



# July 2016 MEE Questions and Analyses



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## Contents

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Preface.....ii

Description of the MEE .....ii

Instructions .....iii

### July 2016 Questions

Corporations & Limited Liability Companies Question..... 3

Evidence/Criminal Law & Procedure Question.....4

Torts Question..... 6

Secured Transactions/Real Property Question ..... 8

Contracts Question..... 9

Civil Procedure Question ..... 11

### July 2016 Analyses

Corporations & Limited Liability Companies Analysis ..... 15

Evidence/Criminal Law & Procedure Analysis ..... 19

Torts Analysis ..... 24

Secured Transactions/Real Property Analysis..... 29

Contracts Analysis ..... 33

Civil Procedure Analysis ..... 36

## **Preface**

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The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the July 2016 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

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

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Civil Procedure question on the July 2016 MEE tested the following areas from the Civil Procedure outline: I.A., B., D. Jurisdiction and venue—Federal subject-matter jurisdiction (federal question, diversity, supplemental, and removal); Personal jurisdiction; Venue, forum non conveniens, and transfer.

For more information about the MEE, including subject matter outlines, visit the NCBE website at [www.ncbex.org](http://www.ncbex.org).

## **Description of the MEE**

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The MEE consists of six 30-minute questions and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Civil Procedure, Conflict of Laws, Constitutional Law, Contracts (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Article 9 [Secured Transactions] of the Uniform Commercial Code. Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

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

## Instructions

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

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

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

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

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

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

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

Answer all questions according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

NOTE: Examinees testing in UBE jurisdictions must answer according to generally accepted fundamental legal principles rather than local case or statutory law.



# *July 2016*

## *MEE Questions*

*Corporations & Limited Liability Companies*

*Evidence/Criminal Law & Procedure*

*Torts*

*Secured Transactions/Real Property*

*Contracts*

*Civil Procedure*



# CORPORATIONS & LIMITED LIABILITY COMPANIES

## QUESTION

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Two siblings, a brother and a sister, decided to start a bike shop with their cousin. They filed a certificate of organization to form a limited liability company. The brother and the sister paid for their LLC member interests by each contributing \$100,000 in cash to the LLC. Their cousin paid for his LLC member interest by conveying to the LLC five acres of farmland valued at \$100,000; the LLC then recorded the deed.

Neither the certificate of organization nor the members' operating agreement specifies whether the LLC is member-managed or manager-managed. However, the operating agreement provides that the LLC's farmland may not be sold without the approval of all three members.

Following formation of the LLC, the company rented a storefront commercial space for the bike shop and opened for business.

Three months ago, purporting to act on behalf of the LLC, the brother entered into a written and signed contract to purchase 100 bike tires for \$6,000 from a tire manufacturer. When the tires were delivered, the sister said that they were too expensive and told her brother to return the tires. The brother was surprised by his sister's objection because twice before he had purchased tires for the LLC at the same price from this manufacturer, and neither his sister nor their cousin had objected. The brother refused to return the tires, pointing out that the tires "are perfect for the bikes we sell." The sister responded, "Well, pay the bill with your own money; you bought them without my permission." The brother responded, "No way. I bought these for the store, I didn't need your permission, and the company will pay for them." To date, however, the \$6,000 has not been paid.

One month ago, purporting to act on behalf of the LLC, the cousin sold the LLC's farmland to a third-party buyer. The buyer paid \$120,000, which was well above the land's fair market value. Only after the cousin deposited the sale proceeds into the LLC bank account did the brother and sister learn of the sale. Both of them objected.

One week ago, the brother wrote in an email to his sister, "I want out of our business. I don't want to have anything to do with the bike shop anymore. Please send me a check for my share."

1. What type of LLC was created—member-managed or manager-managed? Explain.
2. Is the LLC bound under the tire contract? Explain.
3. Is the LLC bound by the sale of the farmland? Explain.
4. What is the legal effect of the brother's email? Explain.

## EVIDENCE/CRIMINAL LAW & PROCEDURE QUESTION

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A defendant was tried before a jury for a robbery that had occurred at Jo-Jo's Bar on November 30. At trial, the prosecutor called the police officer who had investigated the crime. Over defense counsel's objection, the officer testified as follows:

Officer: I arrived at the defendant's home on the morning of December 1, the day after the robbery. He invited me inside, and I asked him, "Did you rob Jo-Jo's Bar last night?" The defendant immediately started crying. I decided to take him to the station. Before we left for the station, I read him Miranda warnings, and he said, "Get me a lawyer," so I stopped talking to him.

Prosecutor: Did the defendant say anything to you at the station?

Officer: I think he did, but I don't remember exactly what he said.

Immediately after this testimony, the prosecutor showed the officer a handwritten document. The officer identified the document as notes she had made on December 2 concerning her interaction with the defendant on December 1. The prosecutor provided a copy of the document to defense counsel. The document, which was dated December 2, stated in its entirety:

The defendant burst into tears when asked if he had committed the robbery. He then received and invoked Miranda rights. I stopped the interrogation and didn't ask him any more questions, but as soon as we arrived at the station the defendant said, "I want to make a deal; I think I can help you." I reread Miranda warnings, and this time the defendant waived his rights and said, "I have some information that can really help you with this case." When I asked him how he could help, the defendant said, "Forget it—I want my lawyer." When the defendant's lawyer arrived 30 minutes later, the defendant was released.

The officer then testified as follows:

Prosecutor: After reviewing your notes, do you remember the events of December 1?

Officer: No, but I do remember making these notes the day after I spoke with the defendant. At that time, I remembered the conversation clearly, and I was careful to write it down accurately.

Over defense counsel's objection, the officer was permitted to read the document to the jury. The prosecutor also asked that the notes be received as an exhibit, and the court granted that request, again over defense counsel's objection. The testimony then continued:

Prosecutor: Did you speak to the defendant any time after December 1?

Officer: Following my discovery of additional evidence implicating the defendant in the robbery, I arrested him on December 20. Again, I read the defendant his Miranda rights. The defendant said that he would waive his Miranda rights. I then asked him if he was involved in the robbery of Jo-Jo's Bar, and he said, "I was there on November 30 and saw the robbery, but I had nothing to do with it."

Defense counsel objected to the admission of this testimony as well. The court overruled the objection.

The defendant's trial for robbery was held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

Were the following decisions by the trial court proper?

1. Admitting the officer's testimony that the defendant started crying. Explain.
2. Permitting the officer to read her handwritten notes to the jury. Explain.
3. Admitting the officer's handwritten notes into evidence as an exhibit. Explain.
4. Admitting the officer's testimony recounting the defendant's statement, "I have some information that can really help you with this case." Explain.
5. Admitting the officer's testimony recounting the defendant's statement, "I was there on November 30 and saw the robbery, but I had nothing to do with it." Explain.

## TORTS QUESTION

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Six months ago, a man visited his family physician, a general practitioner, for a routine examination. Based on blood tests, the physician told the man that his cholesterol level was somewhat elevated. The physician offered to prescribe a drug that lowers cholesterol, but the man stated that he did not want to start taking drugs because he preferred to try dietary change and “natural remedies” first. The physician told the man that natural remedies are not as reliable as prescription drugs and urged the man to come back in three months for another blood test. The physician also told the man about a recent research report showing that an herbal tea made from a particular herb can reduce cholesterol levels.

The man purchased the herbal tea at a health-food store and began to drink it. The man also began a cholesterol-lowering diet.

Three months ago, the man returned to his physician and underwent another blood test; the test showed that the man’s cholesterol level had declined considerably. However, the test also showed that the man had an elevated white blood cell count. The man’s test results were consistent with several different infections and some types of cancer. Over the next two weeks, the physician had the man undergo more tests. These tests showed that the man’s liver was inflamed but did not reveal the reason. The physician then referred the man to a medical specialist who had expertise in liver diseases. In the meantime, the man continued to drink the herbal tea.

Two weeks ago, just before the man’s scheduled consultation with the specialist, the man heard a news bulletin announcing that government investigators had found that the type of herbal tea that the man had been drinking was contaminated with a highly toxic pesticide. The investigation took place after liver specialists at a major medical center realized that several patients with inflamed livers and elevated white blood cell counts, like the man, were all drinking the same type of herbal tea and the specialists reported this fact to the local health department.

All commercially grown herbs used for this tea come from Country X, and are tested for pesticide residues at harvest by exporters that sell the herb in bulk to the five U.S. companies that process, package, and sell the herbal tea to retailers. U.S. investigators believe that the pesticide contamination occurred in one or more export warehouses in Country X where bulk herbs are briefly stored before sale by exporters, but they cannot determine how the contamination occurred or what bulk shipments were sent to the five U.S. companies. The companies that purchase the bulk herbs do not have any control over these warehouses, and there have been no prior incidents of pesticide contamination. The investigators have concluded that the U.S. companies that process, package, and sell the herbal tea were not negligent in failing to discover the contamination.

Packages of tea sold by different companies varied substantially in pesticide concentration and toxicity, and some packages had no contaminants. Further investigation has established that the levels of contamination and toxicity in the herbal tea marketed by the five different U.S. companies were not consistent.

The man purchased all his herbal tea from the same health-food store. The man is sure that he purchased several different brands of the herbal tea at the store, but he cannot establish which brands. The store sells all five brands of the herbal tea currently marketed in the United States.

The man has suffered permanent liver damage and has sued to recover damages for his injuries. It is undisputed that the man's liver damage was caused by his herbal tea consumption. The man's action is not preempted by any federal statute or regulation.

1. Is the physician liable to the man under tort law? Explain.
2. Are any or all of the five U.S. companies that processed, packaged, and sold the herbal tea to the health-food store liable to the man under tort law? Explain.
3. Is the health-food store liable to the man under tort law? Explain.

## **SECURED TRANSACTIONS/REAL PROPERTY QUESTION**

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Two years ago, PT Treatment Inc. (PTT), incorporated in State A, decided to build a new \$90 million proton-therapy cancer treatment center in State A. The total cost to PTT for purchasing the land and constructing the building to house the treatment facility was \$30 million. PTT financed the purchase and construction with \$10 million of its own money and \$20 million that it borrowed from Bank. To secure its obligation to Bank, PTT granted Bank a mortgage on the land and all structures erected on the land. The mortgage was properly recorded in the county real estate records office, but it was not identified as a construction mortgage.

Two months after the mortgage was recorded, PTT finalized an agreement for the purchase of proton-therapy equipment from Ion Medical Systems (Ion) for \$60 million. PTT made a down payment of \$14 million and signed a purchase agreement promising to pay the remaining \$46 million in semi-annual payments over a 10-year period. The purchase agreement provided that Ion has a security interest in the proton-therapy equipment to secure PTT's obligation to pay the remaining purchase price. On the same day, Ion filed a properly completed financing statement with the office of the Secretary of State of State A (the central statewide filing office designated by statute), listing "PT Treatment Inc." as debtor and indicating the proton-therapy equipment as collateral.

Shortly thereafter, Ion delivered the equipment to PTT and PTT's employees installed it. The equipment was attached to the building in such a manner that, under State A law, it is considered a fixture and an interest in the equipment exists in favor of anyone with an interest in the building.

The new PTT Cancer Treatment Center opened for business last year. Unfortunately, it has not been an economic success. For a short period, PTT contracted with State A Oncology Associates (Oncology) for the latter's use of the proton-therapy equipment pursuant to a lease agreement, but Oncology failed to pay the agreed fee for the use of the equipment, so PTT terminated that arrangement. To date, PTT has been unsuccessful in its efforts to collect the amounts that Oncology still owes it. PTT's own doctors and technicians have not attracted enough business to fully utilize the cancer treatment center or generate sufficient billings to meet PTT's financial obligations. PTT currently owes Ion more than \$30 million and is in default under the security agreement. Ion is concerned that PTT will soon declare bankruptcy.

In a few days, Ion will be sending a technician to the PTT facility to perform regular maintenance on the equipment. Ion is considering instructing the technician to complete the maintenance and then disable the equipment so that it cannot be used by PTT until PTT pays what it owes.

1. In view of PTT's default, if Ion disables the proton-therapy equipment, will it incur any liability to PTT? Explain.
2. If PTT does not pay its debts to either Bank or Ion, which of them has a superior claim to the proton-therapy equipment? Explain.
3. Does Ion have an enforceable and perfected security interest in any of PTT's assets other than the proton-therapy equipment? Explain.

## CONTRACTS QUESTION

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A homeowner and his neighbor live in houses that were built at the same time. The two houses have identical exteriors and are next to each other. The homeowner and his neighbor have not painted their houses in a long time, and the exterior paint on both houses is cracked and peeling. A retiree, who lives across the street from the homeowner and the neighbor, has complained to both of them that the peeling paint on their houses reduces property values in the neighborhood.

Last week, the homeowner contacted a professional housepainter. After some discussion, the painter and the homeowner entered into a written contract, signed by both of them, pursuant to which the painter agreed to paint the homeowner's house within 14 days and the homeowner agreed to pay the painter \$6,000 no later than three days after completion of painting. The price was advantageous for the homeowner because, to paint a house of that size, most professional housepainters would have charged at least \$8,000.

The day after the homeowner entered into the contract with the painter, he told his neighbor about the great deal he had made. The neighbor then stated that her parents wanted to come to town for a short visit the following month, but that she was reluctant to invite them. "This would be the first time my parents would see my house, but I can't invite them to my house with its peeling paint; I'd be too embarrassed. I'd paint the house now, but I can't afford the going rate for a good paint job."

The homeowner, who was facing cash-flow problems of his own, decided to offer the neighbor a deal that would help them both. The homeowner said that, for \$500, the homeowner would allow the neighbor to take over the homeowner's rights under the contract. The homeowner said, "You'll pay me \$500 and take the contract from me; the painter will paint your house instead of mine, and when he's done, you'll pay him the \$6,000." The neighbor happily agreed to this idea.

The following day, the neighbor paid the homeowner \$500 and the homeowner said to her, "The paint deal is now yours." The neighbor then invited her parents for the visit that had been discussed. The neighbor also remembered how annoyed the retiree had been about the condition of her house. Accordingly, she called the retiree and told him about the plans to have her house painted. The retiree responded that it was "about time."

Later that day, the homeowner and the neighbor told the painter about the deal pursuant to which the neighbor had taken over the contract from the homeowner. The painter was unhappy with the news and stated, "You can't change my deal without my consent. I will honor my commitment to paint the house I promised to paint, but I won't paint someone else's house."

There is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house.

1. If the painter refuses to paint the neighbor's house, would the neighbor succeed in a breach of contract action against the painter? Explain.
2. Assuming that the neighbor would succeed in the breach of contract action against the painter, would the retiree succeed in a breach of contract action? Explain.

## Contracts Question

3. If the painter paints the neighbor's house and the neighbor does not pay the \$6,000 contract price, would the painter succeed in a contract claim against the neighbor? Against the homeowner? Explain.

## CIVIL PROCEDURE QUESTION

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A woman and a man have both lived their entire lives in State A. The man once went to a gun show in State B where he bought a gun. Otherwise, neither the woman nor the man had ever left State A until the following events occurred.

The woman and the man went hunting for wild turkey at a State A game preserve. The man was carrying the gun he had purchased in State B. The man had permanently disabled the gun's safety features to be able to react more quickly to a turkey sighting. The man dropped the gun and it accidentally fired, inflicting a serious chest wound on the woman. The woman was immediately flown to a hospital in neighboring State C, where she underwent surgery.

One week after the shooting accident, the man traveled to State C for business and took the opportunity to visit the woman in the hospital. During the visit, the woman's attorney handed the man the summons and complaint in a suit the woman had initiated against the man in the United States District Court for the District of State C. Two days later, the woman was released from the hospital and returned home to State A where she spent weeks recovering.

The woman's complaint alleges separate claims against the man: 1) a state-law negligence claim and 2) a federal claim under the Federal Gun Safety Act (Safety Act). The Safety Act provides a cause of action for individuals harmed by gun owners who alter the safety features of a gun that has traveled in interstate commerce. The Safety Act caps damages at \$100,000 per incident, but does not preempt state causes of action. The woman's complaint seeks damages of \$100,000 on the Safety Act claim and \$120,000 on the state-law negligence claim. Both sets of damages are sought as compensation for the physical suffering the woman experienced and the medical costs the woman incurred as a result of the shooting.

The man has moved to dismiss the complaint, asserting (a) lack of personal jurisdiction, (b) lack of subject-matter jurisdiction, and (c) improper venue. State C's jurisdictional statutes provide that state courts may exercise personal jurisdiction "to the limits allowed by the United States Constitution."

With respect to each asserted basis for dismissal, should the man's motion to dismiss be granted? Explain.



# *July 2016 MEE Analyses*

*Corporations & Limited Liability Companies*

*Evidence/Criminal Law & Procedure*

*Torts*

*Secured Transactions/Real Property*

*Contracts*

*Civil Procedure*



# CORPORATIONS & LIMITED LIABILITY COMPANIES ANALYSIS

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Corporations and Limited Liability Companies I.C., D.; V.D.

## ANALYSIS

### Legal Problems:

- (1) What type of LLC is created when neither its certificate of organization nor its operating agreement specifies whether it is member-managed or manager-managed?
- (2) In a member-managed LLC, does a member who purchases goods for the business have authority (actual or apparent) to bind the LLC when the member acted without the express approval of the other members?
- (3) In a member-managed LLC, does a member who sells land on behalf of an LLC that operates a bike shop bind the LLC when the member acted without the approval of the other members as required in their operating agreement?
- (4) In a member-managed LLC, does a member who withdraws unilaterally dissolve the LLC, thus forcing a winding up of the LLC's business and distribution of its net assets?

## DISCUSSION

### Summary

This LLC is member-managed. The default rule is that an LLC is member-managed unless the certificate of organization or the operating agreement specifies otherwise. Thus, the brother (as a member of the LLC) had the actual and apparent authority to bind the LLC to contracts involving the carrying out of the LLC's ordinary business, such as the tire-purchase contract.

On the other hand, the LLC is not bound by the farmland sale. The cousin lacked actual authority, given the specific limitation in the LLC's operating agreement concerning sale of the company's farmland. In addition, the cousin lacked apparent authority to sell the farmland; the sale was outside the scope of the company's ordinary business and there was no other manifestation by the company that the cousin had authority to sell the farmland.

The withdrawal of the brother resulted in his dissociation from the LLC, but he has no right to payment for his member interest or to have the LLC dissolved and wound up. Instead, the brother is entitled to distributions only if and when made by the continuing members.

### ***Point One (20%)***

The LLC is member-managed, given that neither its certificate of organization nor its operating agreement specifies otherwise.

## Corporations & Limited Liability Companies Analysis

When the certificate of organization fails to specify whether the LLC is member-managed or manager-managed, the LLC is presumed to be member-managed, unless the members' operating agreement specifies how the LLC is to be managed. *See* REVISED UNIFORM LIMITED LIABILITY COMPANY ACT (RULLCA) § 407(a) (2006). Here, given the absence of an express election to be manager-managed in either the certificate or the operating agreement, the LLC is member-managed.

[NOTE: Some examinees may discuss whether an LLC was properly formed. This question is not raised in the call and does not warrant additional credit. Generally, an LLC is formed when the certificate of organization (a.k.a. articles of organization) is filed with the Secretary of State and the LLC has at least one member. RULLCA § 201(d)(1). Here the certificate was filed and, after the three acquired their membership interests, the LLC had at least one member.]

### ***Point Two (20%)***

The LLC is bound by the tire-purchase contract, given that the brother had both actual and apparent authority to act on behalf of the LLC.

Under RULLCA, “each member [in a member-managed LLC] has equal rights in the management and conduct of the company’s activities.” RULLCA § 407(b)(2). Thus, consistent with general agency law principles and with the approach of other acts governing LLCs, each member of a member-managed LLC can bind the company to contracts for apparently carrying on the ordinary business of the company unless the member lacks authority to do so and the other party to the contract has notice that the member lacks such authority. *See, e.g.*, UNIFORM LIMITED LIABILITY COMPANY ACT (ULLCA) § 301(a) (1996). Thus, a member of a member-managed LLC has the authority—both actual and apparent—to bind the LLC, much as a partner in a general partnership.

Here, the brother had actual authority to bind the LLC, given that he was a member of the LLC and was carrying out the company’s ordinary business by purchasing tires for the bike shop, even though the other members had not expressly approved these purchases. He also had apparent authority, given that the tire manufacturer had previously sold tires to the bike shop and could rely on the appearance that the brother was again properly acting for the LLC.

### ***Point Three (30%)***

The LLC is likely not bound by the farmland sales contract, given that the cousin lacked actual authority under the operating agreement and lacked apparent authority because the sale was outside the ordinary course of the LLC’s activities.

Whether there is actual authority for a non-ordinary transaction depends on the operating agreement of the LLC, which governs “relations . . . between the members and the limited liability company” and “the activities of the company.” RULLCA § 110(a)(1), (3). Here, the members’ operating agreement specified that sale of the company’s land required consent of all members. Thus, the cousin did not have actual authority to transfer the land without the consent

of the other two members. That the cousin sold the land above fair market value is not relevant to the question of authority.

The 2006 RULLCA does not provide for “statutory” apparent authority, but instead leaves questions of a member’s authority to agency law principles. *See* RULLCA § 301(a), (b) (2006) (“A person’s status as a member does not prevent or restrict law other than this [act] from imposing liability on a limited liability company because of the person’s conduct.”). Under agency law principles, the cousin lacked *actual authority* to sell the farmland because the LLC’s operating agreement required consent by all the members for the sale of the company’s farmland.

In addition, the cousin lacked *apparent authority* to sell the land because the buyer could not reasonably rely on the cousin’s sole signature on behalf of the LLC. There is no indication that the LLC made any manifestations to the third-party buyer that the cousin was authorized to enter into the sale of the farmland or that the sale of farmland by a bike shop was in the ordinary course of the LLC’s business. *See* RULLCA § 407(b)(4) (in a member-managed LLC, matters “outside the ordinary course of the activities of the company” require the consent of all members).

Nonetheless, some earlier LLC acts provide that, absent a contrary provision in the certificate of organization, an LLC member has authority to sign and deliver a deed of the company’s interest in real property and “the instrument is conclusive” in favor of a bona fide purchaser for value without notice. *See* ULLCA § 301(c) (1996). Under these earlier statutes, acts of members not “in the ordinary course of the company’s business” bind the company only if authorized by the other members. *Id.* § 301(a)(2). Here, given that the ordinary business of the LLC was operating a bike shop, the buyer would not have been a bona fide purchaser because he should have had doubts that one LLC member alone could bind the company in the sale of land. Moreover, there is no indication that the buyer had reason to believe that the other LLC members had authorized the farmland sale.

[NOTE: Examinees might address whether the LLC could set aside the sale or seek a remedy against the cousin for his violation of fiduciary duties. This should not receive any credit, as the question asks only whether the LLC is bound by the sale of the farmland.]

***Point Four (30%)***

The brother’s withdrawal constitutes a “dissociation” from the LLC, but does not cause a “dissolution” and winding up of the business. Upon dissociation, he becomes entitled to distributions from the LLC only if and when made by the continuing members.

Under RULLCA, the express will of a member to withdraw results in “dissociation.” RULLCA § 602(1) (2006). Dissociation does not result in dissolution of the LLC. Dissolution under RULLCA requires the consent of all the members. *Id.* § 701(a)(2). Here, the brother’s email reflects an express will to withdraw, thus causing him to be dissociated from the LLC. The brother’s dissociation results in (1) loss of his rights to participate in the LLC and (2) rights to distributions (payments by the LLC) only if and when made by the continuing members. *Id.*

## Corporations & Limited Liability Companies Analysis

§§ 502(b), 603(a)(1), (3). He has no right to payment for his LLC interest, unless the operating agreement specifies that a withdrawing member has a right to payment upon dissociation, that the remaining members are to agree to have the LLC buy his interest, or that the other members are to consent to dissolution (and winding up of the business).

The result under the 2006 RULLCA (and other more modern LLC acts) is different from the result under some older LLC acts, including the 1996 ULLCA, which generally treat the withdrawal of a member of an at-will LLC (no term) in much the same way as the withdrawal of a partner in an at-will general partnership. *See* ULLCA § 601(1) (dissociation occurs on notice of member's express will to withdraw), § 603(a)(1) (dissociated member's interest in at-will LLC must be purchased by LLC), and § 701(a)(1) (providing that such interest be purchased by the LLC for "fair value" at time of dissociation).

[NOTE: Examinees might notice that the rights of a withdrawing LLC member are not like those of a partner in an at-will partnership, but rather more like those of a minority shareholder in a closely held corporation. Partner withdrawal in an at-will partnership, unless agreed otherwise, causes the dissolution of the partnership and a right to cash payment for the pro rata share of the withdrawing partner's interest, after satisfying any creditor claims. The withdrawal of a minority shareholder in a closely held corporation results neither in dissolution of the corporation nor in any right to pro rata payment of the corporation's net assets. Instead, the minority shareholder remains entitled to dividends and other distributions only if and when the board of directors (majority shareholders) chooses to authorize such payments.]

# EVIDENCE/CRIMINAL LAW & PROCEDURE ANALYSIS

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Evidence V.A., E./Criminal Law and Procedure V.B., D.

## ANALYSIS

### Legal Problems:

- (1) Did the admission of the officer's testimony that the defendant started crying violate the defendant's Miranda rights? Was this evidence inadmissible hearsay?
- (2) Was the officer properly permitted to read her handwritten notes to the jury?
- (3) Were the officer's notes properly received into evidence as an exhibit?
- (4) Did the admission of the officer's testimony recounting the defendant's statement "I have some information that can really help you with this case" violate the defendant's Miranda rights? Was this evidence inadmissible hearsay?
- (5) Did the admission of the officer's testimony recounting the defendant's statement "I was there on November 30 and saw the robbery, but I had nothing to do with it" violate the defendant's Miranda rights? Was this evidence inadmissible hearsay?

## DISCUSSION

### Summary

The trial court properly permitted the officer to testify that the defendant began crying after the officer asked him, "Did you rob Jo-Jo's Bar last night?" Crying (that does not include speaking) is not the type of compelled communication or testimony protected by the privilege against self-incrimination or the Miranda rule. Furthermore, Miranda warnings are required *only* when a suspect is both in custody and under interrogation. The defendant was under interrogation, but he was not in custody when he burst into tears. Finally, the defendant's crying did not raise hearsay concerns because it was not a statement.

The trial court properly permitted the officer to read her notes to the jury. Although the notes are hearsay, they are admissible under the hearsay exception for recorded recollections. They concern a matter about which the officer once had knowledge but now has inadequate recollection to testify fully and accurately, they were made by the officer at a time when the events were fresh in her memory, and she has testified that the notes are accurate. Thus, the notes were properly admitted and read into evidence.

However, the trial court erred by receiving the notes as an exhibit. A written document admitted as "recorded recollection" may be read to the jury, but it may not be received as an exhibit unless it is offered as such by the adverse party. Here, the adverse party (defense counsel) did not offer the document but, in fact, objected to its admission.

The trial court properly permitted the officer to recount the defendant's statement "I have some information that can really help you with this case." There was no Miranda violation because the

defendant initiated communication with the officer. Under the Federal Rules of Evidence, the out-of-court statement is not hearsay because it is an “opposing party’s statement.”

The trial court properly permitted the officer to recount the defendant’s December 20 statement. Even though the defendant had invoked his right to counsel on December 1, the officer arrested him on December 20 and interrogated him without counsel being present. Nonetheless, the defendant’s December 20 statement—“I was there on November 30 and saw the robbery, but I had nothing to do with it.”—was properly admitted. First, at the time he was arrested on December 20, the defendant had been out of police custody for over two weeks. This was sufficient time to terminate the officer’s obligation to honor the defendant’s December 1 invocation of the right to counsel. Second, the officer gave proper Miranda warnings on December 20, prior to reinitiating interrogation, and the defendant waived his rights. Finally, under the Federal Rules of Evidence, the out-of-court statement is not hearsay because it is an opposing party’s statement.

***Point One (25%)***

The officer’s testimony that the defendant started crying did not violate the defendant’s Miranda rights because crying is not testimonial/communicative evidence and the defendant was not in custody when he burst into tears. This testimony is not hearsay because crying is not a statement.

The trial court properly permitted the officer to testify that the defendant began crying after she asked him, “Did you rob Jo-Jo’s Bar last night?” The testimony did not violate *Miranda*, because crying is not the type of compelled communication or testimony protected by the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* has consistently been interpreted to protect only testimonial/communicative evidence. See *Schmerber v. California*, 384 U.S. 757, 761 (1966) (“We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .”) Here, the defendant’s crying would not be considered a testimonial communication. *Doe v. U.S.*, 487 U.S. 201, 210 (1988) (“[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”).

Moreover, Miranda protections apply only when a suspect is both in custody and under interrogation. The defendant *was* under interrogation because the officer had asked him a direct question. See *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (defining interrogation as “either express questioning or its functional equivalent”). But for Miranda purposes, custody can only be established if a reasonable person under similar circumstances would believe that she was in custody. See *Berkemer v. McCarty*, 468 U.S. 420 (1984). Here, when the defendant burst into tears, he was not entitled to Miranda protections, as he was not in custody because a reasonable person who had just voluntarily admitted a police officer into his home would not believe that he was in custody. See *Beckwith v. United States*, 425 U.S. 341 (1976) (daytime interrogation in the suspect’s home by several government agents not viewed as custody without a more “significant” deprivation of the suspect’s freedom of action).

Finally, crying does not raise hearsay concerns because it is not a statement. Hearsay is an out-of-court statement “offer[ed] in evidence to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(c). Here, the defendant burst into tears, but did not assert or communicate anything while he was crying.

***Point Two (25%)***

The notes made by the officer are hearsay, but the officer was properly permitted to read the notes to the jury as a recorded recollection. Statements by the defendant contained in the notes are nonhearsay opposing-party’s statements.

The trial court properly permitted the officer to read her notes to the jury. The document containing the officer’s notes is hearsay because it is an out-of-court statement that is “offer[ed] in evidence to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(c). However, the notes are admissible under the hearsay exception for recorded recollections. FED. R. EVID. 803(5). A recorded recollection is “[a] record that . . . is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately [and] was made . . . when the matter was fresh in the witness’s memory . . . .” *Id.* The officer’s notes are a recorded recollection because the officer, who once had knowledge of the contents of those notes, prepared them herself but had insufficient recollection of the events they described to testify fully and accurately at trial regarding those matters.

The Federal Rules of Evidence also permit the use of a writing, such as the notes, to refresh a witness’s recollection for the purpose of testifying. FED. R. EVID. 612. Here, the prosecutor’s effort to use the notes to refresh the officer’s recollection was not successful because even after reading the notes, the officer still had insufficient recollection to enable her to testify fully and accurately. However, the officer also testified that she remembered making the notes and that she was careful to write the notes correctly. Thus, the court properly admitted the notes into evidence and permitted the officer to read them to the jury. FED. R. EVID. 803(5).

The notes themselves recount additional out-of-court statements made by the defendant (a second level of hearsay), but these statements are deemed nonhearsay by the hearsay exception for out-of-court statements by opposing parties. FED. R. EVID. 801(d)(2).

***Point Three (10%)***

The trial court erred by receiving the officer’s notes as an exhibit.

Although the officer’s notes fit the hearsay exception for recorded recollections, under this exception “[i]f admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.” FED. R. EVID. 803(5). Here, the notes were used by the prosecutor and offered as an exhibit by the prosecutor, *not* by an adverse party. Therefore, it was error for the court to admit them as an exhibit.

[NOTE: The officer’s notes are not admissible under the hearsay exception for public records under Federal Rule of Evidence 803(8) because the rule specifically exempts statements by law enforcement personnel when offered in a criminal case.]

***Point Four (25%)***

The admission of the officer's testimony recounting the defendant's statement "I have some information that can really help you with this case" did not violate the defendant's Miranda rights because the defendant initiated communication with the officer. This testimony also is not hearsay because it is an opposing-party statement.

The trial court properly permitted the officer to testify recounting the defendant's statement "I have some information that can really help you with this case." On December 1, the officer provided the defendant with Miranda warnings and the defendant invoked his right to counsel by stating, "Get me a lawyer." After the defendant's invocation of his right to counsel, the officer was required to cease the interrogation. *Miranda*, 384 U.S. at 474. Here, the officer immediately stopped the interrogation.

However, if a custodial suspect who has invoked his right to counsel initiates post-invocation communication with the police, the suspect's subsequent statements may be admissible. *See Edwards v. Arizona*, 451 U.S. 477 (1981). Although a suspect's questions/comments "relating to routine incidents of the custodial relationship" will not be treated as initiation of communication with the police, *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983), statements from a suspect that clearly indicate a willingness to speak to the police about matters relating to the investigation will be treated as initiation of communication. *Id.* at 1045–1046.

Here, when the defendant said, "I want to make a deal; I think I can help you," he was clearly initiating communication with the officer. Following this initiation of communication by the defendant, the officer properly provided new Miranda warnings and obtained a waiver of rights. *Edwards*, 457 U.S. at 484–485. Admission of the defendant's subsequent statements did not violate his constitutional rights.

Finally, although the defendant's statement was made out of court because it was made by the defendant and offered by the prosecutor against the defendant, it is an opposing-party statement and not considered hearsay. FED. R. EVID. 801(d)(2).

***Point Five (15%)***

The admission of the officer's testimony recounting the defendant's December 20 statement "I was there on November 30 and saw the robbery, but I had nothing to do with it" did not violate the defendant's Miranda rights because, following the defendant's second invocation of his right to counsel of December 1, the defendant was released from interrogative custody for 19 days. This testimony is nonhearsay because it is an opposing-party statement.

As discussed in Point Four, on December 1 the defendant received Miranda warnings from the officer, invoked his right to counsel by saying "Get me a lawyer," initiated communication with the officer, received a fresh set of Miranda warnings, waived his rights, made a statement, and then re-invoked his right to counsel by saying, "Forget it—I want my lawyer." Following the defendant's second invocation, he was provided with counsel and released. He was not

questioned again until more than two weeks later, when he was arrested and given fresh Miranda warnings.

The Supreme Court has concluded that if a suspect has been released from interrogative custody, the police obligation to honor an invocation of the Miranda right to counsel terminates after 14 days. *Maryland v. Shatzer*, 559 U.S. 98 (2010). Although the defendant invoked his right to counsel on December 1 by saying “Forget it—I want my lawyer,” after *Shatzer*, that earlier invocation by the defendant of his right to counsel was no longer binding on the officer when she re-arrested the defendant on December 20.

On December 20, the officer properly provided the defendant with new Miranda warnings. The defendant waived his rights and made a voluntary statement to the officer. Admission of the statement into evidence did not violate the defendant’s constitutional rights. Moreover, the statement is not hearsay because it is a statement by an opposing party. FED. R. EVID. 801(d)(2).

# TORTS ANALYSIS

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Torts II.B., C., D.3.; III.

## ANALYSIS

### Legal Problems:

- (1) Can the man recover damages under tort law from the physician?
- (2)(a) When may a producer of a defective product be found liable for injuries caused by that product?
- (2)(b) Can the man recover from any of the five U.S. companies when he cannot show what company's product caused his injuries?
- (3) Can the man recover damages from the health-food store?

## DISCUSSION

### Summary

A doctor is liable to a patient only when the evidence shows that he has failed to comply with the standard of care for the relevant specialty and medical community, and his failure causes the patient's injury. Because liver specialists did not make the link between the herbal tea and symptoms like the man's until after being presented with a group of patients, the family physician's conduct did not fall below the standard of care either at the initial consultation or thereafter.

A producer is liable in tort for a defective product that is unreasonably dangerous and that causes the plaintiff's injury. A product that does not meet the producer's own specifications is defective; an herbal tea contaminated with toxic pesticide is unreasonably dangerous.

However, the man cannot show which of the five U.S. companies who process, package, and sell the herbal tea caused his injury because he consumed more than one brand. None of the doctrines that permit a plaintiff to meet the causation requirement without direct proof of causation are available here. Thus, because the man cannot show which company caused his injury, he cannot recover against any of the five herbal tea producers.

A retail seller is strictly liable in tort for defective products it sells even if it had no control over the production process. Thus, the health-food store may be found liable to the man because the man purchased all of the herbal tea he consumed from that health-food store, and the evidence shows that the herbal tea caused the man's injury.

### *Point One (25%)*

A doctor is liable to a patient only when the evidence shows that the doctor has failed to comply with the standard of care for the relevant specialty and medical community and the failure caused the patient's injury. Because the facts here do not establish such a failure, the physician would not be liable for the man's injury.

A medical doctor is liable to a patient only when the evidence shows that he has failed to comply with the standard of care for the relevant specialty and medical community and his failure causes the patient's injury. In assessing whether a doctor has met this test, most courts compare the doctor's conduct to national standards rather than those that prevail in his or her locality. Because the standard requires assessment of typical doctor conduct, expert testimony is almost invariably necessary to establish a doctor's negligence. *See* RICHARD A. EPSTEIN, TORTS § 6.2 (1999); *Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968).

Here, there are two possible negligence claims against the physician. The man might argue that the physician was negligent in suggesting that drinking the herbal tea might lower his cholesterol. The man also might argue that, in his follow-up visit, the physician was negligent in failing to determine that his symptoms were due to the herbal tea if the man could establish that the delay in diagnosis worsened his medical condition. To succeed with either argument, the man would have to show that, if the physician had complied with the standard of care for general practitioners, the man would have followed a different course of action. Additionally, the man would have to show that the physician's failure to comply with the standard of care caused him harm. Based on the available evidence, it appears highly unlikely that expert testimony will be available to make such a showing.

Here, there is no indication that the physician failed to comply with the standard of care by suggesting that this type of herbal tea lowered cholesterol levels. There is no indication that the physician was aware that this type of herbal tea would be contaminated with toxic pesticides. Moreover, there is no indication that complying with the standard of care for general practitioners would have required him to be aware of such contamination. The facts establish that the physician advised the man that a prescription drug was the most reliable method of lowering cholesterol levels and told the man to come back for another test in three months. The physician only mentioned the herbal tea when the man refused a prescription drug in favor of "natural" methods and dietary change and did so because of a recent research report. Indeed, the herbal tea may have played a role in lowering the man's cholesterol.

With respect to the physician's failure to correctly diagnose the source of the man's symptoms, the facts establish that the physician responded to the man's elevated white blood cell count promptly and ordered additional tests. After these tests revealed a liver inflammation, the physician promptly referred the man to a specialist. More importantly, the facts show that even liver specialists were able to determine the link between the herbal tea and symptoms like the man's only when they had a cluster of patients with similar symptoms and discovered that all of the patients were drinking the same herbal tea.

Thus, based on the available evidence, the physician may not be found liable to the man.

***Point Two(a) (20%)***

The producer of goods that cause injury to a person may be liable to the injured person in tort if the seller was negligent, if the goods were defective, or if they did not satisfy the implied

warranty of merchantability. Here, the herbal tea that the man purchased was defective because it was contaminated with pesticide.

“One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused. . . .” RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

Products that fail to meet the producer’s own specifications are typically described as having a “manufacturing” defect. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998). In the case of food products, the presence of a harmful ingredient is generally considered a manufacturing defect “if a reasonable consumer would not expect the food product to contain that ingredient.” *Id.* § 7. The herbal tea that the man consumed falls into the manufacturing defect category even though it is not a manufactured product in the traditional sense because a reasonable consumer would expect the herbal tea to be free of contamination when processed and packaged. Given the severe harm caused to consumers by the pesticide residue, its presence clearly rendered the product unreasonably dangerous. Thus, the processor selling tea with this defect would be liable in tort for resulting injuries.

In order to recover for injuries sustained because of a manufacturing defect, a plaintiff need not show that the producer was negligent. A producer is strictly liable whenever “the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product . . . .” *Id.* § 2.

The man could also rely on the implied warranty of merchantability to establish the U.S. companies’ liability. Because the sale of the herbal tea by the producers is a sale of goods, it is governed by Article 2 of the Uniform Commercial Code. *See* UCC §§ 2-102, 2-105(1). The producers are “merchant(s)” with respect to those goods (*see* UCC § 2-104(1)), so the contract of sale included an implied warranty of merchantability. UCC § 2-314(1). (There is no evidence that this warranty was excluded or modified in any of the contracts under which those companies sold herbal tea. *See* UCC § 2-316.) To be merchantable, goods must, *inter alia*, be “fit for the ordinary purposes for which such goods are used.” UCC § 2-314(2)(c). Clearly, the contaminated herbal tea was not fit for the ordinary purpose for which the herbal tea is used. Thus, the producers breached the implied warranty of merchantability and are liable for that breach. *See* UCC §§ 2-714 – 2-715.

Under both warranty theory and strict products liability, the producers may not rely on the fact that the contamination took place before the herbal tea came into their hands to evade liability. In a warranty action, the only issue is whether the herbal tea was merchantable. How it came to be unmerchantable is irrelevant. In a strict products liability action, the issue is whether the product was defective. Thus, the man could recover against a producer of the herbal tea without proof of negligence *if* he could show that any given producer sold the product that caused his injury. *See* Point Two(b).

[NOTE #1: In some states, privity requirements may be applied to prevent the man from recovering from a seller with whom he is not in privity. However, in many states, privity rules have been relaxed or modified sufficiently to permit a remote purchaser like the man to assert an implied warranty claim against the seller of a food product.]

[NOTE #2: Some examinees might note that complete analysis of the warranty claim requires knowledge of whether the relevant contract effectively disclaimed the warranty of merchantability. However, this would not affect the tort liability claim.]

***Point Two(b) (35%)***

Because the man consumed several brands of the herbal tea, he cannot show which producer of the herbal tea supplied the product that caused his injury, and none of the doctrines that permit a plaintiff to meet the causation requirement without direct proof of causation are available here.

Like all tort plaintiffs, the plaintiff in a products liability action must establish that the defendant caused his injury. Had the man consumed only one brand of the herbal tea, causation might be established by showing the link between the tea's toxicity and the man's symptoms. However, the man drank the herbal tea produced by more than one producer, and he cannot link any particular defendant's product to his injury.

There are several doctrines that permit the jury to find a defendant liable when the plaintiff cannot directly meet the causation requirement. However, none of these doctrines would help the man to establish causation here.

The "market share" liability doctrine permits the jury to apportion damages based on the market shares of manufacturers of a defective product. But virtually all courts have held that this doctrine is available only if the manufacturers' defective products are fungible in relation to their capacity to cause harm. *See Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980) (market theory applied; DES drug was fungible product manufactured by several companies using identical formula); *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 173 (Pa. 1997) (market-share liability doctrine did not apply in lead paint case; lead paint was produced using various formulas with different amounts of lead and so differed in potential toxicity). Here, the man cannot make such a showing; what caused the man's injury was pesticide-contaminated herbal tea, and the facts specify that the contamination was not uniform. Some packages were heavily contaminated and some not at all. Thus, market-share liability is unavailable.

The "alternative liability" doctrine permits a jury to find two defendants liable when each was *negligent* and either could have caused the plaintiff's injuries. *See Summers v. Tice*, 199 P.2d 1 (Cal. 1948); RESTATEMENT (SECOND) OF TORTS § 433B(3). Here, there are five defendants, and there is no evidence that any producer was negligent.

The "joint venture" or "joint enterprise" doctrine allows the jury to impute one defendant's tortious conduct to other defendants who are engaged in a common project or enterprise and

## Torts Analysis

who have made an explicit or implied agreement to engage in tortious conduct. *See* EPSTEIN, *supra*, § 9.1. Here, however, there is no evidence that the producers had any control over the warehouses in which the pesticide contamination originated, let alone that they collaborated in tortious conduct.

In sum, based on the evidence at hand, none of the producers could be held liable for the man's injury because no evidence links a particular producer to that injury and no exception to this requirement applies.

### ***Point Three (20%)***

The health-food store from which the man bought the contaminated herbal tea may be found strictly liable in tort even though the store did not produce the tea.

Strict products liability applies to all commercial sellers; even a retailer who had no control over the design and manufacture of a product may be found strictly liable if that retailer sells a defective product. Because the health-food store is a commercial seller, it may be found liable to the man for the defective herbal tea that the man purchased there. *See* RESTATEMENT (SECOND) OF TORTS § 402A.

The man could also recover on an implied warranty theory (*see* Point Two(a)) against the health-food store in all jurisdictions because he was in privity with the store.

Just as with the herbal tea producers, the man has the burden of showing causation. But the facts specify that the man purchased *all* the herbal tea he consumed from the same health-food store. The identification problem that makes causation impossible to establish with respect to the producers thus does not arise with respect to the health-food store.

Thus the health-food store may be found liable for the man's injury based on the fact that it sold a defective product that caused the man's injury. Some states have statutes that exclude strict liability in tort for retailers who sell products in closed packages.

# SECURED TRANSACTIONS/REAL PROPERTY ANALYSIS

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Secured Transactions II.E.; III.D.; IV.F., G.; V.A./Real Property II.C.

## ANALYSIS

### Legal Problems:

- (1) When the debtor is in default under a security agreement, does the secured creditor have the right to disable equipment that is part of the collateral?
- (2) When collateral becomes a fixture, what are the relative rights of a person who has a security interest in the collateral and a mortgagee of the real property to which the collateral is affixed?
- (3) Does a person who has a security interest in equipment also have a security interest in the debtor's right to be paid by a lessee who leased the equipment? If so, is the security interest perfected?

## DISCUSSION

### Summary

Ion Medical Systems (Ion) has a security interest in the proton-therapy equipment and may disable that equipment after PTT's default, so long as that can be done without a breach of the peace.

While Ion has a security interest in the equipment, Bank also has a claim to that equipment under the mortgage because the equipment has become a fixture. Bank's interest is superior to that of Ion because Ion did not make a fixture filing in the real estate filing office.

PTT's rights against Oncology under the lease of the proton-therapy equipment constitute proceeds of the equipment and thus are also collateral of Ion. Because Ion's security interest in the equipment is perfected, its security interest in the lease proceeds is perfected.

### *Point One (40%)*

Because PTT defaulted under its security agreement with Ion, Ion is entitled to take possession of the equipment that is collateral for that obligation or leave the equipment at PTT's premises and render it unusable.

Ion has an enforceable security interest in the proton-therapy equipment under the criteria set forth in UCC § 9-203(b). The security interest is enforceable because (i) Ion gave value to PTT by providing credit to PTT, which PTT used to purchase the proton-therapy equipment, (ii) PTT acquired rights in the proton-therapy equipment when it purchased the equipment from Ion, and (iii) PTT authenticated (i.e., signed or its electronic equivalent) a security agreement that described the proton-therapy equipment and granted Ion a security interest in it.

## Secured Transactions/Real Property Analysis

Following a debtor's default, if the collateral is "equipment," a secured party may leave the equipment in place and render it unusable. UCC § 9-609(a)(2). The secured party may pursue this option "without judicial process, if it proceeds without breach of the peace." UCC § 9-609(b)(2). (Although "breach of the peace" is not defined, courts may look to, *inter alia*, public harm or loss of public order.)

"Equipment" is a defined term under Article 9 of the UCC, referring to "goods other than inventory, farm products, or consumer goods." UCC § 9-102(a)(33). The term "goods" means "all things that are movable when a security interest attaches" and also includes fixtures. UCC § 9-102(a)(44). Here, the proton-therapy equipment clearly constitutes goods, and it is not inventory, farm products, or consumer goods (as those terms are defined in UCC § 9-102), so it is "equipment."

Accordingly, because PTT has defaulted, Ion is entitled to disable the equipment if it can do so without breach of the peace. UCC § 9-609(b)(2). Here, its technician will be in the facility performing routine maintenance on the equipment and can disable it at that time. The technician will be lawfully in the facility, and there is nothing to indicate that the technician would have to engage in any violent, disruptive, or illegal behavior to prevent the equipment from being used. Without some reason to believe that there will be a breach of the peace, Ion can lawfully instruct its technician to disable the equipment.

[NOTE: Examinees may note that Ion's security interest is perfected. While analysis of perfection is necessary in order to answer Point Three, it is not necessary in order to answer this question.]

### ***Point Two (40%)***

Because the equipment has become a fixture and Ion did not make an effective "fixture filing," Bank's interest in the equipment is superior to that of Ion.

Bank has a mortgage on the land and the building in which the proton-therapy equipment is housed. The facts also state that, as a result of the installation, the equipment became a fixture. Accordingly, Bank's mortgage extends to the equipment.

Ion has a perfected security interest in the proton-therapy equipment. The security interest is enforceable under UCC § 9-203(b), and thus (in the absence of an agreement to the contrary under UCC § 9-203(a)) the security interest is attached. This is because all three elements of UCC § 9-203(b) have been satisfied: "value" has been given (the proton-therapy equipment has been delivered to PTT), PTT has rights in the proton-therapy equipment, and the signed purchase agreement qualifies as a security agreement that contains a description of the collateral. Ion's security interest is perfected under UCC §§ 9-308 and 9-310 because a financing statement properly listing the debtor and indicating the collateral was filed in the office of the State A Secretary of State. (State A is the correct state in which to file the financing statement because perfection of this security interest is governed by the law of the state in which PTT is located; in this case, PTT is located in State A because, as a corporation, PTT is a "registered organization" and, thus, is located in the state under whose laws it is organized. *See* UCC §§ 9-301, 9-307.)

[NOTE: Inasmuch as State A is the only state mentioned in this problem, examinees who do not do this conflict-of-laws analysis should nonetheless be able to receive full credit.]

A security interest in fixtures (such as that of Ion), even if perfected, is ordinarily subordinate to a conflicting interest of an “encumbrancer . . . of the related real property,” such as Bank. UCC § 9-334(c). There are, however, a number of exceptions to this rule. One exception relates to the priority of a “purchase-money security interest” in fixtures as against an encumbrancer of the related real property. (Ion has a purchase-money security interest in the equipment because the equipment secures credit given by Ion to allow PTT to buy the equipment. UCC § 9-103.) Because the security interest of Ion is a purchase-money security interest, had Ion made a “fixture filing” before the equipment became a fixture or within 20 days thereafter, the security interest of Ion would have had priority over Bank’s mortgage. UCC § 9-334(d). Ion did not make a fixture filing, though. While Ion did perfect its security interest by filing the financing statement with the Secretary of State (*see above*), that financing statement did not qualify as a “fixture filing” because a fixture filing must provide a description of the real property to which the collateral is related and must be filed in the office in which a mortgage on the related real estate would be filed, not in the state’s central filing office. UCC §§ 9-501(a)(1)(B), 9-502(b). Therefore, no exception to the general rule is applicable and the security interest of Ion in the equipment is subordinate to the interest of Bank.

***Point Three (20%)***

Ion has a security interest in PTT’s rights under the lease with Oncology because those rights are proceeds of its collateral. Because the security interest of Ion in the equipment was perfected by filing, its security interest in the rights to payment is perfected.

A secured party that has a security interest in collateral also has a security interest in any identifiable “proceeds” of the collateral. UCC § 9-315(a)(2). Proceeds include “whatever is acquired upon the . . . lease of collateral.” UCC § 9-102(a)(64)(A). Thus, PTT’s rights under the lease with Oncology are proceeds of the proton-therapy equipment in which it has a security interest. As a result, Ion has a security interest in PTT’s rights against Oncology under the lease. UCC § 9-315(a)(2).

Whether Ion’s security interest in the rights under the lease is perfected is important because this will determine Ion’s rights compared to those of other parties who have a claim to the rights under the lease. A security interest in proceeds of collateral is perfected for at least 20 days if the security interest in the original collateral was perfected. UCC § 9-315(c). Ion’s security interest in the proton-therapy equipment was perfected by the filing of the financing statement with the Secretary of State. (*See Point Two above.*) As a result, Ion’s security interest in the proceeds of that equipment (the rights against Oncology under the lease) is perfected for at least 20 days. The security interest will remain perfected after the 20-day period if, *inter alia*, the security interest in the original collateral was perfected by a filing in the same office in which a security interest in the proceeds could be perfected by filing (*see UCC § 9-315(d)*). Here, PTT’s rights under the lease with Oncology constitute chattel paper because the lease evidences both a monetary

## Secured Transactions/Real Property Analysis

obligation and a lease of specific goods. UCC § 9-102(a)(11). A security interest in chattel paper may be perfected by filing a financing statement in the Secretary of State's office in State A, the same office in which PTT filed the financing statement with respect to the equipment. *See* UCC § 9-501(a)(2) (state designates a single statewide office for filing of all security interests except certain real-estate-related interests). Thus, the security interest in the chattel paper (the proceeds) is perfected not only for the first 20 days but thereafter as well.

# CONTRACTS ANALYSIS

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Contracts I.A., A.4.; VI.

## ANALYSIS

### Legal Problems:

- (1) May a contractual right to the performance of services be assigned without the obligor's consent, giving the assignee the right to enforce the contract, when the assignment would not change the obligor's duty in any material respect?
- (2) If the obligor does not perform, may a third party who would have benefitted from performance enforce the contract?
- (3) If the obligor performs the services for the assignee pursuant to the assigned contract, is the assignee liable for payment? Is the assignor liable for payment?

## DISCUSSION

### Summary

The homeowner's rights against the painter can be assigned to the neighbor because the substitution of neighbor for homeowner will not materially change the painter's duty or increase the painter's burden. Because those rights have been assigned, the neighbor can enforce them against the painter. The retiree cannot enforce those rights because he is not a party to the contract (either initially or by assignment) and does not qualify as a third-party beneficiary of it. The assignment of rights to the neighbor does not relieve the homeowner of his payment obligation; if the painter paints the neighbor's house and the neighbor does not pay the painter, the painter will have causes of action against both homeowner and neighbor.

### *Point One (45%)*

The homeowner's rights against the painter are assignable because the substitution of neighbor for homeowner does not materially change the painter's duty or materially increase the burden imposed on the painter, and would not materially increase the painter's risk or chance of obtaining return performance, or materially reduce the value of the contract to him.

While contract rights are generally assignable, a contract is not assignable if the assignment (i) would materially change the duty of the obligor (here, the painter), (ii) would materially increase the burden or risk imposed on the obligor, (iii) would materially impair the obligor's chance of obtaining return performance or materially reduce the value of that return performance to the obligor, (iv) is forbidden by statute or precluded by public policy, or (v) is validly precluded by contract. RESTATEMENT (SECOND) OF CONTRACTS § 317(2). In this case, there is no indication of a statute or public policy that would forbid or preclude the assignment, and no contractual provision prohibiting assignment. Thus, the only questions are whether the assignment would materially change the duty of the painter or increase the burden imposed on the painter, and

whether the assignment would materially impair the painter's chance of obtaining return performance or materially reduce the value of that return performance to the painter.

Under these facts, which specify that there is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house, the assignment from the homeowner to the neighbor does not materially increase the painter's duty or risk. The facts specify that the exterior of the neighbor's house is identical to the exterior of the homeowner's house, that both are peeling, and that the labor to paint each house would be comparable in magnitude and difficulty. Moreover, the neighbor's house is next door to the homeowner's house, so no additional travel burden would be placed on the painter by painting the neighbor's house rather than the homeowner's house. Thus, a court would likely conclude that the assignment from the homeowner to the neighbor would neither materially change the painter's duty nor materially increase the burden imposed on the painter.

There is no indication under these facts that the assignment would materially impair the painter's chance of obtaining return performance (the agreed \$6,000 payment), or materially reduce the value of the contract to the painter. *Id.* § 317(2)(a). None of these factors is present here, particularly in light of the fact that the assignor (here, the homeowner) remains liable to pay the painter if the painter fulfills his obligation and the assignee (here, the neighbor) will be liable as well. (*See* Point Four below.)

All that is generally necessary for an effective assignment is (a) that the assignor manifest his or her intent to transfer the right to the assignee, without reserving any right to confirm or nullify the transfer (RESTATEMENT (SECOND) OF CONTRACTS § 324), and (b) that the assignee manifest assent to the assignment. *Id.* § 327(1). Here, both conditions are satisfied by the conversation between the homeowner and the neighbor. No action or manifestation of assent is required from the obligor. No particular form is required for the assignment. With minor exceptions not relevant here, the relevant manifestations of assent may be made either orally or in writing. *Id.* § 324.

If the painter does not paint the neighbor's house, the neighbor has a cause of action against the painter. *Id.* § 317(1) (by virtue of the assignment, "the assignor's right to performance by the obligor is extinguished . . . and the assignee acquires a right to such performance").

[NOTE: Some examinees might argue against assignability of the contract because there are inevitable differences between the paint jobs, such as the relative ease of dealing with the homeowners. If well-reasoned, such analysis should receive credit.]

***Point Two (20%)***

The retiree is neither an assignee of the contract nor a third-party beneficiary of the painter's promise; accordingly, the retiree cannot enforce the painter's obligations.

The retiree has no cause of action for the painter's breach. The homeowner's rights under the contract have been assigned to the neighbor, not to the retiree; therefore, the retiree may not enforce the contract as an assignee.

Moreover, the retiree does not qualify as a third-party beneficiary who can enforce the contract. While the retiree would benefit from the painter's performance of his obligations, not all who benefit from performance of a promise may enforce it. Rather, contract law distinguishes between "incidental" beneficiaries and "intended" beneficiaries, and only the latter can enforce a promise of which he or she is not the promisee. The retiree is not an intended beneficiary inasmuch as there is no indication that benefitting him was in the contemplation of any of the parties when the contract was entered into. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 and comment *e* and Illustration 16.

***Point Three (35%)***

The painter's right to be paid for the completed paint job is enforceable against the delegatee (the neighbor) and also against the original/delegator (the homeowner).

The transaction between the homeowner and the neighbor is not only an assignment to the neighbor of the homeowner's rights against the painter, but also a delegation to the neighbor of the homeowner's obligation to the painter. This is shown by the fact that the neighbor assented to the homeowner's idea of the neighbor paying the painter. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 328(1) (assignment in general terms includes "a delegation of [the assignor's] unperformed duties under the contract"). As a result, if the painter completes the paint job and is not paid in accordance with the terms of the contract, then he has a cause of action against the neighbor, even though the neighbor was not a party to the original contract.

The homeowner's delegation to the neighbor of the duty to pay the painter does not, however, relieve the homeowner of that payment responsibility in the absence of the painter's agreement to the discharge of the homeowner. *See id.* § 318(3). As a result, if the painter is not paid in accordance with the terms of the contract, then the painter retains a cause of action against the homeowner as well.

# CIVIL PROCEDURE ANALYSIS

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Civil Procedure I.A., B., D.

## ANALYSIS

### Legal Problems:

- (1) May the U.S. District Court for the District of State C exercise personal jurisdiction based on personal service on the man while he was temporarily in State C?
- (2)(a) Does the U.S. District Court for the District of State C have subject-matter jurisdiction over the woman's Safety Act claim?
- (2)(b) Does the U.S. District Court for the District of State C have subject-matter jurisdiction over the woman's state-law negligence claim?
- (3) Is venue proper in the U.S. District Court for the District of State C?

## DISCUSSION

### Summary

Personal service of process on an individual who is voluntarily physically present in a state is sufficient to give the courts of the state (including federal courts located in the state) jurisdiction over that individual. In this case, there are no facts that would warrant a departure from the ordinary rule allowing a court to exercise such "transient jurisdiction." Accordingly, the court has personal jurisdiction over the man.

The U.S. District Court for the District of State C possesses federal-question jurisdiction over the woman's Safety Act claim and supplemental jurisdiction over the woman's negligence claim.

However, the District of State C is not an appropriate venue for the woman's suit. The man does not reside there, and the events giving rise to the woman's claims occurred in State A. The fact that the woman received medical treatment and may have experienced pain and suffering in State C is not a sufficient basis for venue when the acts causing injury occurred elsewhere. The man's motion to dismiss for improper venue should be granted.

### *Point One (25%)*

Personal service of process on the man while he was voluntarily present in State C is sufficient to warrant the U.S. District Court's exercise of personal jurisdiction over the man.

Federal Rule of Civil Procedure 4(k)(1)(A) provides that a federal court can take personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Thus, the U.S. District Court's jurisdiction over the man in this action depends on whether the state courts of State C would take jurisdiction over the man under the circumstances of the case. The facts of the problem indicate that State C courts generally will take jurisdiction over a defendant whenever the U.S. Constitution permits them to do so.

Here, the man was personally served with process while he was voluntarily present in State C. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), a unanimous Supreme Court held that a court’s exercise of such “transient jurisdiction,” i.e., jurisdiction based on physical presence alone, is generally consistent with due process. A plurality concluded that transient jurisdiction is constitutional simply “because it is one of the continuing traditions of our legal system that define the due process standard . . . .” *Id.* at 619 (opinion of Justice Scalia for four members of the Court). Although five members of the Court believed that tradition alone did not warrant upholding the constitutionality of transient jurisdiction, they did all agree at least that “the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State.” *Id.* at 629 (concurring opinion of Justice Brennan).

Here, as in *Burnham*, the man was physically present in State C when he was served with process, and his presence in State C was voluntary. Furthermore, given that transient jurisdiction has long been the rule in American courts, the man was on notice that his presence within State C could, upon service, subject him to personal jurisdiction. Moreover, by traveling to State C, the man availed himself of various benefits provided by State C, such as the benefits of “police, fire, and emergency medical” protection; access to the state’s transportation system; and “fruits of the State’s economy.” *See id.* at 637–38. At the same time, the burden on the man of defending the suit in neighboring State C is insubstantial in light of modern communication and transportation and the man’s demonstrated ability to travel to State C.

Thus, the man’s motion to dismiss for lack of personal jurisdiction should be denied.

[NOTE: Although no facts suggest that the Federal Gun Safety Act has special rules related to service of process and personal jurisdiction, some examinees may mention that possibility.]

***Point Two(a) (15%)***

The U.S. District Court has federal-question jurisdiction over the woman’s Safety Act claim.

Under 28 U.S.C. § 1331, district courts may exercise subject-matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” As a general rule, causes of action that are created by federal law qualify for federal-question jurisdiction while those created by state law do not. *See Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). In this case, the allegations of the woman’s well-pleaded complaint state a Safety Act claim that is created by federal law. As a result, federal-question jurisdiction exists over the woman’s Safety Act claim.

***Point Two(b) (35%)***

The U.S. District Court does not have diversity jurisdiction over the state-law negligence claim, but it may nonetheless hear the claim pursuant to its supplemental jurisdiction.

As noted above, the U.S. District Court for the District of State C does not have federal-question jurisdiction over the woman’s state-law negligence claim. The court also lacks diversity

jurisdiction over that claim because the woman and the man are not citizens of different states. *See* 28 U.S.C. § 1332. State citizenship for individual U.S. citizens is determined by their domicile: the true, fixed, permanent home to which the individual intends to return when absent. *See, e.g., Mas v. Perry*, 489 F.2d 1396, 1399–1400 (5th Cir. 1974). The facts make clear that the woman and the man are both domiciled in (and therefore citizens of) State A, where they have lived their entire lives, and where they both currently live. While the woman was convalescing in a hospital in State C when the suit was brought, the woman exhibited no intent to change domicile, and she returned to State A upon her release from the hospital. Because both parties are State A citizens, the fundamental requirement for diversity jurisdiction is not met.

However, under 28 U.S.C. § 1367, a district court may exercise supplemental jurisdiction over claims that form part of the same “case or controversy under Article III” as claims over which the district court has original jurisdiction. It is generally understood that claims are part of the same case or controversy if they arise from a common nucleus of operative facts. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

Here, the woman’s Safety Act and negligence claims arise from a common nucleus of operative facts: the man’s disabling of his gun’s safety features and the resulting accidental shooting of the woman. As a result, the U.S. District Court possesses supplemental jurisdiction over the woman’s state-law negligence claim.

Although a court has power to exercise supplemental jurisdiction, it need not do so in all cases. Under § 1367(c), a “district court[] may decline to exercise supplemental jurisdiction” under certain conditions, including when “the claim [over which the court has only supplemental jurisdiction] substantially predominates over the claim . . . over which the district court has original jurisdiction.”

Here, one might argue that the woman’s negligence claim substantially predominates over the federal-question claim because the damages sought on the woman’s negligence claim are larger than the damages sought on the woman’s federal claim. *See, e.g., Rivera Flores v. P.R. Tel. Co.*, 776 F. Supp. 61, 71–72 (D.P.R. 1991) (declining supplemental jurisdiction when non-federal claims seek \$6 million in damages and federal claim seeks only injunctive relief and back pay). Nonetheless, the U.S. District Court is unlikely to dismiss the negligence claim given the factual and evidentiary overlap in the two claims and the resulting efficiency of resolving them together. *See Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349 (D. Col. 1994) (where facts needed to prove each claim are similar or identical, it cannot be said that state claims predominate); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780 (3rd Cir. 1995) (where state-law negligence claim is based on same facts as federal claim, “it will be the rare case” where the state issues will substantially predominate).

In short, the U.S. District Court has federal-question jurisdiction over the woman’s Safety Act claim and possesses supplemental jurisdiction over the woman’s state-law negligence claim. As a result, the man’s motion to dismiss for lack of subject-matter jurisdiction should be denied.

***Point Three (25%)***

Venue is not appropriate in the U.S. District Court for the District of State C because the man does not reside in State C, the events giving rise to the woman’s claims did not occur there, and there is another district (in State A) where venue would have been proper.

28 U.S.C. § 1391(b) governs venue in this action. Under § 1391(b), venue is appropriate “in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, . . . or (3) if there is no district in which an action may otherwise be brought . . . , any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.”

The man does not reside in the district of State C, so venue cannot be based on § 1391(b)(1).

State C also does not qualify as an appropriate venue pursuant to § 1391(b)(2) because it is not “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” Here, the events giving rise to the woman’s claims were the disabling of the gun’s safety features and the accidental shooting—both of which occurred in State A. One might argue that a substantial part of the events giving rise to the claim occurred in State C because the woman received medical treatment there and, as a result, it was in State C that the woman experienced much of the harm (physical suffering and medical expenses) for which she seeks to recover damages. *See, e.g.*, 14D CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, AND RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE § 3806 (4th ed. 2013) (in tort cases, place where harms were felt could be considered place where “substantial part of the events or omissions occurred”). However, most courts that have considered this statutory language in the context of personal injury torts have concluded that venue is proper in the district where the defendant’s tortious acts occurred, but not in a district that is connected to the incident only because the plaintiff received medical treatment there. *See, e.g.*, *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 736 (8th Cir. 1997) (venue is proper where alleged tortious acts occurred, not where medical treatment for injuries was received); *Bryan v. Hyatt Corp.*, 2008 WL 205246 (E.D. Mich. 2008) (same); *Arriaga v. Imperial Palace, Inc.*, 252 F. Supp. 2d 380, 387–88 (S.D. Tex. 2003) (same); *Smith v. Fortenberry*, 903 F. Supp. 1018, 1020 (E.D. La. 1995) (same).

Nor would venue be appropriate in State C on the § 1391(b)(3) grounds that the man was found there at the time of service. Although the man was in State C at the time of service, § 1391(b)(3) is a backup provision that applies only when no other district qualifies as an appropriate venue. Here, the man resides in State A and the acts giving rise to the cause of action occurred there. Accordingly, a relevant district in that state would qualify as an appropriate venue under either § 1391(b)(1) or § 1391(b)(2). So § 1391(b)(3) is inapplicable.

Thus, the man’s motion to dismiss for improper venue should be granted.







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