February 2019
MEE Question 1
Torts

FEBRUARY 2019 MEE
QUESTION 1—TORTS

One year ago, a man was injured when the car in which he and a woman were traveling slid off an icy highway during a winter storm and overturned. At the time of the accident, the woman was driving the car. The man was sitting in the front passenger seat, wearing his seat belt. The woman was driving 40 mph at the time of the accident, although the posted speed limit was 50 mph.

The man and the woman were rushed to a local hospital in its ambulance. There, hospital surgeons performed emergency surgery on the man. The man remained in the hospital for 10 days following his admission. Numerous medical instruments were used during his surgery and subsequent hospitalization, including needles, clamps, and surgical tools. However, he did not receive a blood transfusion or any blood products.

Three days after the man was released from the hospital, he developed a fever and visited his personal physician, who is not affiliated with the hospital. The physician ordered routine blood tests. The tests revealed that the man had a serious infection that is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments (needles, clamps, surgical tools, etc.) that come into contact with a patient's blood. There are, however, other possible sources of the infection in a hospital environment, such as a failure of staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another and staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Infections occurring in individuals who have not received a blood product and have not been hospitalized during the period of likely exposure are possible but rare. The physician told the man that he "must have contracted this infection at the hospital" because the period between infection and symptom development is 10 to 13 days and the man was a patient at the hospital during the entire relevant period. The physician also stated that "at hospitals that have adopted medical-instrument sterilization procedures recommended by experts, cases of this infection have been almost completely eliminated." The man has no history of intravenous drug use, and he did not receive any medical treatment for several months before his hospital stay. All sterilization procedures at the hospital are performed by hospital employees. However, the particular sterilization procedure used while the man was hospitalized cannot be determined because, while the hospital now uses the sterilization procedure recommended by experts, there is no record of when it started using that procedure.

The man has sued the woman and the hospital, alleging negligence. Neither defendant is judgment-proof, and this jurisdiction has no automobile-guest statute. The parties have stipulated that the man's damages for the injuries he suffered in the accident are $100,000 and his damages from the infection he contracted are $250,000.

1. Could a court properly find that the woman was negligent even though she was driving below the posted speed limit? Explain.

2. Could a court properly find that the woman is liable for the man's damages resulting from the infection? Explain.

3. Could a court properly find that the hospital is liable for the man's damages resulting from the infection? Explain.

4. If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident? Explain.

February 2019
MEE Analysis 1
Torts

FEBRUARY 2019 MEE
ANALYSIS 1—TORTS

This February 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Could a court properly find that the woman was negligent even though she was driving below the speed limit?

(2) Could a court properly find that the woman is liable for the man's damages resulting from the infection?

(3) Could a court properly find that the hospital is liable for the man's damages resulting from the infection?

(4) If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident?

DISCUSSION

Summary

A court could properly find that the woman was negligent despite the fact that she was driving at a speed lower than the posted limit if it concludes that her conduct was unreasonable under the circumstances. Given the icy road conditions, a court could find that her conduct was unreasonable.

Because exposure to either negligent or non-negligent medical treatment is a foreseeable risk of negligent driving, the woman could be found liable for the damages arising from the infection if the court concludes that the man contracted the infection through the hospital's conduct.

Although the man cannot show when or how he contracted the infection, under the doctrine of res ipsa loquitur the man could recover damages from the hospital if he can show that the harm he suffered (the infection) does not normally occur without negligence and that other responsible causes, including his own conduct and that of third persons, are sufficiently eliminated by the evidence. Here, the evidence shows that the man was in the hospital during the entire period in which he contracted the infection, that he had no other known means of exposure, and that the risk of infection can be almost eliminated through the hospital's use of recommended infection-

control procedures. A court thus could properly rely on the res ipsa loquitur doctrine to find the hospital liable.

If the court found that the negligence of both the woman and the hospital caused the infection, the woman's liability must be greater than $100,000. Because the woman's negligence alone caused the car accident, she alone would be liable for the $100,000 damages for the injuries the man suffered in the accident. In addition, in joint and several liability jurisdictions, she and the hospital together would be liable for the full amount of damages from the man's infection. Thus, her total damages for both the accident and the infection would not be limited to $100,000.

Point One (20%)

Because compliance with a statutory standard does not insulate an actor against liability for negligence, the woman could properly be found liable to the man despite the fact that she was driving below the posted speed limit.

Statutory standards typically establish the level of care necessary to avoid a finding of negligence. Thus, "an actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 14. However, an actor is negligent when he or she "does not exercise reasonable care under *all* the circumstances." *Id.* at § 3 (emphasis added). Speed limits are established for normal driving conditions, not hazardous conditions caused by poor weather. Given that the accident in which the man was injured occurred on an icy road during a winter storm, a court could find that the woman was negligent even though she was driving at a speed lower than the posted speed limit. Compliance with a statute does not establish freedom from fault. *See id.* § 16.

Point Two (20%)

Because contracting the serious infection was within the scope of the risk of negligent driving, the court could find that the woman's negligence was the proximate cause of the man's injuries sustained as a result of contracting the infection.

An actor is liable for those harms that are a foreseeable consequence of his negligence.

Courts have routinely found that subsequent medical malpractice is within the scope of the risk created by a tort defendant. "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner." Restatement (Second) of Torts § 457. Liability typically attaches even when the medical services rendered "cause harm which is entirely different from that which the other had previously sustained . . . so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who render such services." *Id.* at cmt. a.

Thus, because it is foreseeable that an injured person will require hospitalization and that hospitalization will expose the injured person to other infections, the woman could be found

liable for the man's damages associated with contracting the infection so long as the trier of fact concludes that the hospital is responsible, whether negligent or not, for the man's contracting the infection.

Point Three (40%)

Although the man cannot directly prove that he contracted the infection in the hospital or from a specific action by the hospital or its employees that was negligent, the hospital could be found liable under the doctrine of res ipsa loquitur because the man can show that (1) contracting the infection does not normally happen without negligence, and (2) other responsible causes are sufficiently eliminated by the evidence.

Typically, the tort plaintiff bears the burden of proof to establish the specific actions of the defendant or its employees (acting within the scope of their employment) that were negligent and caused his harm. Here, the plaintiff has no direct proof of the actions of the hospital or its employees that were negligent and that caused the infection from which he is suffering.

However, the doctrine of res ipsa loquitur permits the trier of fact to infer that the harm suffered by the plaintiff was caused by negligence of the defendant when

> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Second) of Torts § 328D.

Res ipsa loquitur is commonly used in actions against medical providers when the patient suffers an unexplained injury and the evidence establishes that the risk of such an injury can be largely eliminated when reasonable care is used. If, for example, the "evidence shows that a particular adverse result of surgery is totally preventable when surgeons exercise reasonable and customary care, then res ipsa is appropriate in the patient's suit against the surgeon." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17 cmt. e; *Kambat v. St. Francis Hospital,* 678 N.E.2d 456 (N.Y. 1997).

The man should be able to show that contracting the infection is an event that normally does not occur in the absence of negligence. A plaintiff need not show that reasonable care would completely eliminate the risk, only that it "ordinarily does not occur in the absence of negligence." Restatement (Second) of Torts § 328D.

The man should also be able to show that the very likely cause of the infection is one of three possibilities: (1) improperly sterilized instruments, (2) failure of employees to follow proper handwashing techniques, or (3) reuse of medical instruments that cannot be properly sterilized. Any of these possibilities would constitute hospital negligence. Another cause that could suggest either hospital negligence or negligence by a third-party supplier is the use of contaminated blood, but that cause is eliminated by the facts. The possible causes that do not suggest hospital

negligence are "rare possibilities" that occur outside the hospital setting. These possible causes are eliminated because the man was hospitalized during the entire period of potential exposure. Thus, even though the specific cause of the infection cannot be proven, it appears that there is a very strong inference that the hospital's negligence caused the infection.

Lastly, here the hospital clearly had a duty to the man to protect him against contracting infections while hospitalized. Thus, the indicated negligence—failing to protect the man from contracting the infection—was within the scope of the hospital's duty to the man.

Based on this evidence, the court could use the res ipsa loquitur doctrine to find that the hospital is liable for the man's infection.

[NOTE: This answer sets out the res ipsa loquitur requirements from the Restatement (Second) of Torts. Jurisdictions differ as to exactly how they express the requirements of the res ipsa loquitur doctrine. One traditional variation requires that the plaintiff show three things: "(1) the accident which produced a person's injury was one which ordinarily does not happen unless someone was negligent, (2) the instrumentality or agent which caused the accident was under the exclusive control of the defendant, and (3) the circumstances indicated that the untoward event was not caused or contributed to by any act or neglect on the part of the injured person." *See, e.g., Eaton v. Eaton*, 575 A.2d 858, 863 (N.J. 1990). The Third Restatement offers another formulation: that negligence can be inferred when the accident causing harm is of a type that "ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17.

Answers relying on any of these variations should be given full credit as long as the examinee recognizes that courts interpret that variation, regardless of the specific way it sets out its requirements, "to limit the application of the res ipsa loquitur doctrine to those situations in which the defendant's negligence was more probably than not the cause of the plaintiff's injuries." *Giles v. City of New Haven*, 636 A.2d 1335 (Conn. 1994); *see also* Dan B. Dobbs et al., *Torts and Compensation* 190 (7th ed. 2013) ("We should expect variation in local verbalization of the rules, but always remember that a different verbalization may be intended to express substantially the same ideas.")]

[NOTE: An examinee might note that statutes in some jurisdictions restrict the use of res ipsa loquitur in medical malpractice cases. No such statute appears here, and an examinee should not receive credit for assuming such and answering accordingly. *See* Prosser, Wade, and Schwartz's *Torts Cases and Materials* 259 (13th ed. 2015).]

Point Four (20%)

A finding that the woman's negligence caused the car accident would mean that the woman is solely responsible for the $100,000 damages from the accident and is liable for that amount. She and the hospital together will be jointly and severally liable for the $250,000 in damages from the man's infection. Thus, the man can collect any portion, or all, of the $250,000 damages from the woman. Therefore, the woman's liability for both injuries cannot be limited to $100,000.

If the woman negligently caused the auto accident, she would be the sole proximate cause of the accident and would be liable for the $100,000 stipulated damages. She alone bears responsibility for those damages.

If the negligence of the woman and the hospital both caused the man's infection, the woman and the hospital would be jointly and severally liable for the $250,000 stipulated infection damages. Joint and several liability would be imposed for the infection damages because both the woman and the hospital have caused an indivisible injury, one of the bases of joint and several liability. Each of them is liable for the full amount of the man's damages from the infection.

Thus, because the woman is solely liable for the $100,000 of damages just from the accident and is jointly and severally liable for the foreseeable infection damages, her liability cannot be limited to $100,000.

[NOTE: The man has no obligation or need to ask the court to apportion the infection damages. He can approach either tortfeasor, or both tortfeasors, and seek total infection damages of $250,000 or a lesser amount. The man has the choice of how to apportion collection efforts between the two. The fourth call asks only whether the woman's liability could be limited to $100,000. Clearly the answer is "no" because she is liable for $250,000 as a joint tortfeasor in addition to liability for $100,000 damages from the accident. The examinee is not asked to specify how the plaintiff would apportion collection efforts between the two joint tortfeasors.

The MEE Subject Matter Outline notes that all torts questions occur in a jurisdiction that has joint and several liability with pure comparative negligence.]

February 2019
MEE Question 2
Secured Transactions

FEBRUARY 2019 MEE
QUESTION 2—SECURED TRANSACTIONS

A company is in the business of manufacturing and selling stereo equipment. Several months ago, the company borrowed money from a bank, to be repaid by the company in monthly installments. The loan agreement, which was signed by the company's owner, provided that, to secure the company's obligation to repay the loan, the company granted the bank a security interest in "all personal property" owned by the company. Also that day, under an oral agreement with the company's owner (who had full authority to speak on behalf of the company), the bank took possession of one of the most valuable items of the company's property—an original Edison gramophone that the company had acquired because it was the earliest precursor of the company's digital music players—as part of the collateral for the loan. The bank properly filed a financing statement in the appropriate filing office, listing the company as debtor and, in the space for the indication of collateral, listing only "all personal property."

Since borrowing the money, the company has run into various financial troubles. It has missed some loan payments to the bank and recently lost a lawsuit, resulting in a large judgment against the company. Last month, the judgment creditor obtained a judicial lien on the gramophone.

Last week, the bank notified the company that it was in default under the loan agreement. Without giving advance notice to the company, the bank sold the gramophone to an antiques collector in a commercially reasonable manner. The judgment creditor has learned about the sale of the gramophone and asserts that he had a superior claim to it.

The sale of the gramophone did not generate enough money to satisfy the company's obligation to the bank. The bank would like to seize some of the company's other property in which the bank has an enforceable security interest.

1. Does the company have any claim against the bank with respect to the sale of the gramophone? Explain.

2. As between the bank and the judgment creditor, who had a superior claim to the gramophone? Explain.

3. Does the bank have an enforceable security interest in any personal property of the company other than the gramophone? Explain.

February 2019
MEE Analysis 2
Secured Transactions

FEBRUARY 2019 MEE
ANALYSIS 2—SECURED TRANSACTIONS

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ANALYSIS

Legal Problems:

(1) May a secured party dispose of collateral after the debtor's default without first notifying the debtor?

(2) Whose rights are superior as between the rights of a secured party having possession of an item of collateral and a person who has a judicial lien on the same item?

(3) Does a security agreement describing collateral as "all personal property" create an enforceable security interest in a debtor's property?

DISCUSSION

Summary

The company has a claim against the bank with respect to the sale of the gramophone because the bank did not provide the company with advance notification of the bank's intent to dispose of the gramophone. The bank's security interest in the gramophone is superior to the judicial lien of the judgment creditor because the bank's security interest was perfected before the lien was created. The bank does not have an enforceable security interest in other property of the company because the language in the security agreement is insufficient and thus the bank's security interest is not enforceable or attached.

Point One (20%)

The company has a claim against the bank with respect to the sale of the gramophone because the bank did not send the company a notification of disposition before the sale.

After default by the debtor, a secured party may dispose of the collateral. UCC § 9-610(a). If it does so, the proceeds of that disposition will be applied first to the expenses of that process and then to the satisfaction of the debtor's obligation to the secured party. UCC § 9-615(a). Before disposing of the collateral, however, the secured party must send the debtor a "reasonable authenticated notification of disposition." UCC § 9-611(b). The only exception to this notification requirement is if the collateral is perishable or threatens to decline speedily in value

or is of a type customarily sold on a recognized market. UCC § 9-611(d). There is no indication that the gramophone in this problem fits into any of those categories. Therefore, because the bank sent no notification to the company before the disposition, the disposition was improper. This breach of the bank's obligation may expose the bank to liability to the company for damages (*see* UCC § 9-625(b)) or lessen the amount of any deficiency recoverable by the bank after application of the proceeds of sale to the company's obligation. *See* UCC § 9-626.

[NOTE: An examinee might mention that a private sale of collateral, such as occurred here, is permissible if commercially reasonable. This is true. UCC § 9-610(b). But this does not obviate the requirements with respect to pre-disposition notification.]

Point Two (40%)

The bank's security interest in the gramophone is superior to the judgment creditor's lien because the bank's security interest was perfected before the judgment creditor obtained his lien.

Except as otherwise provided in the UCC, a security agreement is effective against creditors. UCC § 9-201(a). UCC § 9-317 provides such an exception, however. That section indicates that a security interest is subordinate to the rights of a person who became a lien creditor before the security interest was perfected. UCC § 9-317(a)(2)(A). Here, the judgment creditor is a lien creditor under § 9-102(a)(52)(A) because of his judicial lien. Thus, the bank's security interest in the gramophone will be subordinate to the rights of the judgment creditor only if the bank's security interest was not perfected when the judgment creditor became a lien creditor.

A security interest is not perfected unless it has "attached." UCC § 9-308(a). A security interest attaches when it becomes enforceable unless the time of attachment has been postponed by agreement. UCC § 9-203(a). Thus, the bank's security interest in the gramophone cannot be perfected unless it is enforceable. A security interest is enforceable if the three criteria in UCC § 9-203(b) have been satisfied. The first two criteria are clearly satisfied: "value" has been given (because the loan was made) and the debtor (the company) had rights in the gramophone (the company owned it). *See* UCC §§ 9-203(b)(1)–(2) and 1-204. The third criterion can be satisfied in several ways. Here, it is satisfied because the requirements of UCC § 9-203(b)(3)(B) ("the collateral . . . is in the possession of the secured party . . . pursuant to the debtor's security agreement") are met. The gramophone was in the possession of the bank, and this was pursuant to the company's "security agreement." A "security agreement" is an agreement that creates or provides for a security interest. UCC § 9-102(a)(74). Thus, the oral agreement between the company's owner (speaking for the company) and the bank is a security agreement pursuant to which the bank took possession of the gramophone. Accordingly, when the bank took possession of the gramophone, its security interest was enforceable and attached.

An attached security interest can be perfected in many ways. *See generally* UCC § 9-308. In the case of security interests in goods, one method of perfection is for the secured party to take possession of the goods. UCC §§ 9-310(b)(6), 9-313(a). Thus, the bank's possession of the gramophone not only was an element of enforceability and attachment but also resulted in perfection of the security interest.

Because the bank's security interest in the gramophone was perfected before the judgment creditor became a lien creditor, the bank's security interest is superior to the judgment creditor's judicial lien.

[NOTE: An examinee may mention that the language in the loan agreement, standing alone, would be insufficient to create an enforceable and attached security interest in the gramophone. This is accurate, but the bank's possession of the gramophone pursuant to the oral agreement is sufficient. Thus, the security interest is enforceable and attached whether or not the language in the written loan agreement would suffice in the absence of the bank's possession. Some examinees may discuss the elements of enforceability of a possessory security interest in the answer to question 1 and refer back to that discussion in their answer to this question. Such examinees should get credit for that analysis as part of their answer to question 2. Examinees may organize their answers either way and receive full credit.]

Point Three (40%)

The bank does not have an enforceable security interest in the company's other assets because the description of the collateral in the loan agreement is insufficient to create an enforceable security interest in those assets.

A security interest attaches when it becomes enforceable unless the time of attachment has been postponed by agreement. UCC § 9-203(a). The three criteria in UCC § 9-203(b) have not been satisfied. The first two criteria are clearly satisfied: "value" has been given (because the loan was made) and the debtor (the company) has rights in its personal property (because it owns it). *See* UCC §§ 9-203(b)(1)–(2) and 1-204. The third criterion has not been satisfied.

Here, because the bank does not have possession of the remaining personal property of the company (and other specialized criteria are inapplicable), the bank's security interest in that personal property is enforceable only if the requirements of UCC § 9-203(b)(3)(A) are met. Under that provision, the debtor must have authenticated (i.e., signed or its electronic equivalent) a security agreement that contains a description of the collateral. The loan agreement is a security agreement inasmuch as it creates or provides for a security interest. UCC § 9-102(a)(74). Moreover, it is authenticated inasmuch as we are told in the question that the loan agreement was signed by the company's owner. *See* UCC § 9-102(a)(7) (definition of "authenticate") and UCC § 1-201(b)(37) (definition of "signed"). The description of the collateral in the security agreement is insufficient, however. UCC § 9-108(a) states that, except as provided in, *inter alia*, UCC § 9-108(c), a description of personal property is sufficient if it reasonably identifies what is described. UCC § 9-108(c), though, provides that descriptions of a debtor's property such as "all of the debtor's personal property" or words of a similar import do *not* reasonably identify the collateral. Here, the description of the collateral in the loan agreement is "all personal property" owned by the company. Therefore, the description is insufficient under UCC § 9-108, and accordingly the security agreement does not satisfy the requirements of UCC § 9-203(b)(3)(A).

Thus, the bank's security interest in the company's assets (other than the gramophone in the possession of the bank discussed in Point One) is not enforceable. Since the security interest is not enforceable, it did not attach; since the security interest did not attach, the security interest is not perfected.

[NOTE: An examinee may mention that "all personal property" is a sufficient indication of collateral in a financing statement. That is true. UCC § 9-504(2). But the filing of a financing statement cannot perfect a security interest that does not attach. Therefore, the security interest is not perfected here even if the financing statement would be sufficient to perfect a security interest that, unlike here, attached.]

February 2019
MEE Question 3
Agency & Partnership

FEBRUARY 2019 MEE
QUESTION 3—AGENCY & PARTNERSHIP

Five years ago, three radiologists—Carol, Jean, and Pat—opened a radiology practice together. They agreed to call their business "Radiology Services," to split the profits equally, and to run the practice together in a manner that would be competitive. Toward that end, they purchased state-of-the-art radiology imaging equipment comparable to that of other radiology practices in the community.

Shortly after opening the practice, Carol, Jean, and Pat retained an attorney to organize the practice as a limited liability company. The attorney prepared all the necessary documents and forwarded the documents to Carol, Jean, and Pat for signature. However, they were so involved in their radiology practice that they forgot to sign the documents, and they have never done so.

Four months ago, Carol suggested to Jean and Pat that the practice replace some of the imaging equipment. Jean was worried about overspending on imaging equipment, but she did not express her concern to Carol and Pat.

Three months ago, Carol, without discussing the matter further with either Jean or Pat or obtaining their consent, purchased for the practice a $400,000 state-of-the-art imaging machine like those recently acquired by other radiology practices in the community.

After the purchase but prior to delivery, Jean learned what Carol had done and was furious. Jean did not believe the practice could afford such an expensive machine. When Jean confronted Carol, Carol said, "Too bad, it's a done deal—get over it." At that, Jean responded, "That's it. I've had enough. This machine was purchased without my consent. It's a terrible idea. I'm out of here and never coming back. Just give me my share of the value of the practice." Carol responded, "Fine with me." Carol and Pat subsequently agreed to continue their participation in Radiology Services without Jean.

Radiology Services is in a jurisdiction that has adopted both the Revised Uniform Partnership Act (1997, as amended) and the Uniform Limited Liability Company Act (2006, as amended).

1. What type of business entity is Radiology Services? Explain.

2. Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat? Explain.

3. Did Jean's statements to Carol constitute a withdrawal from Radiology Services? Explain.

4. Were Jean's statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice? Explain.

February 2019
MEE Analysis 3
Agency & Partnership

FEBRUARY 2019 MEE
ANALYSIS 3—AGENCY & PARTNERSHIP

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ANALYSIS

Legal Problems:

(1) What type of business entity is Radiology Services?

(2) Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat?

(3) Did Jean's statements to Carol constitute a withdrawal from Radiology Services?

(4) Were Jean's statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice?

DISCUSSION

Summary

Radiology Services is an "at-will" general partnership because Carol, Jean, and Pat agreed to share profits and operate the business together without specifying a specific term. They did not form a limited liability company (LLC), as they intended, because no documentation to create an LLC was signed or filed.

As a partner of the general partnership, Carol had the authority to purchase the imaging machine on behalf of the partnership without the consent of either Jean or Pat because each partner has the authority to conduct partnership business. And while a partner may be liable to the other partners for a purchase that exceeds her authority, here Jean likely has no claim against Carol for purchasing the machine without the consent of Jean and Pat because the purchase of the imaging machine was most likely in the ordinary course of the business of the partnership.

Jean's oral statements to Carol stating her will to withdraw from Radiology Services resulted in her dissociation from the partnership, and because the partnership was "at will," her dissociation was not wrongful.

Because Carol and Pat agreed to continue the partnership, Jean's dissociation did not result in the dissolution and winding up of the partnership. Instead, Jean is entitled to receive a buyout

payment from Radiology Services for her one-third partnership interest 120 days after making a written demand for payment. Because Jean did not make a written demand, the partnership has no specified time in which to pay her the buyout price.

[NOTE: General partnerships are governed by either the Revised Uniform Partnership Act (RUPA) (1997, as amended), the Revised Uniform Partnership Act (1997), or the Uniform Partnership Act (1914) (UPA). The 1997 act, which the Uniform Law Commission amended in both 2011 and 2013 as part of its harmonization project, applies in all states (sometimes with the amendments) except for Georgia, Indiana, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Wisconsin, which continue to use versions of the UPA (1914). Because the facts state that Radiology Services is in a jurisdiction that has adopted the RUPA (1997, as amended), citations to the other acts are omitted, although the results under those acts are similar.

The Uniform Limited Liability Company Act (2006, as amended) contains principles that are widely adopted in LLC law. In all states, articles of organization must be signed and filed to create an LLC.]

Point One (20%)

Radiology Services is a general partnership. Despite their intentions, Carol, Pat, and Jean never formed a limited liability company.

A general partnership is formed whenever two or more persons associate (whether or not in writing) for the purpose of carrying on a business for profit. *See* Revised Uniform Partnership Act (RUPA) § 202(a) (1997, as amended) ("the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership"). Here, by agreeing to share profits and operate their radiology practice together, Carol, Jean, and Pat formed a general partnership, despite their intention to operate their business as a limited liability company. Furthermore, because the partnership was for neither a fixed term nor a specific undertaking, it was an "at-will" partnership.

A limited liability company is formed by the filing of a signed certificate of organization with the Secretary of State. Unif. Limited Liability Company Act § 201 (2006, as amended). Here, no certificate was signed or filed; thus, Carol, Jean, and Pat did not form a limited liability company.

[NOTE: Although some jurisdictions have recognized the "de facto" LLC doctrine where there has been a good-faith but failed attempt to form the LLC, this doctrine insulates members only from liability to third parties; it does not create an LLC as between the members themselves. *See* Emeka Duruigbo, *The De Facto and Estoppel Concepts in the LLC Context: Still Birth or Stunted Growth?*, ExpressO (2009), available at https://works.bepress.com/emeka_duruigbo/1/.]

Point Two (30%)

Carol had the authority to purchase the imaging machine without the consent of Jean and Pat because it appears that Carol purchased the machine in the ordinary course of business and was unaware of Jean's concerns about purchasing expensive imaging equipment.

Section 401(h) of the Revised Uniform Partnership Act, as amended, provides that "each partner has equal rights in the management and conduct of the partnership's business." This grant of authority to each partner is tempered by subsection 401(k), which provides: "A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the affirmative vote or consent of all the partners."

As the comments to Section 401(h) note, the scope of a partner's authority is governed by agency law principles. If the partnership agreement is silent on the scope of the agent-partner's authority, a partner has actual authority to commit the partnership "to usual and customary matters, unless the partner has reason to know that (i) other partners might disagree, or (ii) for some other reason consultation with fellow partners is appropriate." *See* comments to RUPA § 401 (1997, as amended). In light of this principle, a partner has authority to bind the partnership as to "usual and customary" dealings with third parties and need not seek the prior approval of the other partners unless the partner has reason to believe that the other partners might not approve or might expect to be consulted. Furthermore, under general agency law principles, a partner does not have actual authority to take "unusual or non-customary actions that will have a substantial effect on the partnership." *Id*., comment to subsection h.

Here, it appears that purchase of the equipment was in the ordinary course of business. The partners had purchased state-of-the-art imaging equipment when they started the practice, they had agreed to run the practice in a manner consistent with other area practices, and other practices had bought equipment like that which Carol purchased.

Further, although Jean had concerns about the practice purchasing expensive imaging machines, there is no indication that Carol was aware of Jean's concerns when she made the purchase. The facts clearly state that Jean did not express her concerns to either Carol or Pat. Furthermore, the facts indicate that the three partners (including Jean) had agreed that the partnership would have imaging equipment that would allow it to be competitive with other similar practices in the community.

Point Three (20%)

<u>Jean's oral statement to Carol, "I'm out of here," resulted in Jean's dissociation from the partnership.</u>

A partner is dissociated from a partnership when the partnership has notice of the partner's will to withdraw as a partner. RUPA § 601(1) (1997, as amended). A partner can dissociate from the partnership at any time. The notice of the partner's will to withdraw need not be in writing. *See* RUPA § 103(b)(6) (partnership agreement *may* provide that notice of withdrawal be in writing). The dissociation is rightful—that is, the dissociating partner has no obligations to the other partners—when the partnership is at will and the dissociation breaches no express provision in the partnership agreement. *See also* RUPA § 102(13) (1997, as amended) ("'partnership at will' means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking"); § 602(b) (1997, as amended)

(specifying that a partner's dissociation is wrongful in an at-will partnership "only if . . . it is in breach of an express provision of the partnership agreement").

Here, Jean's statement to Carol that "I'm out of here and never coming back" constituted a dissociation, and it was not wrongful because there is no indication in this at-will partnership that her withdrawal breached any express provision in the partnership agreement.

Point Four (30%)

Because Carol and Pat agreed to continue the partnership, Jean's dissociation did not result in the dissolution and winding up of the partnership. Instead, Jean is entitled to receive a buyout price for her partnership interest 120 days after she makes written demand for payment. Because her demand was not in writing, the partnership has no specified time in which to make payment.

Normally, a partner's dissociation in an at-will partnership results in its dissolution, and the business must be wound up. *See* RUPA § 801(1) (1997, as amended). But such dissolution can be rescinded by the affirmative vote or consent of all remaining partners. *Id*. § 803; *accord*, RUPA § 802(b) (1997, as amended) (permitting the partners to "waive the right to have the partnership's business wound up and the partnership terminated"). Under RUPA, as amended, the dissociating partner is no longer considered a partner and does not participate in this decision to continue the partnership. *See* RUPA § 102(10) (1997, as amended) (the term "partner" does not include a partner who dissociated under Section 601).

When a partnership is continued and not dissolved, the dissociating partner is entitled to have her interest purchased for a buyout price equal to that partner's interest in the value of the partnership, based on the greater of its liquidation or going-concern value (plus interest from the date of dissociation). RUPA § 701 (1997, as amended). Further, if the withdrawing partner makes a written demand for payment and no agreement is reached within 120 days after the demand, the partnership must pay in cash the amount it estimates to be the buyout price, including accrued interest. *Id*. § 701(e).

Here, although Jean made clear her will to withdraw, the partnership was not dissolved because Carol and Pat agreed to continue the partnership. Thus, Jean would be entitled to receive payment of a buyout price. Although Jean made an oral statement demanding payment for her interest, her demand was not in writing. Thus, the partnership does not have a specific time in which to pay the buyout price. But if Jean makes her demand in writing, the partnership would have to reach an agreement with her on the buyout price within 120 days or, failing this, pay her in cash its estimate of the buyout price plus accrued interest.

February 2019
MEE Question 4
Civil Procedure

FEBRUARY 2019 MEE
QUESTION 4—CIVIL PROCEDURE

An airline is incorporated in State A, where its corporate headquarters are located. The facility where it receives and processes online and telephone reservation requests is located in State B. It employs 150 people at that facility. The airline's base of physical operations, including its transport hub and major maintenance facility, is in State C, where more than 12,000 of its 15,000 employees are located. The airline serves States A and C but not State B.

In August, a woman who lived in State C called the reservation center in State B to obtain a round-trip ticket for the woman to fly between State C and State A in early September.

In early September, the woman used the ticket to fly to State A. The purpose of her trip was to hunt for an apartment in State A, where she was planning to start working at a new job that was set to begin in December. The woman found an apartment and signed an agreement to rent the apartment for one year, starting on December 1.

On the woman's return flight from State A to State C, a mechanical failure forced the plane to make an emergency landing in State A. The woman suffered serious and permanent injuries during the emergency landing and was hospitalized for three weeks in State A. Upon leaving the hospital, she returned to her home in State C. Because of the injuries she suffered, the woman has been unable to work, and she has received an indefinite deferral of the starting date for her job in State A. She continues to live in State C, where she has lived her entire life, although she hopes one day soon to move to the apartment in State A and begin working at her new job.

The woman has retained an attorney, who recommended filing a personal injury claim against the airline in State B because of the larger awards that State B juries tend to give in such cases. Accordingly, the woman sued the airline in federal court in State B, making a state-law tort claim for damages in excess of $1 million for the injuries she suffered during the plane's emergency landing.

The airline promptly filed a motion to dismiss for lack of subject-matter and personal jurisdiction.

State B's long-arm statute allows its courts to exercise personal jurisdiction to "the maximum extent allowed by the Fourteenth Amendment of the United States Constitution."

How should the federal district court rule on the motion to dismiss? Explain.

February 2019
MEE Analysis 4
Civil Procedure

FEBRUARY 2019 MEE
ANALYSIS 4—CIVIL PROCEDURE

This February 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1)(a) Does the woman's claim for $1 million in damages satisfy the amount-in-controversy requirement for diversity jurisdiction?

(1)(b) Is the woman a citizen of State C or State A for the purpose of determining federal diversity jurisdiction?

(1)(c) Is the airline a citizen of State A, State B, or State C for the purpose of determining federal diversity jurisdiction?

(2)(a) Are there sufficient contacts between the airline and State B for a State B court to exercise specific personal jurisdiction over the airline in a personal injury action brought by a State C resident, arising out of an accident in State A, and involving travel between States A and C?

(2)(b) Are there sufficient contacts between the airline and State B for a State B court to exercise general personal jurisdiction over the airline in a personal injury action brought by a State C resident, arising out of an accident in State A, and involving travel between States A and C?

DISCUSSION

Summary

The court should grant the motion to dismiss. Although the court would have diversity jurisdiction, the court lacks personal jurisdiction over the airline.

The woman's claim against the airline is based on state law, so diversity is the only basis upon which a federal district court could exercise subject-matter jurisdiction over this case. Here, the amount in controversy is more than $1 million and clearly sufficient for diversity jurisdiction. Further, the parties are diverse.

The woman's citizenship, determined by her domicile, is in State C, where she has lived her entire life.

The airline is a citizen of State A, where it is incorporated and where its corporate headquarters are located.

The federal court in this case can exercise personal jurisdiction over the airline only if the airline would be subject to the jurisdiction of the State B state courts. Because the State B courts exercise jurisdiction to the limits of the Constitution, the question is whether the airline has sufficient "minimum contacts" with State B "such that the maintenance of the suit [in State B] does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Here, there are insufficient contacts with State B for either general or specific jurisdiction. The only contact between the airline and State B that is mentioned in the facts is that State B is the location of the airline's online and telephone reservation center. The woman's personal injury action arises out of an accident that occurred in State A and had no connection at all to State B. Although the woman booked her ticket through the reservation center in State B, the woman's claim for bodily injury has no relation to the manner in which she purchased her ticket or to the fact that the reservation center is in State B. On these facts, it does not seem that the airline could reasonably anticipate being haled into a State B court for this particular claim. Moreover, if this claim is allowed, then any personal injury claim against the airline could be litigated in State B, regardless of where and how the injury occurred, if the related ticket was booked online or by telephone. This seems unreasonable, without some additional evidence concerning the nature and extent of the airline's State B contacts.

Point One(a) (10%)

<u>The court has diversity jurisdiction only if the amount in controversy exceeds $75,000 and the parties are citizens of different states.</u>

The diversity jurisdiction statute, 28 U.S.C. § 1332(a)(1), grants original federal jurisdiction to the United States District Courts in cases "where the amount in controversy exceeds . . . $75,000 . . . and is between (1) citizens of different States." Diversity of citizenship is determined as of the time the suit is filed.

Here the woman's claim for relief seeks in excess of $1 million, a potentially credible amount since the facts note that the woman sustained serious and permanent physical injuries that interfered with her ability to act upon a job offer. In deciding a motion to dismiss on jurisdictional grounds, the court will take the woman's claim for relief at face value with respect to the amount in controversy unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 289 (1938).

Point One(b) (20%)

<u>Here, the woman is a citizen of State C because, despite her desire to move to State A, she has never established a residence in State A.</u>

The citizenship of individuals for diversity purposes is determined by domicile at the time of the lawsuit. Domicile continues until changed, and in this case, the facts demonstrate that when the events began, the woman, a lifelong resident of State C, was a State C domiciliary and a State C citizen for diversity purposes. A person can change her domicile by (1) taking up residence in a new jurisdiction with (2) the intent to remain there indefinitely. *Gilbert v. David*, 235 U.S. 561 (1915). Here, the woman appears to have had an intention to move to State A and make it her home indefinitely. She accepted a job in State A, and she signed a lease on an apartment there.

However, the woman never took up residence in State A and therefore did not change her domicile. The mere "expression of an intention to move one's residence, without actually moving" is not sufficient to establish a domicile. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* 31–32 (4th ed. 2005). The woman was temporarily present in State A and signed a one-year lease for an apartment. She was also briefly hospitalized in State A. But her physical presence in State A never coincided with a *present* intent to remain in State A indefinitely. At the time of her trip to State A, she always intended to return to State C and to make her permanent move to State A at a later date. Thus, that trip alone would be insufficient to change the woman's diversity citizenship from State C to State A.

[NOTE: An examinee who erroneously concludes that the September events did change the woman's domicile to State A should consider whether subsequent events changed her domicile back to State C. After her hospitalization, she returned to State C to live, with a desire to move to State A in the future, but with no clear time at which that would happen. Thus, it would be reasonable to conclude that the woman re-acquired her State C domicile because she is now present there with no immediate plans to leave (i.e., she intends to remain there for an indefinite period of time).]

Point One(c) (20%)

<u>The airline is a citizen of State A, where it is incorporated and where, under the "nerve center" test of *Hertz Corp. v. Friend*, the airline has its principal place of business.</u>

The airline's citizenship for diversity purposes is determined by both the place of its incorporation and the place where it has its principal place of business. *See* 28 U.S.C. § 1332(c)(1). Here, its place of incorporation is State A. Its principal place of business is "the place where the corporation's high-level officers direct, control, and coordinate the corporation's activities." *See Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010). The facts state that the airline's corporate headquarters are in State A, and there is no suggestion that the officers run the corporation from any other location. The airline is, therefore, a citizen of State A under the principal-place-of-business rule as well as the place-of-incorporation rule.

Because the airline is a citizen of State A and the woman is a citizen of State C, the parties are diverse. As noted earlier, the amount in controversy exceeds $75,000. Thus, the court has diversity jurisdiction.

Point Two(a) (25%)

<u>The fact that the airline maintains an online reservation facility in State B is not a sufficient basis for State B to exercise specific personal jurisdiction over a personal injury action that arose out</u>

of an incident in another state, involved airline transportation between two different states, and was brought by a plaintiff who is a resident of another state.

A federal court can exercise personal jurisdiction over a defendant who is subject to the jurisdiction of the courts of the state in which the federal court sits. *See* Fed. R. Civ. P. 4(k)(1)(A). In this case, State B's courts exercise jurisdiction to the limits of the Constitution. The federal district court can therefore take personal jurisdiction over the airline if the airline has sufficient "minimum contacts" with State B "such that the maintenance of the suit [in State B] does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In this inquiry, two critical questions are whether the quality and nature of the airline's contacts with the jurisdiction are such that it can reasonably anticipate being haled into court there and whether those contacts are such that it is reasonable to expect the airline to defend the action in State B. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the Supreme Court recognized a distinction between "general jurisdiction" (also called "all-purpose" jurisdiction), which permits a court to exercise jurisdiction over any claim against a defendant if the defendant has extensive connections with the forum, and "specific jurisdiction" (also called "case-linked" jurisdiction), which permits a forum to hear a case only if the suit arises out of or relates to the defendant's forum contacts.

In this case, there does not seem to be a basis for State B to exercise specific jurisdiction. For specific jurisdiction to be proper, there must be "'an affiliation between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

Here, the only connection between the airline and State B is that State B is the location of the airline's reservation center. The woman's suit, however, is not directly related to the presence of the airline reservation center in State B. Rather, the woman's claim against the airline arises from the accident in State A and her use of the airline to fly between States A and C. The airline's affiliation with State B is not sufficiently related to the woman's claim to require the airline to defend the action in State B on the basis of specific jurisdiction.

Point Two(b) (25%)

The airline's operation of a reservation center in State B is not a sufficient basis for a State B court to exercise general jurisdiction over the airline when the airline is incorporated elsewhere, its principal place of business is elsewhere, and its operations in other states are far more extensive than in State B.

General (all-purpose) jurisdiction is proper over a corporation only when "the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities." *International Shoe Co. v. Washington,* 326 U.S. 310, 318 (1945). Although courts and commentators often have described the standard for general jurisdiction as whether a corporation has engaged in a "substantial, continuous and systematic course of business" in a state, the Supreme Court has recently described that standard as "unacceptably grasping." *Daimler A.G. v. Bauman,* 571 U.S. 117, 138 (2014). The proper test is not whether the activities are "continuous and systematic," it

is whether the business's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state." *Daimler A.G.* at 138–39 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915 (2011)). There are "only a limited set of affiliations with a forum" that will justify concluding that the corporation is "essentially at home" there. The paradigmatic affiliations are place of incorporation and principal place of business, each of which has "the virtue of being unique . . . as well as easily ascertainable." *Daimler A.G.,* 571 U.S. at 137.

In this case, the maintenance of a reservation center in State B that employs 150 people is unlikely to be enough to justify a conclusion that the airline is "essentially at home" there. The airline is incorporated elsewhere, its headquarters are elsewhere, and the bulk of its physical operations (employing thousands of people) occur elsewhere. The fact that it engages in substantial business activities in State B (as well as in other states where it conducts part of its operations) is, by itself, not sufficient to satisfy the court's requirement that it be "essentially at home" there, especially given the Court's admonition that only a "limited set of affiliations" will suffice for a forum to assert all-purpose jurisdiction over a defendant. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court,* 377 P.3d 874, 883 (Cal. 2016) (drug company is not "at home" in California—even though it sells "large volumes of its products" in California, maintains several research facilities in California, and employs hundreds of people in California—when company's forum operations "are much less extensive than its activities elsewhere in the United States" and company is incorporated and has its principal place of business elsewhere), *reversed on other grounds*, 137 S.Ct. 1773 (2017).

Because there is no personal jurisdiction, the court should grant the motion to dismiss.

[NOTE: Pursuant to 28 U.S.C. § 1631, the court has the authority to transfer the case to another court in order to avoid the jurisdictional problem. Some examinees may mention this as an alternative to dismissal.]

February 2019
MEE Question 5
Trusts & Future Interests

FEBRUARY 2019 MEE
QUESTION 5—TRUSTS & FUTURE INTERESTS

Eight years ago, a settlor created a $300,000 irrevocable trust. The settlor's brother is the sole trustee of the trust. The trust's primary beneficiaries are the settlor's son and daughter. The trust instrument provides, in relevant part:

> During the term of this trust, the trustee shall pay to and between my two children so much, if any, of trust income and principal as he deems advisable, in his sole discretion, for each child's support. Upon the death of the survivor of my children, the trustee shall distribute any remaining undistributed trust principal and income equally among my surviving grandchildren.

The trust contains a spendthrift clause that prohibits the voluntary assignment of a beneficiary's interest and does not allow a beneficiary's creditors to reach that interest.

Two months after creating the trust, the settlor died. Both the settlor's son, now age 35, and the settlor's daughter, now age 32, survived the settlor and are still alive. The settlor's son has three living children, now 9, 11, and 14 years of age. These children currently live with their mother, from whom the settlor's son was divorced seven years ago. The settlor's daughter is unmarried and has no children. Both the son (employed as a waiter) and the daughter (employed as a bookkeeper) have earned, on average, less than $35,000 per year during the past seven years.

Over the past eight years, the son has incurred and has not paid the following debts:

> (a) $10,000 to a hospital for the son's emergency-room care
> (b) $35,000 to his former wife in unpaid, judicially ordered child support
> (c) $5,000 to a friend for repayment of a loan, five years ago, to purchase a high-end computer-gaming system for recreational use

Repayment of the debt to the friend was due last year, but the son defaulted on the loan.

During the first year of the trust, the trustee distributed $9,000 of trust income to each of the settlor's two children for their support. Thereafter, relations between the settlor's son and the trustee deteriorated. After the son and his wife divorced, the trustee frequently told others, behind the son's back and without any direct basis, that the son was an "adulterer" and a "terrible father." The trustee often referred to the son as a "bum," and he told the settlor's daughter, without any explanation, "Your brother is rude to me."

Over the last seven years, although the son's and daughter's financial needs were similar, the trustee has distributed $80,000 from trust income and principal to the settlor's daughter and nothing to the settlor's son, despite the son's repeated requests for trust distributions to help him pay his hospital bill, child support, and loan.

1. Given the terms of the trust the settlor created, could the trustee have properly distributed trust assets to the son to enable him to pay (a) his hospital bill, (b) child support, and (c) the loan to purchase the computer-gaming system? Explain.

2. Did the trustee abuse his discretion in refusing to make any distributions to the son during the past seven years? Explain.

3. In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets? Explain.

February 2019
MEE Analysis 5
Trusts & Future Interests

FEBRUARY 2019 MEE
ANALYSIS 5—TRUSTS & FUTURE INTERESTS

This February 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Could the trustee have properly distributed trust assets to the son to enable him to pay his hospital bill, child support obligations, or loan to purchase the computer-gaming system?

(2) Did the trustee abuse his discretion in refusing to make any distributions to the son?

(3) In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets?

DISCUSSION

Summary

The settlor created a discretionary support trust with spendthrift protection. A discretionary support trust permits distributions *only* for the support of trust beneficiaries, and it provides a trustee with discretion (which the trustee may not abuse) to withhold a distribution even when a beneficiary needs support.

A hospital bill and court-ordered child support are debts incurred for support, which the trustee could pay in his discretion, but a loan to purchase a recreational computer-gaming system would not likely be characterized as a debt incurred for support.

Given the trustee's personal animosity toward the son, the trustee's comparatively liberal distributions to the daughter, and the absence of any reasonable justification for withholding distributions to the son, the son should be able to show that the trustee breached his duty by refusing to make distributions to the son. Thus, the son should be able to bring a successful action against the trustee for the trustee's failure to make distributions that would have enabled him (in whole or in part) to pay the hospital and child-support debts or receive other distributions for support.

Under the Restatement (Third) of Trusts, a creditor of a support trust beneficiary with spendthrift protection may reach trust assets if the creditor provided a necessary to the trust beneficiary or seeks to enforce a child-support claim. The son's former wife and the hospital thus should be

able to obtain orders against the trustee for their respective claims. However, because the purchase of a computer-gaming system is not a "necessary" for a person of modest means, the friend cannot obtain an order against the trustee seeking payment for that debt. Under the provisions of the Uniform Trust Code, only the child support would be recoverable.

Point One (40%)

The settlor created a discretionary support trust subject to a spendthrift clause. The hospital bill and child support debt are support expenses for which the trustee could distribute trust assets to the son. The loan to purchase a computer-gaming system is not likely to be characterized as support.

The settlor created a discretionary support trust subject to a spendthrift clause. A support trust permits distributions from the trust to enable the beneficiary to maintain his or her accustomed standard of living. Restatement (Third) of Trusts § 50, cmt. d(2). When a trust instrument grants the trustee of a support trust discretion whether or not to pay a beneficiary's support-related expenses, the trustee's judgment controls unless the trustee abuses his discretion. *Id.* § 50 cmt. d(1).

This trust is also subject to a spendthrift clause. This clause may prevent a beneficiary's creditors from reaching trust assets, *see* Point Three, but it does not prevent the beneficiary himself from reaching trust assets if the trustee has abused his discretion in failing to make payments to the beneficiary.

The meaning of the term "support" is fact-dependent. Support includes more than necessities or bare essentials. Most courts measure support in terms of the lifestyle to which the beneficiary has become accustomed even if the trust instrument does not expressly refer to that lifestyle. A beneficiary's accustomed lifestyle is determined at the time the beneficiary's trust interest is created, but is subject to adjustment to accommodate the beneficiary's changing needs. *Id.* § 50 cmt. d(2).

Necessary medical care is invariably treated as support. *Id*. Support also invariably includes "reasonable amounts for the support of . . . minor children who reside elsewhere but for whom the beneficiary either chooses or is required to provide support." *Id.*

Here, the trustee could properly have distributed trust assets to the son to pay the son's hospital bill and child support obligation.

On the other hand, without more facts, a distribution to allow repayment of the son's debt incurred for the purchase of a computer-gaming system would not appear to be a distribution for the son's support. Of course, if the son could establish that such a system is necessary to allow him to live in accordance with his accustomed lifestyle, then it might be considered a support expense. However, the facts state that the son's income is about $35,000, a modest sum in light of the son's child support obligation and expenses for basic needs such as health care, food, clothing, shelter, and transportation. Given this income, it is unlikely that the son could establish a lifestyle that would warrant the trustee's conclusion that the recreational computer-gaming system is a support expense.

Point Two (35%)

The trustee likely abused his discretion in failing to make any distributions to the son, including distributions for the payment of the hospital bill and child support.

The fact that the son's hospital bill and child support obligations should be characterized as support is not the end of the matter. When the trust instrument grants a trustee discretion to pay a beneficiary's support-related expenses, the trustee's judgment controls unless the trustee abuses his discretion. Restatement (Third) of Trusts § 50, cmt. d(1). A trustee's discretionary power is subject to judicial control "only to prevent . . . abuse of the discretion by the trustee." *Id*. § 50. Trustees may have a number of legitimate reasons to withhold payments from a beneficiary, including discharging the trustee's duty to act impartially with respect to all trust beneficiaries and the beneficiary's ability to pay the expenses from other resources. However, if a court finds that a trustee acted in bad faith or with an improper motive, it may overrule his decisions. *Id.*

What constitutes an abuse of discretion, according to the Restatement (Third), depends upon the terms of the trust instrument and the other duties of the trustee, such as the duty to administer the trust in accordance with its terms, the duty to act impartially, and the duty of care. *See id.* § 50, cmt. b. These duties, read together, entitle the beneficiary to "general information concerning the bases upon which the trustee's discretionary judgments have been or will be made." *Id*. Furthermore, a trustee abuses discretion by acting in bad faith or with an improper motive. *Id*.; *see also* § 50, cmt. e(1).

As section 50 of the Restatement (Third) suggests, where, as here, there are multiple trust beneficiaries, the trustee's duty of impartiality requires that, in making distributions, the trustee act "with due regard for the diverse beneficial interests created by the terms of the trust." *Id*. § 79. "The duty of impartiality is an extension of the duty of loyalty to beneficiaries but involves, in typical trust situations, unavoidably and thus permissibly conflicting duties to various beneficiaries with their competing economic interests.

It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of 'equality' of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee's balancing of those interests. Impartiality does mean that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration." *Id*. at § 79, cmt. b.

Here, there is a strong argument that the trustee abused his discretion by withholding support distributions from the son. He ignored the son's repeated requests for distributions, without offering any reason for his refusals. He made substantial distributions to the daughter, whose income was not, on average, different from the son's. The trustee made disparaging comments about the son (that the son was a "bum," a "terrible father," and an "adulterer," and was "rude" to the trustee). Together, these facts support an inference that the trustee withheld distributions from the son because of personal animus rather than a valid reason. All of this supports the conclusion that the trustee abused his discretion in withholding distributions from the son.

[NOTE: Although the question does not ask whether the son could successfully sue based on the trustee's abuse of discretion or what he could recover if his suit were successful, in cases like this one, if the court finds an abuse of discretion, it will typically make an independent judgment of what the trustee would have distributed when carrying out his fiduciary duties and then direct that such payment be made from the trust, if trust assets are available, or otherwise surcharge the trustee. *See generally* Unif. Trust Code § 504(d).]

Point Three (25%)

Despite the trust's spendthrift clause, the son's former wife and, assuming that the necessaries doctrine applies, the hospital may reach the son's interest in the trust to satisfy their claims if the trustee abused his discretion. However, the friend cannot reach the son's interest to satisfy his claim against the son.

The trust created by the settlor was discretionary. "[I]f the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion . . . a creditor of the beneficiary is entitled to receive . . . any distributions the trustee . . . is required to make in the exercise of that discretion . . . ." *See* Restatement (Third) of Trusts § 60.

This general principle does not apply, however, when a trust includes a spendthrift clause. *See id.* § 59. A spendthrift clause puts trust assets out of the reach of most creditors of a trust beneficiary until such time as trust assets are distributed to that beneficiary. *Id*. § 58. *Accord*, Unif. Trust Code § 502.

However, even when a trust provides spendthrift protection, claims against a beneficiary for unpaid child support may still be enforced against the trust. *See* Restatement (Third) of Trusts § 59 cmt. b; Unif. Trust Code § 504(c)(2) (a court may order the trustee to pay the child "such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute for the benefit of the beneficiary had the trustee complied with the [support] standard or not abused the discretion."). Here there is a strong argument that the trustee breached his discretion (*see* Point Two), such that the former wife will be able to obtain payment from the trustee.

In some jurisdictions, creditors who provided the beneficiary with "necessaries" such as health care may reach the beneficiary's interest in satisfaction of any unpaid debt despite a spendthrift clause. Restatement (Third) of Trusts §§ 59, 60 cmt. c. (Comments to the Restatement suggest that the creditor may reach the beneficiary's interest but may not force a sale of the interest. In such a case, the court could direct the trustee to distribute trust income to the creditor until the claim is paid. *Id.* § 56 cmt. e.). Medical care is invariably treated as a necessary. But if in addition to a spendthrift clause, distributions are discretionary with the trustee, the creditor who provided the beneficiary with a necessary cannot compel a distribution if the beneficiary could not do so. In other words, the creditor cannot compel a distribution absent an abuse of discretion. *Id*. § 60 cmt. e.

The necessaries exception is not recognized in the Uniform Trust Code. *See* Unif. Trust Code §§ 503 and 504, cmt. to subsection b. Comments to the Restatement also suggest that the necessaries rule, while consistent with prior trust Restatements, is not followed in some U.S.

jurisdictions. In these jurisdictions, the hospital cannot reach the son's interest in the trust in satisfaction of its claim.

In jurisdictions that follow the necessaries doctrine as applied to a spendthrift clause, the hospital's claim is not barred by the spendthrift clause. But because distributions from the trust are discretionary, the hospital will not be able to reach the son's interest unless the trustee abused his discretion. Here, there is a strong argument that the trustee abused his discretion, thus allowing the hospital to reach the son's interest and obtain some payment from the trustee. *See* Point Two.

The friend should not succeed in his suit against the trustee. The friend's claim is not a claim for support, and here, the facts cannot support an assertion that a $5,000 computer-gaming system is a "necessary" for the son.

February 2019
MEE Question 6
Criminal Law & Procedure

FEBRUARY 2019 MEE
QUESTION 6—CRIMINAL LAW & PROCEDURE

One evening, Ben received a visit from his neighbor. Hanging on Ben's living room wall was a painting by a famous artist. "I love that artist," the neighbor said. "I've collected several of her paintings." Ben remarked that the famous artist was his ex-wife's mother and that whenever his new girlfriend visited, the fact that the painting still hung in his house made her jealous. The neighbor said, "I have a solution. Why don't you give the painting to me for safekeeping? I have an unsigned print by the same artist that you can hang in its place. The print is not in the artist's usual style, so your girlfriend will not get jealous and your living room will still have great art."

Ben thought this was a good idea. He and his neighbor carried the painting to the neighbor's house and hung it in the neighbor's dining room. Ben then took the neighbor's unsigned print home and hung it in his living room.

The next day, Ben decided that he really didn't like the print, and he took it off the wall. Then, around 10:00 p.m., he decided to retrieve the painting from his neighbor.

Ben went to his neighbor's house and knocked on the door, but there was no answer. Just as he was about to leave, he noticed that a ground-floor window was ajar. Ben pushed the window fully open and began to climb into the house to retrieve the painting. The neighbor, who had been asleep upstairs, was awakened by the noise and ran downstairs to find Ben halfway through the window. The neighbor became enraged. Ben tried to explain, but the neighbor would not stop yelling. Ben decided that it would be better to return to his home and retrieve the painting later, after the neighbor had a chance to cool off. But the neighbor followed him outside and across the lawn, yelling, "How dare you sneak into my house!" The yelling attracted the attention of a police officer who was passing in her patrol car. The officer stopped to investigate, and Ben was arrested, questioned, and released.

Two days later, the neighbor returned the painting to Ben, saying "Here's your painting. Give me back the print that I loaned you and we'll forget the whole thing." However, the previous day Ben had been so angry with the neighbor about his arrest that he had contacted an art dealer and had sold her the print. Ben did not tell the art dealer that the unsigned print was by the famous artist. Ben simply offered to sell the print at a very low price and told the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all." Although the art dealer often investigated the ownership history of her purchases, she bought the print without further discussion. An hour after the sale, the art dealer contacted a foreign art collector famously uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it.

The prosecutor is considering bringing the following charges: (i) a charge of burglary against Ben in connection with the incident at the neighbor's house, (ii) a charge of larceny or embezzlement against Ben for his actions involving the unsigned print, and (iii) a charge of receiving stolen property against the art dealer for her actions involving the print.

The jurisdiction where these events occurred has a criminal code that defines burglary, larceny, embezzlement, and receiving stolen property in a manner consistent with traditional definitions of these crimes.

With what crimes listed above, if any, should Ben and the art dealer be charged? Explain.

February 2019
MEE Analysis 6
Criminal Law & Procedure

FEBRUARY 2019 MEE
ANALYSIS 6—CRIMINAL LAW & PROCEDURE

This February 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Does someone who unlawfully enters the dwelling of another commit burglary when the purpose of the entry was to retrieve property that the person owns?

(2)(a) Does someone who sells property that has been temporarily entrusted to him by its owner commit the crime of larceny when he acts without authorization and with the intention of depriving the owner of his property?

(2)(b) Does someone who sells property that has been temporarily entrusted to him by its owner commit the crime of embezzlement when he acts without authorization and with the intention of depriving the owner of his property?

(3) Does a purchaser of property commit the crime of receiving stolen property when the surrounding circumstances suggest that a reasonable person should have been alerted to the fact that the property she received was stolen?

DISCUSSION

Summary

Ben, who intended only to retrieve his own painting from the neighbor's house, did not have an intent to commit a felony therein. Therefore, he should not be charged with burglary.

The facts do not support a charge of larceny against Ben for his acts in connection with the print. Larceny is typically defined under the common law as the misappropriation of another's property by means of taking it from his possession without his consent. With respect to the print, Ben did not take it from its owner without his consent. To the contrary, the neighbor voluntarily loaned the print to Ben. Ben's subsequent sale of the print, while wrongful, was not larceny.

On the other hand, Ben may be charged with the theft crime of embezzlement for his acts in connection with the print. A person in lawful possession of another's property commits embezzlement when he wrongfully converts the property with the intent to deprive the owner of it. Ben's sale of the print to the art dealer constituted an embezzlement because Ben's intent was to permanently deprive the neighbor of the print.

Whether the art dealer should be charged with receiving stolen property for her acts in connection with the print depends on whether there is sufficient evidence that she knew the print was stolen. The crime of receiving stolen property typically has two elements: (1) the actus reus of the receipt of stolen property and (2) the simultaneous mens rea of the defendant's knowledge that the property was stolen. Here, the art dealer "received" the print when she took physical possession of it following the sale by Ben. The central question is whether the art dealer satisfies the mens rea requirement of knowledge that the print was stolen. Proof of the requisite knowledge can be inferred from the surrounding circumstances, including (1) the low price; (2) Ben's statement to the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all"; (3) the art dealer's failure to investigate the provenance of the print; (4) the fact that the art dealer contacted, on the same day she acquired the print, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions; and (5) the sale of the print by the art dealer to the collector for 10 times what she had paid for it. Given these circumstances, the art dealer likely had knowledge that the print was stolen.

Point One (20%)

Ben should not be charged with burglary based on his attempt to recover the painting because he did not act with the necessary mens rea.

At common law, burglary was defined as the "breaking and entering of the dwelling house of another in the night with the intent to commit a felony" therein. *See* Wayne R. LaFave, *Criminal Law, Chapter 21: Real Property Crimes* § 21.1 (5th ed. 2010).

Ben's acts clearly satisfy three of the elements of burglary as defined by the common law and in statutes based on the common law: (1) Ben illegally entered the neighbor's home by using force to push open the neighbor's ground-floor window and starting to climb inside; (2) the neighbor's house is a "dwelling," a "structure," or an "occupied structure" (it would even satisfy the common law requirement of a "dwelling"); and (3) Ben's acts occurred at night.

Here, the only question is whether Ben satisfies the mens rea requirement. The evidence suggests that Ben did not intend to commit a felony in the neighbor's home because he intended only to retrieve his own painting. On these facts, Ben should not be charged with burglary.

Point Two(a) (20%)

Ben should not be charged with the theft crime of larceny of the print because he did not take possession of the print without the neighbor's consent with the intent to steal it from the neighbor.

The crime of "theft" was traditionally three separate crimes: larceny, embezzlement, and false pretenses. *See* LaFave, *supra*, *Chapter 19: Theft* § 19.1. Here, Ben should not be charged with larceny, although he should be charged with embezzlement (*see* Point Three).

At common law, larceny was defined as the misappropriation of another's personal property by means of taking it from his possession without his consent. *See id*. Larceny requires an intent to steal. *See Binnie v. State*, 583 A.2d 1037, 1041–42 (Md. Ct. App. 1991) (noting that intent to steal not established by the defendant's honest belief, even if such belief was mistaken, that the

property belonged to him). Moreover, under the common law, the intent to retain property temporarily and then return it to its rightful owner has long provided a defense to larceny. *See, e.g*., *Impson v. State*, 58 P.2d 523, 524 (Ariz. 1936).

Here, Ben should not be charged with larceny because (a) he did not take the print from the neighbor without the neighbor's consent, and (b) there are no facts showing that he had the requisite intent to steal when he took the print from the neighbor. It was the neighbor who had proposed swapping the artworks. Thus, when Ben took possession of the neighbor's print he had the neighbor's permission to take it, and there are no facts supporting an inference that Ben intended to steal it from the neighbor at that time.

Point Two(b) (30%)

Ben should be charged with the theft crime of embezzlement because his sale of the neighbor's print to the art dealer was a wrongful conversion of that property done with the intent to permanently deprive the neighbor of his property.

To cover the case where someone in lawful possession of another person's property wrongfully misappropriates such property, the English parliament and U.S. legislatures developed the theft crime of embezzlement. Although precise statutory definitions vary, embezzlement generally occurs when a person unlawfully converts property owned by another to his own use with the intent to permanently deprive the lawful owner of the property. LaFave, *supra,* § 19.6.

Here, Ben should be charged with embezzlement. The neighbor loaned the print to Ben so that Ben could hang it in his living room temporarily. *See id.* § 19.6(e). When Ben, in a fit of anger following his arrest, sold the print to the art dealer, he wrongfully converted the neighbor's property. Ben's actions suggest strongly that he acted with the requisite intent to permanently deprive the neighbor of the print.

Point Three (30%)

The art dealer probably should be charged with receiving stolen property because the surrounding circumstances suggest that she had the requisite knowledge that the print was stolen.

Receiving stolen property typically has two elements: (1) the actus reus of the receipt of stolen property and (2) the simultaneous mens rea of knowledge that the property was stolen. Most jurisdictions include the further requirement that the defendant intend to deprive the owner of her property. LaFave, *supra*, § 20.2. "Stolen property" typically includes property unlawfully obtained using larceny, embezzlement, or false pretenses, because "it is inappropriate to make the liability of the receiver turn on the method by which the original thief acquired the property." *See id*. at n. 57 (quoting Model Penal Code § 223.6, comment at 241).

Here, the facts support charging the art dealer with receiving stolen property. The art dealer "received" the print. Assuming that Ben embezzled the print, *see* Point Two(b), it would constitute stolen property.

The central question is therefore whether the facts establish that the art dealer had the requisite mens rea of knowledge that the print was stolen. Normally, a person is not guilty of receiving

stolen property unless the person knew it was stolen "at the moment of receiving it." *State v. Caveness,* 78 N.C. 484, 491 (1878); subsequent discovery that property is stolen is not sufficient. *But see State v. Post,* 286 N.W.2d 195, 202–03 (Iowa 1979) (subsequent knowledge is enough when crime is defined not as "receiving" stolen property but as "exercising control over" stolen property).

Some jurisdictions require proof of a defendant's actual subjective knowledge that the property was stolen. *See Sonnier v. State*, 849 S.W.2d 828 (Tex. App. 1992). In those jurisdictions, evidence that a reasonable person would have known that the property was stolen will not suffice. *See Gibson v. State*, 643 N.E.2d 885 (Ind. 1994).

Other jurisdictions follow the modern view in which mens rea can be inferred from all surrounding circumstances. *See* LaFave, *supra,* § 20.2, n. 71 (citing *United States v. Prazak*, 623 F.2d 152 (10th Cir. 1980) (noting that a low price can support the inference that the purchaser knew the property was stolen); *United States v. Werner*, 160 F.2d 438 (2d Cir. 1947) (same); *State v. Butler*, 450 P.2d 128 (Ariz. Ct. App. 1969) (same); *State v. Chester*, 707 So. 2d 973 (La. 1997) (same); *Russell v. State*, 583 P.2d 690, 699 (Wyo. 1978) (thieves "must rid themselves of stolen property as quickly as possible, and willingness to sell at a grossly reduced price betrays or should betray such a predicament").)

The art dealer probably should be charged with receiving stolen property. Under the modern view, or even in a jurisdiction that requires proof of subjective knowledge, the art dealer's mens rea of knowledge can be inferred from (1) the low price; (2) Ben's statement to the art dealer: "I can sell this print to you at such a good price only because I shouldn't have it at all"; (3) the art dealer's failure to investigate the provenance of the print; (4) the fact that the art dealer contacted, on the same day she acquired the print, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions; and (5) the sale of the print by the art dealer to the collector for 10 times what she had paid for it. Given these circumstances, the art dealer likely had knowledge that the print was stolen.