here, the collateral is adequately defined as "all of the manufacturer's present and future accounts." This is a validly perfected security interest.

In the case of priority between a perfected interest and an unperfected interest, the perfected interest always has priority. In this case, FC has an unperfected interest and Bank has a perfected interest. Therefore, Bank has priority. Bank has a superior right to the claims against the retail stores for the money the retail stores owe the manufacturer for clothing they bought on credit before February 1.

II. Retail stores’ refusal to pay

The retail stores are incorrect in stating they have no obligations and that paying the manufacturer will discharge their payment obligations. The issue is whether a valid assignment of the accounts receivable is enforceable. The general rule is that an assignment of a credit contract is valid when the party that must tender payment is aware payment is owed to a new party. Additionally, upon the giving of notice to the paying party, the paying party cannot tender payment to the original party to satisfy their debt.

In this case, upon default by Manufacturer on May 24, Bank sent signed letters to each of the retail stores to which the manufacturer sold clothing on credit. The letters instructed each retail store to pay to Bank any amounts that the store owed to the manufacturer for clothing purchased on credit. The letter explained that manufacturer defaulted on its obligation to Bank and Bank was exercising its rights as a secured party. Therefore, all retailers had notice and the financing statement was available for verification. Because proper notice was given, the paying party could not have tendered payment to manufacturer. Thus, the retail stores incorrectly state that they have no obligations to the Bank and that paying the manufacturer will discharge their payment obligations.

MEE Question 4

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

> *A. I give $50,000 to my cousin, Bob;*
> *B. I give my household goods to those persons mentioned in a memorandum I will write addressed to my executor; and*
> *C. I leave the balance of my estate to Bank, as trustee, to hold in trust to pay the income to my child, Sam, for life and, when Sam dies, to distribute the trust principal in equal shares to his children who attain age 21.*

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

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

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

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

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

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

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

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

I. Validity of Testator's Will

The issue here is whether Testator's will satisfies the requirements of a formal will.

Under the statutes of this jurisdiction holographic wills are not recognized. Therefore for a will to be valid, it must be a formal will. For a formal will to be valid it must be executed with testamentary intent (the testator must intend for it to dispose of his property at his death), it must be signed by the testator, and it must be witnessed by two witnesses. Under the majority rule, the testator and witnesses must all sign the will within the presence of each other; under the minority rule, it is enough that the witnesses sign the will within a reasonable time after the testator signs the will, and that the testator be aware that they are signing it. Additionally, under the traditional rule, a beneficiary of the will was not competent to witness a will. Gradually, this rule was replaced with a rule that merely struck any gift to the beneficiary witness in excess of his/her intestate share. Finally, the majority/modern trend is to treat interested witnesses no differently than disinterested witnesses.

Here, Testator had testamentary intent: he referred to the document as his will, and the contents clearly indicate he intended to have it dispose of his property after he was dead. Second, Testator signed the will in front of two witnesses, and then they signed the will in Testator's presence. Although they did not know the contents of the will, that does not affect the validity, rather witnesses need only know that they are witnessing *a* will. Further, so long as the jurisdiction follows the modern trend, the fact that Bob takes under the will does not affect his competency to be a witness for it. Because the will was made with testamentary intent, signed by the testator, and signed by two witnesses, the will is valid.

II. Impact of Codicil

The issue here is what effect a codicil has on a will.

After a person has executed a will, they may modify that will by executing a codicil. A codicil must be executed with all the formalities of a will and has the effect of changing the will, to the extent the terms of the codicil contradict the will, and otherwise republishes the will in question.

Here, the facts state that the codicil was properly executed: Testator had testamentary

intent, he signed it, and it was witnessed by two unrelated witnesses. This makes the codicil valid to amend the will regarding the age at which Sam's children would take under the will. Additionally, because the witnesses were disinterested, this codicil also has the effect of validating the preexisting will and its gift to Bob, even if the jurisdiction in question follows the older rules regarding beneficiaries being witnesses to a will.

III. Distribution to Bob

The issue is whether Bob can take under the will.

As noted above, the majority rule is that a witness can take under a will. Further, the witnessing of the codicil by two disinterested witnesses would republish the will, even if the older rules regarding gifts to witnesses was followed.

Because Testator has a valid will and codicil, that will should be followed. Accordingly, Bob should be distributed $50,000 under the will.

IV. Distribution of Household Goods

The issue here is whether an external writing may be given effect in a will.

Ordinarily, testamentary gifts must meet the requirements of a formal will. However, one exception to this is that a will may refer to an external document, in existence at the time the will is executed, which can be specifically identified. If such a document is referred to, that document can be followed for the distribution of property, even if it does not comply with the requirements for a will. Additionally, under the Uniform Probate Code, such a document need not exist at the time the will is created (but rather may be written after the execution of the will), as long as it disposes only of personal property.

Here, assuming the jurisdiction follows the traditional/majority rule, the will's reference to the memorandum is invalid, because the memorandum was not in existence at the time either the will or the codicil was executed. Therefore the household goods would pass to the residuary, and would be distributed as part of the estate described below. However, if the jurisdiction follows the Uniform Probate Code, the reference to the memorandum would be valid: it is identified with sufficient specificity and purports to only dispose of personal property. In that case, the furniture would go to Testator's Aunt.

V. Distribution of Balance of Estate

The issues here are whether Testator disinherited Amy and how to distribute Sam's share of the estate.

A. Distribution to Daughter

When an individual executes a will and then has children, there is a presumption that the testator forgot to update his will, and the children are entitled to their intestate share, even though not included in the will. Similarly, when a testator has one child provided for in a will and then has a second child, there is a presumption that the testator forgot to update their will to account for the new child, and the child (or children) share equally in the beneficiary child's gift. However, these presumptions do not apply if the will is executed after all children have been born. In that case, the effect of excluding a child from the will is to disinherit the child, and the child does not receive anything upon the death of the testator.

Here, Testator executed his will in 2012 and the codicil in 2015, during which times both of his children had already been born. As a result, neither presumption regarding forgotten children applies. Rather, Testator's daughter is considered to be disinherited, and she is not entitled to any distribution of Testator's property.

B. Distribution of Sam's Share

The issue here is how the court should distribute property under clause C of Testator's will.

Under the common law rule against perpetuities a contingent future interest must vest or fail within 21 years of a life in being at the time the future interest is created, or else the future interest is void.

Here, Testator's will and codicil together provide that the trust property is to be held by Bank until Sam's children reach the age of 25 and this gift does not violate the rule against perpetuities. Amy and Dan were lives in being at the time the future interest was created and are eligible to be the measuring life for the gift. The gift to Amy will vest or fail within a year, and then Dan's gift will either fail when he dies or vest while he (a measuring life) is still alive and reaches age twenty five. Since Sam predeceased

Testator, it impossible for there to be additional children of Sam whose interest might not vest or fail within 21 years of Dan's death. Therefore, the gift in trust to Dan and Amy is valid, and the funds should be held by Bank until Dan reaches the age of 25, at which point the funds should be equally divided between Dan and Amy (assuming both live to age 25).

MEE Question 5

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

> The woman started dating the man in August. A few months later, after the woman broke up with him, the man began calling the woman's cell phone and hanging up without saying anything. In February, the man called and said, "I promise you'll be happy if you take me back, but very unhappy if you do not." The following week, to protect herself against the man, the woman lawfully bought a handgun.
>
> On March 1, the woman was working late in her office. At 10:00 p.m., the man entered the woman's office without knocking. The woman immediately grabbed the gun and shot the man once, hitting him in the shoulder.
>
> The police arrived at the scene at 10:10 p.m. By this time, a number of people had gathered outside the doorway of the woman's office. A police officer entered the office, and his partner blocked the doorway so that the woman could not leave and no one could enter. The officer immediately seized the gun from the woman and asked her, without providing Miranda warnings, "Do you have any other weapons?" She responded, "I have a can of pepper spray in my purse. Is that a weapon?"
>
> At 10:20 p.m., after the woman had been arrested and the man taken to the hospital, a custodian told the police officer, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."
>
> A few hours later, at the hospital, the man told the police officer that he had entered the woman's office just to speak with her and that the woman had shot him without provocation.

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

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

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

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

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

1. Testimony from the woman, offered by the defense, repeating the man's statement, "I promise you'll be happy if you take me back, but very unhappy if you do not."

2. Testimony from the police officer, offered by the prosecution, repeating the woman's statement, "I have a can of pepper spray in my purse. Is that a weapon?"

3. Testimony from the police officer, offered by the prosecution, repeating the custodian's statement, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

1)

The testimony should be admitted because it is relevant and nonhearsay. The issue is whether the statement is hearsay.

A statement will be admissible if it is relevant. A statement is relevant if it is likely to make any material fact more or less probable. Although a statement is relevant, it may still be excluded based on unfair prejudice, public policy, or character evidence or hearsay grounds.

Hearsay is inadmissible. A statement is hearsay if it is an out of court statement used to prove the truth of the matter asserted. A statement is nonhearsay if it is not used to prove the truth of the matter asserted but is used for some other reason, such as state of mind, effect on listener, or motive. Further, there are several exceptions that allow hearsay to still be admissible.

Here, testimony by woman is a stated by the man of "I promise you'll be happy if you take me back, but very unhappy if you do not." This is an out of court statement, and will be hearsay if the purpose the woman is seeking to admit it is to show the truth of the matter asserted. Here, however, this statement is likely nonhearsay because the woman is offering it to prove her state of mind and the effect that it had on her as the listener. Here, woman is being charged with murder of the man. Her defense is that she acted in self-defense. In this jurisdiction, self-defense is force used when a defendant reasonably believes that such force is immediately necessary for the purpose of protecting themselves against the use of unlawful force by another person. This statement is relevant because it relates to the woman's defense that she used self-defense because she was afraid of the man. This is further evidenced by her purchasing a gun after the man made the statement. Further, it is nonhearsay because the woman is seeking to admit the statement to show the effect it had on her, that she was afraid of the man, and has a reasonable fear because he made this statement. Therefore, in turn, it was reasonable for her to shoot him in self-defense on March 1. Because the statement is being used for this purpose, and not to prove the truth of the matter asserted in the statement, the statement is nonhearsay and should be admitted.

2)

The issue is whether the statement was obtained in violation of the woman's Miranda

rights. The 5th Amendment protects against self-incrimination and as part of this protection a person must be read Miranda rights. Miranda rights explain that a person has the right to remain silent, anything said against them can and will be used against them in court, a person has a right to an attorney, and one will be appointed to them if they cannot afford one. This requirement applies only when a person is in custodial interrogation. Therefore, the issue here is whether the woman was under custodial interrogation at the time the police obtained the statement from the woman.

To determine whether a person is in custody, the standard is whether a reasonable person would feel as though they do not have freedom to leave. A person does not need to be formally arrested to be in custody for Miranda purposes. Here, the police entered the woman's office and blocked the doorway so that the woman could not leave and no one could enter the woman's office. A reasonable person would likely not believe they had freedom to leave in this situation, and therefore the woman was likely in custody.

The second issue is whether the woman was subject to interrogation. A person is subject to interrogation if the police make statements that are likely to incite an incriminating response. Here, the police asked, "Do you have any other weapons?" This statement was likely to lead to an incriminating response. The police may argue that they asked the statement because it was an emergency situation. The woman shot the man at 10:00 am, and the police arrived 10 minutes later. Many people were gathered outside of the woman's doorway and the police may have been acting to protect themselves and the public from future harm by asking this question. In the case of emergencies and ongoing crimes, the police will be excused from Miranda warnings in order to protect themselves and the public from danger. Here, the police responded to a shooting. The police seized the gun, and it may be reasonable to ask if there were any other weapons without providing the woman with Miranda warnings.

Therefore, although this statement was likely obtained in custodial interrogation without providing Miranda warnings, it may be admitted because the police were acting in an emergency situation to protect themselves and the public from future danger.

Note as well that this statement is relevant to the prosecutor's case. If woman had pepper spray in her purse, and instead pursued a more deadly force option by using her gun, the force may have not been reasonably necessary to protect the woman. Therefore, the statement would be admissible on relevance grounds.

3)

The issue is whether the statement is hearsay. As explained above, hearsay is inadmissible. A statement is hearsay if it is an out of court statement used to prove the truth of the matter asserted and there are several exceptions that allow hearsay to be admissible.

Here, the police officer is testifying as to an out of court statement. It appears that the purpose is to prove the truth of the matter asserted, that the custodian heard noises in the hall around 10 and then a loud bang and screaming. Therefore, the statement would be hearsay as an out of court statement used to prove the truth of the matter asserted.

The hearsay statement may still be admissible, however, if it qualifies for the present sense impression exception. To be a present sense impression, it must be a statement that was made while under the excitement of the event or shortly thereafter, regarding the present sense of what was happening. Here, the event occurred around 10:00 pm and the custodian made the statement at 10:20 pm. Although it was only 20 minutes, it may be argued that the custodian was not still under the excitement of the event because the woman had been arrested and the man had been taken to the hospital. The purpose of the present sense impression is that a statement is deemed to be more reliable when made simultaneously with the event happening, or in a very short amount of time thereafter. Here, the 20 minutes was likely too long of a time to qualify for the present sense impression exception. With no other exception available, the statement would be hearsay and inadmissible.

Note as well that this statement is likely relevant because it tends to make the fact of whether the victim provoked the woman more or less probable. Although it may be relevant, it will still be excluded as hearsay.

MEE Question 6

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

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

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

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

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

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

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

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

Rather than file an answer to Taxes's complaint, the woman filed a motion pursuant to Rule 12(b)(6) to dismiss the action for failure to state a claim upon which relief can be granted. The

woman's motion argued that the noncompete covenant is invalid and unenforceable as a matter of law. Two days after filing the motion to dismiss, and before Taxes had responded to the motion, the woman filed an "amended motion to dismiss." The amended motion sought dismissal on the same basis as the original motion (failure to state a claim), but also asked the court to dismiss the action pursuant to Rule 12(b)(4) for insufficient service of process.

1. Should the court consider the woman's motion to dismiss for insufficient service of process? Explain.

2. If the court considers the woman's motion to dismiss for insufficient service of process, should it grant that motion? Explain.

3. In ruling on the woman's motion to dismiss for failure to state a claim, which state's choice-of-law approach should the court follow? Explain.

4. Which state law should the court apply to determine the enforceability of the noncompete covenant? Explain.

1. The court should consider the woman's motion to dismiss for insufficient service of process. The issue is whether a party can amend a motion or pleadings after failing to raise a waivable defense.

Under the Federal Rules of Civil Procedure, a party must raise certain Rule 12 motions in their first Rule 12 response, whether it is a motion or an answer. If a defendant fails to do so, these defenses are waived. Included among the waivable defenses is the motion to dismiss for improper venue, insufficient process, insufficient service of process, and lack of personal jurisdiction. Therefore, under ordinary circumstances, the woman's failure to make a motion for insufficient service of process in her original motion would waive it.

Defendants have a right to amend their pleadings within 21 days of their answer; in doing so, they may include a waivable defense. However, this option is not available if the defendant's first response is a Rule 12 motion, as was the case here. Nonetheless, a court may permit a party to amend their motion if justice so requires. As such, the court may permit the woman to amend her motion to include the insufficient service of process claim, given that it was only two days later and Taxes had not yet responded.

2. If the court considers the woman's motion to dismiss for insufficient service of process, it should grant the motion. At issue is whether plaintiff's service was proper.

This jurisdiction has procedural rules identical to the Federal Rules of Civil Procedure. As such, the defendant may be served directly, by rules permitted by the state in which the court sits or where process served, by serving the defendant's agent, or - as in the case here - by substitute service. Substitute service is proper if service is left at defendant's abode with a person of suitable age and discretion who lives there. In this case, service was left with a person of suitable age and discretion, as it was left with her father.

However, the facts indicate that defendant has moved out of her parents' home in State A and has moved into an apartment in State B. Therefore, process was not left at her place of abode, and service was improper. Therefore, the court should grant this motion.

3. State A law should govern the court’s choice of law approach.

Under the Erie Doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the forum state. The Supreme Court has recognized choice of law rules as substantive, and thus, are determined by the forum state, State A.

4. State A law should govern the enforceability of the noncompete. At issue is which state's law should apply when a contract contains a choice of law clause.

In this case, when determining whether to give effect to a contractual choice of law clause, State A follows the Restatement (Second) of Conflict of Laws. In this case, the contract expressly states that it shall be governed by State A law. Unless this concerns a matter over which it offends the public policy of State B to implement or there is no significant relationship between the parties and State A, State A law will be enforced. In determining a state’s significant relationship to the parties or the transaction, based on its relevant contacts and when contracts are in dispute, the court will consider the place of the contracting, the place of performance, the place of negotiation, and where the parties are domiciled.

In this case, the parties entered into their written contract in State A. The woman performed her duties under this contract in State A, despite the fact that Taxes had businesses elsewhere. Additionally, Taxes is incorporated in State A - meaning it is technically "at home" in State A. Under these facts, the woman is now at home in State B, as she has moved out of her parents' home, rented an apartment, and started a business in State B. However, State A seems to have the more significant relationship to the parties and transaction overall.

Both States' underlying policies pertaining to noncompete clauses require that they be reasonable in terms of geographic scope and duration. State A has upheld noncompetes similar to this one, which requires that the woman not work as a tax preparer in the Two Towns Metro area for 24 months after leaving Taxes' employ. State B is less lenient as to the validity of noncompetes, and holds them invalid if they exceed 18 months. The presumed underlying interest of both states permitting noncompetes is to protect employers' interests when they invest in employees. Conversely, State B's rule seems to be more concerned with ensuring that employees are not unreasonably restrained in their ability to work than State A’s.

Since the States take the same approach to noncompetes and the difference is only 6 months, it probably does not offend the public policy of State B to apply State A law due to the contract's choice of law. Even if so, the Restatement (Second) of Conflict of Laws uses the Most Significant Relationship Approach. As explained above, State A seems to have the more significant relationship to the parties and transaction and its law would still apply.