MPT 1
July 2023

Dobson v. Brooks Real Estate Agency **(July 2023, MPT-1)** In this performance test, the client, Peter Dobson, has sued the Brooks Real Estate Agency alleging negligence in connection with injuries that Dobson suffered when he slipped and fell on the ice-covered sidewalk adjacent to the defendant's building. The examinee's task is to prepare the argument section of the brief in support of a motion in limine. The purpose of the motion is to persuade the court to bar admission at trial of two pieces of evidence: Dobson's conversation with a neighbor and the deposition testimony of a physician who is now deceased. In addition, the motion seeks to permit the introduction of the insurance policy on the defendant's building. The File contains the task memorandum, the firm's guidelines for writing persuasive trial briefs, a transcript of the client interview, a file memorandum summarizing a related action against Dobson's employer, an investigator's memorandum, and excerpts from the deceased physician's deposition testimony. The Library contains selected provisions from the Franklin Rules of Evidence, which are identical to the Federal Rules of Evidence, and two Franklin cases: *Reed v. Lakeview Advisers LLC* (discussing the "admission by silence" hearsay exclusion), and *Thomas v. WellSpring Pharmaceutical Co.* (discussing the use of former testimony).

I. Caption
[omitted]

II. Statement of Facts
[omitted]

III. Legal Argument

a. The testimony of Doris Gibbs is inadmissible because Mr. Dobson did not acquiesce to her statement through his silence.

While out to dinner after Mr. Dobson's fall, Doris Gibbs speculated about the cause of the fall without any personal knowledge of the facts. Mr. Dobson, who was in a crowded restaurant with Ms. Gibbs, did not respond to her conjecture. The statement of a party opponent that the party "manifested that it adopted or believed to be true" is admissible as non-hearsay only if (1) the party heard the statement, (2) the party understood the statement, (3) the circumstances are such that a person in the party's position would likely have responded if the statement were not true, and (4) the party did not respond. *Reed v. Lakeview Advisers LLC* (Fr. Ct. App. 2015). When considering whether a party acquiesced to a statement by silence, the court should consider the context wherein the statement was made. *Id.*

In *State v. Patel* (Fr. Ct. App. 2010), a statement was made to the defendant at a loud party with more than 100 people in attendance, to which the defendant did not respond. The *Patel* court determined that the statement would not be admitted as a statement to which the defendant acquiesced by silence because the circumstances were such that it was unclear whether the defendant had heard and understood the statement, both of which are required for such admissibility. *Id.* The court additionally noted that a person at a "loud social event with many persons present" would not be expected to respond. *Id.* Similarly here, the statement made by Ms. Gibbs was made in a restaurant at dinner time. This was not a private setting by any means and there were other people around which caused there to be background noise in the restaurant at a minimum. Ms. Gibbs herself is uncertain as to whether Mr. Dobson was listening to her; she merely thinks he was. However, even if Mr. Dobson was listening and understood Ms. Gibbs statement, he, like the defendant in *Patel*, would not be expected to necessarily respond to her statement in a social setting, such as a restaurant.

The context of the statement in this case stands in stark opposition to the admitted statement in *Reed v. Lakeview Advisers LLC* (Fr. Ct. App. 2015). In *Reed*, the statement was made in an office setting. The statement was made by the defendant company's human resources director about the reason for the plaintiff's termination, in a meeting regarding the termination. *Id.* The *Reed* court found that the plaintiff's silence was sufficient to show acquiescence because the statement was made "where serious matters [a]re discussed" at a time when the plaintiff could have expected that the topic would be discussed. *Id.* The *Reed* court went on to note that a person in the plaintiff's position, feeling she was being wrongfully terminated, would respond when told about the reasons for termination. *Id.* In contrast to *Reed*, the statement here was made in a restaurant, where serious matters are not regularly discussed. In addition, Mr. Dobson

would not expect that the source and causation of his injuries would be a topic of discussion at a friendly lunch with his neighbor, unlike the plaintiff in *Reed* who would have anticipated a discussion of the reasons for her termination in a meeting about her termination. Furthermore, Mr. Dobson had no reason to respond to Ms. Gibbs' statement.

Because of the public setting of Ms. Gibbs' statement, with background noise and other possible distractions, it cannot be determined whether Mr. Dobson heard and understood her statement, like the defendant in *Patel*. Even if Mr. Dobson had heard and understood Ms. Gibbs' statement, the context of the statement is such that a person would not be expected to respond, as the statement was made in a social setting by a friend who had no knowledge of the circumstances of Mr. Dobson's injuries. Thus, the statement is inadmissible hearsay and should not be admitted as non-hearsay under the opposing party statement rule.

b. Alternatively, the testimony of Ms. Gibbs is inadmissible because it misleads the jury into thinking she had personal knowledge of the source and causation of Mr. Dobson's injuries and is unfairly prejudicial.

Even if Ms. Gibbs' statement is admissible as a statement of a party opponent, it should be excluded under Franklin Rules of Evidence Rule 403, because its probative value is substantially outweighed by a danger of misleading the jury and unfair prejudice. Ms. Gibbs was not present when Mr. Dobson was injured and has no personal knowledge of the source and causation of Mr. Dobson's injuries. Her statement was merely her postulations about how the injuries *could* have arisen. However, if the statement is admitted as one adopted by Mr. Dobson, the jury will likely be led to believe that Ms. Gibbs spoke from personal knowledge, not mere conjecture.

Ms. Gibbs' statement is not particularly probative. Probative evidence must be able "to make a relevant disputed point more or less likely to be true." *Reed*. However, Ms. Gibbs' statement does not have such an ability, as she lacks any knowledge about the source and circumstances of Mr. Dobson's injuries. In *Reed*, the court found that the statement was probative of the conversation between the plaintiff and the human resources director, which was a relevant interaction, because of the circumstances under which the statement was made. *Reed.* The human resources director in *Reed* had personal knowledge of the facts relayed in her statement. Here, Ms. Gibbs' statement is not probative of the source and causation of Mr. Dobson's injuries because she was not present when Mr. Dobson was injured. Unlike the human resources director in *Reed*, Ms. Gibbs had no personal knowledge about the statement she made. Although Ms. Gibbs' statement, if based in fact, would be probative, it is not based in fact and therefore is not probative of any disputed point.

Furthermore, the statement creates a risk of unfair prejudice for reasons similar to why it misleads the jury. Statements made by a party to litigation are particularly powerful and carry particular weight with the jury. Although no evidence will corroborate Ms. Gibbs' statement, and evidence is likely to contradict it, the jury is likely to believe it

to be true. The statement, made without any personal knowledge, will be highly prejudicial, significantly outweighing its little probative value. As such, it should be excluded under FRE 403.

b. The deposition testimony of Dr. Miller is inadmissible because the issue in this litigation is distinct from the issue in Mr. Dobson's lawsuit against his employer.

In an earlier lawsuit against Mr. Dobson's employer for disability discrimination, Mr. Dobson deposed Dr. Miller about the extent of Mr. Dobson's injuries and the adequacy of the accommodations Mr. Dobson's employer made. The litigation against Mr. Dobson's employer did not present the source and causation of Mr. Dobson's injuries as an issue.

Former testimony of an unavailable declarant is admissible if the party it is offered against had an opportunity and similar motive to develop the testimony. FRE 804(b)(1). A party has a similar motive to develop testimony if the party "is on the same side of the same issue at both proceedings, and . . . had a substantially similar interest in asserting that side of the issue." *Jacobs v. Klein* (Fr. Sup. Ct. 2002).

In *Thomas v. WellSpring Pharmaceutical Co.* (Fr. Ct. App. 2017), former testimony of a doctor regarding the general side effects of a medication was admitted as former testimony, because the trial at which the testimony was developed, and the trial at which it was later admitted, both concerned the same issue: whether the medication "caused debilitating side effects." Here, by contrast, the issues in the earlier litigation against Mr. Dobson's employer and this litigation against the Brooks Real Estate Agency are distinct. In the earlier litigation, the issue was the extent of Mr. Dobson's injuries and the adequacy of the accommodations Mr. Dobson's employer made for those injuries. In this litigation, the issue is the source and causation of Mr. Dobson's injuries. Because the issues are not the same, Mr. Dobson cannot be said to be on the same side of the same issue in both proceedings, and therefore did not have a similar motive to develop Dr. Miller's testimony.

Because Mr. Dobson did not have a similar motive to develop Dr. Miller's testimony in the earlier litigation against Mr. Dobson's employer, Dr. Miller's testimony is inadmissible hearsay and does not qualify for the former testimony exception to the hearsay rule.

c. The insurance policy of the Brooks Real Estate Agency is admissible because it is offered to prove control, not negligence or wrongful conduct.

The Brooks Real Estate Agency's property insurance explicitly covers sidewalks adjacent to the property. The Brooks Real Estate Agency disputes its control of the sidewalks, and the insurance will be offered for the purpose of proving the agency's control of the same.

Under Franklin Rules of Evidence Rule 411, "[e]vidence that a person was or was not insured against liability" may be admitted to prove "ownership, or control." Evidence of liability insurance is not admissible to show negligence or other wrongful acts. *Id.*

Here, the evidence of the insurance policy is not being offered for an impermissible purpose, but rather for a permitted purpose explicitly exemplified in the rule. While there is a concern that the jury will make an impermissible inference from the policy, and potentially induce the jury to decide the case on improper grounds, a limiting instruction will serve to assuage those fears. *See Advisory Committee Notes to Franklin Rule of Evidence 411*. Furthermore, the policy should not be excluded under Rules 402 or 403 because the insurance policy is probative of the Brooks Real Estate Agency's control over the sidewalk, an issue highly relevant to its liability for Mr. Dobson's injuries, and the highly probative value of the evidence is not outweighed by a risk of unfair prejudice or other concern of FRE 402, particularly as limited by a limiting instruction.

Because the insurance policy is offered to prove control of the sidewalk, and not liability, it is admissible under FRE 411 and should be admitted in this case.

MPT 2
July 2023

Martin v. The Den Breeder **(July 2023, MPT-2)** This performance test requires the examinee to write an advice letter to the client, Anthony Martin, assessing his potential claims against Simon Shafer, who raises purebred Irish wolfhounds under a sole proprietorship called "The Den Breeder." About six weeks ago, Martin purchased an Irish wolfhound puppy from Shafer. Martin became concerned when the puppy, which he had named Ash, began appearing listless, especially after eating. Testing by Martin's veterinarian revealed that Ash had a congenital defect of the liver that impaired the liver's ability to filter toxins from his blood. This condition can be treated with surgery, but at a cost of at least $8,000. Martin wants to know what legal recourse he has against Shafer. He wants to keep Ash, but he also wants Shafer to pay for treating Ash's condition and refund the full purchase price. To properly advise Martin, the examinee must analyze the parties' contract as well as the impact of Franklin's "Pet Lemon Law" and its version of the Uniform Commercial Code. The File contains the task memorandum, the firm's guidelines for preparing advice letters to clients, a transcript of the client interview, the contract of sale, an email from Ash's veterinarian, and an article describing Ash's condition. The Library includes selections from the Franklin Uniform Commercial Code and from the Franklin Pet Purchaser Protection Act, and an appellate case, *Cohen v. Dent* (Fr. Ct. App. 2020).

Law Offices of Bradly Wilson
2405 Main Street
Creedence, Franklin 33805

Dear Mr. Martin:

Thank you for consulting with our office regarding your dispute against The Den Breeder regarding your Irish wolfhound puppy, Ash. I understand that the dog has developed an expensive congenital condition for which you would like to recover against the breeder. I understand that your goals are to (1) keep Ash, (2) recover what you paid to the breeder, and (3) have the breeder pay for the cost of corrective surgery. This letter will discuss and explain your potential claim and how to achieve your goals.

I. Can you keep your dog and still have a case against the breeder?

Yes, you can keep your dog and still have a case against the breeder under the Franklin Pet Purchaser Protection Act (FPPPA) and the Uniform Commercial Code. The FPPPA provide that a person who purchased a pet discovered to have a congenital condition within 180 days of the sale may "retain the animal and receive reimbursement from the pet dealer for veterinary services . . . for the purpose of curing or attempting to cure the animal." FPPPA § 753. The FPPPA allows you to keep Ash and require the breeder to pay for the treatment required to correct the congenital condition. Under the UCC, you may keep nonconforming goods and be reimbursed for the difference in the value of the goods as they should have been and how they were provided. Fr. UCC § 2-714.

The contract you signed with the breeder does not limit your rights under the FPPPA. When courts examine a contract, they want it to be clear, so that the parties know what they are getting into. If a contract is unclear, the contract will be held to favor the party who did not write it. In addition, unclear contract terms will be resolved in accordance with relevant statutes. Here, the contract mentions congenital defects "that would prevent the dog from being a companion." However, it does not state what remedies are available. Because the remedies are unclear, a court will default to the FPPPA. *See Cohen v. Dent* (Fr. Ct. App. 2020). In addition, it is unclear what a defect that "prevent[s] the dog from being a companion" would be. Ultimately, a court will likely find that a condition like a liver shunt, which can cause depression, seizures, blindness, and disorientation, would keep a dog from serving that purpose. *See generally Dalton v. Jackson* (Fr. Ct. App. 1997).

II. Can you recover what you paid to the breeder?

Yes, you can recover what you paid to the breeder under the Uniform Commercial Code's (UCC) implied warranty of merchantability. The implied warranty of merchantability requires that goods can "pass without objection in the trade" and "are fit for the ordinary purposes for which such goods are used." Fr. UCC § 2-314(2). The warranty is a part of every contract for the sale of goods, even if it is not expressly

stated, unless it is excluded. Fr. UCC § 2-314(1). For a contract to exclude the warranty, it must mention merchantability and be conspicuous or state that the goods are not guaranteed in any way. The warranty will not be implied if the buyer had an opportunity to fully examine the goods before entering into the contract. If a contract specifically requires the purchaser to obtain a veterinary examination within a certain time, which would have disclosed the condition, the seller is not liable for a breach of warranty if the examination is not obtained. *Tarly v. Paradise* (Fr. Ct. App. 1996).

Here, your contract with the breeder includes the warranty. Dogs are considered goods under the UCC and breeders are considered merchants. *Cohen*. Furthermore, the warranty was not excluded. The contract does not mention merchantability, nor does it state that the dogs are not guaranteed in any way. In fact, it does the opposite, providing for a 48 hour guarantee against "illness" and a one year guarantee against congenital defects, though the remedies are unclear. Although the contract requires you to get the dog tested for illnesses if it shows signs of illness, that requirement does not limit liability as it did in *Tarly* because it does not put a time limit on the examination, and you did take Ash to see a veterinarian upon observing his symptoms. Unless you were provided an opportunity to take Ash for veterinary testing before you purchased him, and declined, the warranty is implied. In addition, the FPPPA does not limit your ability to seek recovery under the UCC. FPPPA § 753(d).

Turning to the terms of the warranty, your vet's certification of Ash's disease on a form stating that it rendered him "unfit for purchase" will establish that Ash could not "pass without objection in the trade." *See Cohen*. In addition, the disease would likely render Ash unfit for the ordinary purpose for which a dog is purchased. *Id.*; s*ee also Dalton*. Although your contract may limit the purpose for which Ash was purchased to companionship, his condition likely means he is not fit for even that purpose, as discussed above.

UCC § 2-714(2) provides that the amount you can recover for the breeder's breach of the implied warranty of merchantability is the difference between the price of a healthy dog and the price of a dog with the congenital condition. Courts generally find that you can recover the whole purchase price because the value of a dog with a congenital defect is zero. *Dalton*. The result is that the breeder's breach of the implied warranty of merchantability will allow you to sue him and recover the full amount you paid to him.

III. Can you have the breeder pay for the cost of corrective surgery?

Yes, under FPPPA § 753(b)(3), you may keep Ash and receive reimbursement from the breeder for the cost of corrective surgery. In *Cohen*, the court found that the FPPPA allowed the owner of a bulldog with hip dysplasia to keep the dog and have the breeder pay for the cost of corrective surgery. There, as here, the breeder and owner had a contract which mentioned congenital defects discovered within one year of the purchase of the animal, but failed to address the issue of refunds or reimbursement. The breeder may try to say that the contract prohibits recovery under the FPPPA, but

like the breeder in *Cohen*, that argument will be shut down by the court because of the unclear language of the contract regarding refunds and reimbursement.

Because the FPPPA allows you to recover the cost of correcting congenital defects certified by a veterinarian within 180 days, and your contract with the breeder does not clearly waive your right to do so, you can have the breeder pay for the cost of corrective surgery.

IV. What are your chances of success?

In a lawsuit against the breeder to recover the purchase price of Ash and the cost of treatment to correct his congenital defect, you are likely to prevail and keep Ash. As discussed above, the contract you signed with the breeder is unclear as to what your recourse is if the dog is diagnosed with a congenital defect. The result is that you retain all of your rights under Franklin law, including the UCC and FPPPA. The *Cohen* case, which is cited and discussed throughout this letter, is remarkably similar to your situation. There, the purchaser and breeder of a dog disputed what the purchaser could recover from the breeder as the result of the dog's congenital defect. *Id.* In *Cohen*, the parties also had an unclear contract which caused the purchaser's rights to be all those provided under Franklin law. Ultimately, the *Cohen* court allowed the purchaser to recover the entire purchase price of the dog under the UCC implied warranty of merchantability and the cost of corrective treatment under the FPPPA.

One potential problem is that the contract requires you to notify the breeder of any congenital defects in writing within 24 hours of receiving a diagnosis. You notified the breeder here within the timeframe, but did so verbally, not in writing. However, the FPPPA does not contain such a requirement. Furthermore, the FPPPA does not require any notice to the breeder, so the contractual requirement and the FPPPA do not conflict. The result is that you will likely retain your FPPPA remedies regardless of whether the notice you provided was adequate under the contract.

Ultimately, because of the factual and legal similarities between your case and the case in *Cohen*, a court is likely to come to the same conclusion as in *Cohen* and award you the price of Ash and the cost of treatment under the UCC and the FPPPA, respectively.

V. What are my next steps?

If you would like to proceed with your claim against The Den Breeder, the best next step would be for us to send a demand letter, informing the breeder of your rights under Franklin law and demanding payment for the full amount of the purchase price and reimbursement for the required veterinary care. Although you have already asked the breeder to pay, a formal demand letter from an attorney may encourage the breeder to pay rather than face litigation.

Your next step is to ensure you obtain a signed certification form from your veterinarian stating that Ash is "unfit for purchase" because of his congenital defect.

She mentioned that she would be prepared to sign "the form certifying [her] opinion" in her email, so she likely will know what you need. It is important to do this as soon as possible, as the FPPPA requires the certification to be done within 180 days of the purchase of the animal. In addition, sending a copy of the certification with our demand letter may help further encourage the breeder to settle this matter. You may proceed with having Ash treated if you wish, even before payment by the breeder, as the FPPPA explicitly provides for "reimbursement." Do not delay treatment if it would cause increased costs, as you may be liable for the increase caused by your delay.

If our demand letter is not successful in securing payment, our next step would be to file a lawsuit against the breeder to recover the purchase price and cost of veterinary care under the UCC and FPPPA respectively.

Should you have any further questions about the issues discussed in this letter, other questions about your legal rights, or questions about your next steps, please feel free to reach out to our office. If you would like to proceed with drafting and sending a demand letter to the breeder, just let us know and we will be happy to do so.

Sincerely,
/s/ Examinee
Examinee

MEE Question 1

GS gas is a commonly used pesticide injected into the soil before farmers plant crops. After two weeks, 90% of GS will have risen from the soil into the air, and crops can be safely planted. GS is highly toxic and can be fatal to people in a confined area, where even slight exposure can cause serious respiratory problems. Some scientists believe that GS likely causes cancer. Several studies have linked GS exposure to cancer in mice, but no study has definitively linked GS exposure to cancer in humans.

Ten years ago, State A's health department researched GS. It found that GS injected into the soil eventually rises above ground and can then drift to nearby land up to one mile from each application point. It also found that before GS rises into the upper atmosphere, it can remain near ground level for several days in concentrations much higher than the department's suggested "safe" exposure limit. It therefore banned GS use in farming.

Two years ago, however, the health department lifted the GS ban in a county where most farms produce valuable crops that are very difficult to grow without effective pesticides. After the only other effective pesticide was taken off the market, the department lifted the GS ban because of several factors, including the need for GS in order to grow the county's traditional crops, the lack of viable substitute crops, the lack of other effective pesticides on the market, the estimated cost of crop losses county-wide if GS were not allowed ($500 million annually), and the low population density in the county. The department requires all farmers using GS to attend a safety seminar that presents information on various risks of GS use (including the risks described in the department's findings supporting its earlier GS ban) and instruction on prudent GS application.

A married couple moved to this county 10 years ago and rented a house on land adjacent to fields that were owned by a local farmer. The couple has rented and lived in the house for the past 10 years.

When the health department lifted the ban on GS in the county, the local farmer attended the department's safety seminar and then began applying GS to the fields according to the application safety recommendations presented in the seminar. The farmer has used GS at the beginning of the last two planting seasons. The couple's house is less than a mile from several points where the farmer applied GS.

Last year, the wife was diagnosed with cancer and the husband began experiencing severe respiratory problems during the planting season. The wife believes that GS caused her cancer, and the husband believes that GS caused his respiratory ailments. Although cancer rates in the county are consistent with the state rate, reports of severe respiratory problems in the county have increased by 50% since the department lifted the ban on GS. The rate of respiratory illness in the county during planting season is now well above the rate of respiratory illness in other counties in the state at the same time of year.

The wife has sued the farmer to recover damages for her cancer, alleging negligence. The husband has also sued the farmer, alleging trespass and seeking injunctive relief to stop the farmer's GS use within one mile of the couple's house.

1. What must the wife prove to establish her negligence claim? Will she likely prevail? Explain.

2. What must the husband prove to establish his trespass claim? Will he likely prevail? Explain.

3. Assuming that the husband prevails, is it likely that the court will permanently enjoin the farmer from using GS within one mile of the couple's house? Explain.

I. The Wife's Negligence Claim

a. Elements of the Wife's Negligence Claim

The issue is what the wife must prove to establish her negligence claim. To prove a claim for negligence, the plaintiff must prove that the defendant owed her a duty, that the defendant breached that duty, that the breach of that duty caused the plaintiff to be injured, and that the plaintiff suffered damages. Alternatively, a person who engages in an ultra-hazardous activity, such as explosive demolitions of the transportation of highly dangerous chemicals, is held strictly liable for harms caused by that activity.

i. Duty

To prove her first element of duty, the wife will need to prove what a reasonable farmer who had attended the health department's safety seminar would do when applying GS to his fields. In general, one person owes no duty to the next, except to act as a reasonable person would in the same circumstances. When a person has specialized knowledge or training, the person is expected to act in conformity with that knowledge or training.

ii. Breach

To prove her second element of breach, the wife will need to prove that the farmer did not act as a reasonable farmer who had attended the health department's safety seminar would when he applied GS to his fields. This will be a highly factual inquiry which will require the examination of the standard procedures as taught in the class, the way those procedures are implemented in the field generally, and the way the farmer in this case implemented those procedures.

iii. Causation

To prove her third element of causation, the wife will need to prove that GS was an actual cause of her cancer. That is, she must prove that but-for the application of GS in the farmer's fields, she would not have suffered the cancer she has at the time she got it.

iv. Damages.

To prove her final element of damages, the wife must prove that she has suffered some sort of loss from her cancer. This is easily provable as she likely has medical costs and other economic losses such as time taken off of work.

To establish her negligence claim, the wife will need to prove that the farmer failed to act as a reasonable farmer who had taken the GS safety seminar would have when he applied the GS to his field, that without the unreasonable application, she would not have suffered from the cancer she got at the time she got it, and that her cancer caused her to sustain damages. Alternatively, the wife may be able to establish that the application of GS is an ultra-hazardous activity, such that the farmer should be held strictly liable.

b. The Wife's Likelihood of Success

The issue is whether the wife's negligence claim is likely to prevail. As noted above, the wife must prove duty, breach, causation, and damages to establish her negligence claim. She must do so by a preponderance of the evidence in a civil lawsuit.

Alternatively, the wife may prove that the application of GS is an ultra-hazardous activity, such that the farmer will be held strictly liable.

The wife is not likely to prevail because she will not likely be able to show by a preponderance of the evidence that the GS caused her cancer. Cancer rates in the county where GS application is allowed is consistent with the rest of the state, where its application is banned. It is possible that this correlation is lagging, because it has only been two years since GS application has been permitted, but as the evidence currently stands, that consistency cuts against the wife's ability to prove causation. Furthermore, GS has only been found to "likely" cause cancer by "some" scientists. This evidence does not support the wife's ability to prove that GS caused her cancer.

Because the wife is not likely to establish causation, her negligence claim is unlikely to prevail.

II. The Husband's Trespass Claim

a. Elements of the Husband's Trespass Claim

The issue is what the husband has to prove to establish his trespass claim. Trespass requires an unlawful entry onto the land of another, causing damage. Trespass may occur by the entry of a physical person, an animal controlled by a person, or a substance or smell released by a person.

Here, the husband must prove that the GS applied by the farmer entered the husband's land. Although the husband is merely renting, he still holds the trespass claim as the legal occupant of the land. The husband cannot merely prove that any GS entered his land, but he must prove that it was the GS applied by the farmer he has sued, as that is the only GS controlled by the farmer. The husband must also prove that the entry of the GS gas caused damage. Here, the damage is not to the land, but to his person. Thus, the husband will need to prove that his severe respiratory problems are caused by the GS gas.

To establish his claim for trespass, the husband must prove that the GS gas applied by the farmer entered the land lawfully occupied by the husband, and that said GS gas caused his severe respiratory problems.

b. The Husband's Likelihood of Success

The issue is whether the husband is likely to prevail on his claim for trespass. To prevail, the husband must establish the elements discussed in Section II.a. above. He must do so by a preponderance of the evidence in a civil lawsuit.

Here, the husband is more likely to prevail than not. He must prove that the GS gas applied by the farmer entered his land. Research conducted by State A's health department found that GS gas travels up to one mile from the point where it is applied. The farmer applied GS within one mile of the husband's land. Provided that there are not other GS application points of other farmers within one mile of the husband's property, he likely will be able to establish this element. The husband must also prove

that the GS caused his severe respiratory distress. He only suffers this distress during the planting season when GS is applied. In addition, severe respiratory problems in the area are elevated in the county where GS can be legally applied. The circumstantial evidence suggests that the distress is linked to the GS. Other medical evidence may be able to go further to prove this element.

Because the husband can likely show that GS entered his land and caused his illness, at least circumstantially, he is more likely than not to prevail on his claim for trespass.

III. The Injunction

The issue is whether the court is likely to grant the husband an injunction against the farmer's use of GS within one mile of the couple's house if the husband prevails on his trespass claim. When granting an injunction, courts consider a number of factors including the burden of the injunction on the enjoined party, the hardship to the opponent if the injunction is not granted, and whether the injunction is in the public interest.

Here, it is likely that the injunction will not be granted because the burden on the farmer will be heightened and the injunction is marginally against the public interest. The reason GS gas is permitted in the county is the difficulty of growing crops without effective pesticides, and GS gas is the only effective pesticide. If the farmer cannot use GS gas, he will likely not be able to make productive use of his land or make a living for himself. On the other hand, the burden on the husband is also significant. He suffers from severe respiratory distress as a result of the GS gas use in the county. However, he only suffers it seasonally, and it does not appear to be life threatening, albeit severe. Furthermore, while the farmer has no alternative, measures by the husband may serve to lessen the impact of the gas. With respect to the public interest, there is certainly a public interest in not having GS gas used, but it seems that the State A government has already determined that the interest of the public in that respect is outweighed by the interest of the public in having valuable crops produced in the county. In addition, the injunction would only serve to help the husband, unless there are other homes within one mile of the same sites the farmer applied GS to which are within a mile of the husband's home. Even if there are, the members of the public helped are likely outnumbered significantly by those harmed by decreased crop production.

Because of the significant harm to the farmer and his operation as compared to the durationally limited harm to the husband and because the public interest at least marginally favors the use of GS in the county, the court is not likely to grant the husband an injunction, even if he prevails on his trespass claim.

MEE Question 2

Parent LLC and Sub LLC are both manager-managed LLCs, each with a sole manager. Parent LLC is the sole member of Sub LLC and selects Sub's manager. Parent obtains recycled plastic from various sources. Parent then sells some of this plastic to Sub at prevailing market prices. Sub uses the plastic to make upscale shoes, which it then sells.

The two companies work closely together. Sub sets its shoe production schedule and creates marketing programs based on Parent's projections of its access to recycled plastic. The local newspaper once characterized the two companies as "partners promoting business sustainability."

The two companies' collaboration is also reflected in their management structures and operations. They share personnel for human resources, accounting, and government relations. In addition, Parent's technical staff regularly works with Sub in designing and testing new processes for using recycled plastic. The two companies have no arrangement for sharing the costs of these services.

Last November, Sub entered into a delivery agreement with VanCo pursuant to which VanCo would deliver shoes made by Sub to Sub's customers. At the request of Sub's manager, who was away from the office, the agreement was signed by Greta, the manager of Parent, who happened to be visiting the Sub offices that day. Greta, who was not employed by Sub, signed the agreement and wrote beneath her signature: "as agent of Sub."

Recently, Sub ran into financial difficulties after a slowdown in the upscale shoe market. Sub is no longer able to pay its creditors and has stopped payments due under the delivery agreement with VanCo. Therefore, Sub, which for a time had been regularly distributing its profits to Parent as the sole member of Sub, has discontinued making distributions to Parent. Although Sub's operating agreement requires that its manager "consult with Parent's management group" before discontinuing distributions to Parent, Sub's manager discontinued these payments without consulting with Parent.

Assume that Sub is liable to VanCo under the delivery agreement and is unable to satisfy the claims by VanCo.

1. Is Parent liable to VanCo as a partner of Sub? Explain.

2. Is Parent bound by the agreement between Sub and VanCo signed by Parent's manager? Explain.

3. Should the fact that Parent and Sub are separate organizations be disregarded so that Parent is liable for Sub's obligations to VanCo? Explain.

Parent Liability to VanCo as a Partner:

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

Generally, a partnership is defined as two or more persons joining together to carry-on as co-owners of a business for profit. While the law generally assumes that general partnerships are the default form of business entity, the two "persons" at issue are LLCs which each have limited liability to their owners. One of the key indicators of a partnership is profit-sharing, which does not appear present here.

While multiple LLCs can join together to form a partnership, and it is not overly difficult to form a partnership, the facts indicate that the act of signing under the VanCo contract was done with Greta, the manager of Parent, acting as an agent for Sub. Although Greta is not an employee of Sub, Sub's manager may reach out to have Greta sign on Sub's behalf if there was consent by both Sub's manager (the principal) and the agent (Greta) and control by Sub.

Here, Sub's manager was out of the office and had Greta sign "as agent of Sub." Although Parent and Sub do have several indicators of a partnership, there is no profit-sharing for each; the only profits flow to Parent as the sole-member of Sub LLC. This does not amount to the presumption of partnership. The two companies share some personnel, but do not arrange for sharing the cost of these services, and the facts do not indicate whether one company covers all expenses or how those costs are distributed. Though the companies appear to work together significantly, they do different things, with Sub setting shoe production and Parent obtaining recycled plastic from sources. The two entities have separate businesses and profit from different markets. As the entities involved are LLCs that do not appear to have entered into a partnership to carry on as co-owners a business for profit, parent is not liable to VanCo as a partner of Sub.

Parent bound by the Agreement between Sub and VanCo:

The second issue is whether Parent is bound by the agreement between Sub and VanCo which was signed by Parent's manager. As noted above, Greta, who is the manager of Parent, acted as an agent of Sub when signing the VanCo agreement.

Generally, when an agent signs a contract on behalf of a disclosed principal, the agent is only liable for acting outside the agency relationship, i.e., acting without actual or apparent authority. Additionally, the agent is personally liable and may need to indemnify the principal for acts falling outside the scope of the agency relationship.

Actual authority can be express or implied. Here, the authority was express, as Greta signed after Sub's manager specifically requested Greta sign the agreement for Sub. This was an express grant of authority to enter into the agreement on Sub's behalf. Additionally, while Greta may be the manager of Parent, her signing an agreement as an agent for Sub, would have no impact on Parent, as Greta individually would be liable

in the event it fell outside the scope of the agency, and/or if the principal was undisclosed or only partially disclosed, neither of which are the case here.

As Greta was acting with an express grant of actual authority when she signed the VanCo agreement on behalf of Sub, neither she nor Parent is bound by the agreement between VanCo and Sub.

Separate Organizations of Parent and Sub:

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

Generally, a properly-filed LLC enjoys limited liability unless a court finds it necessary to "pierce the LLC veil." To pierce the LLC veil, a court generally considers several factors, including under-funding of the LLC or abuse of the LLC form.

Here, there does not seem to be sufficient justification to pierce the LLC veil. Though the companies "work closely together" and Parent receives distributions as the sole member of Sub, Parent does not exercise such extensive control over Sub that the two LLCs appear to function as one. Evidence of this can be found by Sub's recent financial downturn being accompanied by Sub no longer distributing profits to Parent, even though Sub's operating agreement required that its managers consult with Parent's management group prior to discontinuing distributions to Parent. It could be argued that Sub should not have been making earlier distributions to Parent if it could see that it would be unable to pay creditors or did not have sufficient cash on hand, but that situation stems from a recent slowdown in the upscale shoe market, not because of Parent's financial control of the company.

Since there does not appear to be any abuse of the LLC form or under-funding of Sub, the LLC veil should not be pierced and Parent should not be liable for Sub's obligations to VanCo.

MEE Question 3

In 2008, Tom died in State A survived by his 64-year-old wife, Betty, to whom he had been married for 35 years. He was also survived by his estranged daughter from a previous marriage.

Tom had created a valid testamentary trust stating as follows:

> (1) Betty and I have had a wonderful marriage; she is the love of my life, and my primary purpose in creating this trust is to ensure that there will be sufficient funds to provide for her care and support for the rest of her life.
>
> (2) During Betty's lifetime, 80% of trust income shall be paid to her annually, and the balance of income shall be accumulated and added to trust principal to ensure further growth in the principal that will generate more future income for her.
>
> (3) Upon Betty's death, all trust assets shall be paid to my daughter. Sadly, I have no other relatives, so I have little choice but to bequeath the trust to my daughter rather than have the trust property escheat to the state.
>
> (4) No beneficiary may alienate or assign her interest in this trust, nor shall such interest be subject to the claims of her creditors.

Until 2019, 80% of trust income was sufficient, as Tom had anticipated, to provide for Betty's care and support. In 2019, when Betty was 75 years old, she was diagnosed with a health problem that necessitated her move to a nursing home. Initially, her income from the trust and Social Security enabled her to pay for her nursing-home care and other support needs.

Betty is now 79. Nursing-home fees have dramatically increased, a circumstance that Tom had not anticipated. Even with all available resources and government benefits, Betty can no longer afford current and likely future nursing-home fees.

Betty has asked the trustee to terminate the trust and invest the entire trust principal in an annuity, payable to her. A financial adviser has identified two annuities. Annuity A would provide payments sufficient for Betty's care and support for the rest of her life.

Annuity B would provide payments to Betty that are 3% less than the payments under Annuity A but still sufficient for her care and support. It would also include a cash payment payable to the testator's daughter at Betty's death. This payment would be substantially less than the amount the daughter would receive under the trust.

Betty has asked the trustee that, if the trust cannot be terminated, she be paid 100% of trust income so that she can at least meet her current nursing-home expenses and remain in her current nursing home for the time being.

State A's Trust Code includes the following provisions:

> § 1 A trust may be terminated upon consent of all the beneficiaries, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.
>
> § 2 Upon termination of a trust under Section 1, the trustee shall distribute the trust property as agreed by the beneficiaries.
>
> § 3 For purposes of Section 1, a spendthrift provision in the trust is not presumed to constitute a material purpose of the trust.
>
> § 4 If not all beneficiaries of a trust consent to a proposed termination of the trust pursuant to Section 1, the court may nonetheless approve the termination if the court is satisfied that, if all the beneficiaries had consented, the trust could have been terminated under that section, and the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention.
>
> § 5 A court may modify the dispositive terms of a trust if, because of circumstances not anticipated by the testator, modification will further the primary purpose of the trust. To the extent practicable, the modification must be made in accordance with the testator's probable intention.

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

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

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

1. If the daughter consents to the termination of the trust and the purchase of Annuity A, the issue is whether a court may authorize the trustee to terminate the trust and purchase Annuity A.

Under Section 1 of State A's Trust Code, a trust may be terminated upon consent of all the beneficiaries, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

Here, the beneficiaries only include Betty and her daughter. Betty has asked the trustee to terminate the trust and invest in Annuity A wholly for Betty's benefit. If the daughter consents to this termination, it will then be for the court to determine whether continuance of the trust is still necessary to achieve any material purpose of the trust. Tom's trust has a spendthrift provision. A spendthrift provision prohibits a beneficiary from alienating his or her equitable interest in the trust. However, under Section 3 of State A's Trust Code, a spendthrift provision in the trust is not a material purpose of the trust. Therefore, a court could find that when termination has consent of all beneficiaries, continuance of the trust is not necessary even if there is a spendthrift clause that will be violated.

Here, the court may authorize the trustee to terminate the trust and purchase Annuity A because despite the spendthrift clause, this action is consistent with the material purpose of the trust. Tom made it clear that the purpose of the trust was to ensure that there will be sufficient support for Betty for life. The purchase of Annuity comports with that material purpose because it would provide payments sufficient for Betty's care and support for the rest of her life. The only reason why he didn't leave everything to her was because he wanted to make sure the trust would continue generating funds and growth to support her for life. This means that he foresaw something left over when she died if his plan worked to continue generating income for her. Although it wasn't his intention necessarily, he realized the remainder would have to go to someone, so left it to his only other relative, his daughter. Therefore, the circumstances show that leaving a remainder for the daughter is not a material purpose of the trust. For this reason, the court should allow the termination and purchase of Annuity A if Daughter consents.

2. If the daughter does not consent to the termination of the trust and the purchase of Annuity B, the issue is whether a court may authorize the trustee to terminate the trust and purchase Annuity B.

Under Section 4 of State A's Trust Code, if not all beneficiaries of a trust consent to a proposed termination of the trust, the court may still approve the termination if the court is satisfied that, if all the beneficiaries had consented, the trust could have been terminated, and the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intent.

As stated above, the court would have likely have been able to take this action had Daughter consented even though the annuity is different than Annuity A. That is because the only material purpose of the trust is providing for Betty and the termination

of the trust and purchase of Annuity B will meet that purpose by providing sufficient funds for her support.

However, the court must also weigh whether the daughter, who does not consent to this plan and is a beneficiary, will still be appropriately protected in accordance with the testator's probable intent. Here, Tom made it clear that providing for Daughter was not a priority - it was merely a natural outcome of the way he wanted to construct his trust to provide the most care he could for Betty. In order to ensure that the income would continue to grow and provide Betty with resources, he had to reinvest some percentage of it back into the trust. This would inevitably leave something left over, so he left it to daughter. He even stated that he felt he didn't have a choice to let any remainder escheat to the state. He also lamented the fact that he had no other relatives the remainder could possibly go to. This shows that he did not have intent to support Daughter with the interest he left for her. Therefore, it is likely that the court can allow the termination and purchase of Annuity without Daughter's consent. Although this action will leave daughter with substantially less than the amount she would have received under the trust, it is far more aligned with Tom's testamentary intent. Therefore, Daughter's interests will remain protected in accordance with Tom's probable intent and the court can authorize the action.

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

Under Section 5 of State A's Trust Code, a court may modify the dispositive terms of a trust if unanticipated circumstances arise and modification of the trust terms will further the primary purpose of the trust. These modifications must be in accordance with the testator's probable intent.

Here, there is no doubt that the primary purpose of the trust is to support Betty for the rest of her life. Tom's intent was to make sure his beloved wife was cared for and he set the trust terms to only give her 80% of the income because he believed it was the best way to maximize profits to support her needs. He clearly did not anticipate the dramatic increases in nursing-home fees and would not have intended Betty to be forced out of her living situation if there were more assets available in the trust. Therefore, a modification of the terms of the trust that gives Betty 100% of the trust income would surely further the primary purpose of the trust if there is no other way to keep up with the costs of care. Tom would likely rather have Betty stay in the home she's most comfortable in for the longest amount of time than continuing to invest in a trust that wasn't growing fast enough to meet her needs. For this reason, the court can likely make the modification Betty asks in the event the trust cannot be terminated.

MEE Question 4

On January 4, 2023, Diner Inc. sued Tech Inc. in federal district court in State A. Diner Inc.'s complaint read in full (excluding captions and signatures) as follows:

Complaint

1. Diner Inc. (Diner) seeks damages for breach of contract by Tech Inc. (Tech). The contract is governed by the law of State A.

2. This Court has jurisdiction based on diversity. Diner is incorporated in State C, and Tech is incorporated in State D. The amount in controversy exceeds $75,000.

3. Venue is proper in the District of State A because each party maintains its principal place of business in State A and all the material facts in this matter occurred in State A.

4. On January 15, 2018, Diner and Tech entered into an oral contract in State A. Under the terms of the contract, Tech agreed to design software for a voice-recognition ordering system for Diner's locations. Diner paid $125,000 for the software.

5. On November 30, 2018, Tech delivered software for a voice-recognition ordering system. However, the software did not enable Diner's computers to recognize orders for all the items on a typical Diner menu. It permitted recognition only of "combination meal" orders identified by number, such as "combo #2."

6. On December 1, 2018, Diner notified Tech that the software failed to allow recognition of orders for all menu items and that this failure constituted a breach of contract. Tech refused to correct this breach.

7. As a result of this breach of contract, the software was useless to Diner and Diner is entitled to a return of the contract price plus other damages.

Tech's answer, excluding captions and signatures, read in full as follows:

Answer

1. Tech admits the allegations in paragraphs 1–5 of the Complaint.

2. Tech denies the allegations in paragraphs 6–7 of the Complaint.

One month after filing its answer, Tech filed a motion asking the court to grant summary judgment for two reasons. First, Tech argued that Diner's action was barred by the applicable four-year statute of limitations governing contract disputes. Second, Tech contended that its contract with Diner required it to produce voice-recognition software capable of recognizing only "combination meal" orders and that it fully performed that obligation.

In support of its motion, Tech cited the applicable statute of limitations, which states that actions for breach of contract must be brought within four years after the breach occurred. Tech also attached to its motion the affidavit of its president, who asserted (1) that she and Diner's president had agreed that the voice-recognition software would cover "only combination meals identified by number" and (2) that in any event, any breach occurred no later than November 30, 2018, when Tech delivered the software to Diner, which was more than four years before suit was filed.

Diner opposed Tech's motion for summary judgment and made a cross-motion for partial summary judgment on the issue of a contract breach. Diner asserted that the terms of the contract covered all menu items and that Tech's admission of the allegations in paragraph 5 of the Complaint (i.e., that the software did not cover all menu items) established Tech's breach of contract. In support of its cross-motion, Diner submitted the deposition testimony of eight witnesses to the agreement (including two Tech employees), who testified that they were present when the company presidents met and entered into the contract and that they heard the two presidents agree that the voice-recognition system would "cover all menu items."

Neither party offered a copy of a written contract because there was no written contract.

1. Did Tech properly raise the statute of limitations defense? Explain.

2. Assuming that the court reaches the issue of contract breach, how should it resolve the summary-judgment motions on that issue? Explain.

3. Is there any significant action that the court should take on its own initiative unrelated to the merits of the parties' summary-judgment motions? Explain.

1. The issue is whether Tech properly raised the statute of limitations defense in its motion for summary judgment rather than its answer.

An affirmative defense is one that would result in the dismissal of an action if it is proven by the proponent. A statute of limitations defense is an affirmative defense because its success would result in the dismissal of an action. Affirmative defenses must be raised in the defendant's answer or they will be deemed waived.

Here, Tech filed its answer one month before filing the motion for summary judgment, which included the argument that Diner's action was barred by the applicable four-year statute of limitations governing contract disputes.

Therefore, because Tech failed to raise this affirmative defense in its answer, Tech did not properly raise the statute of limitations defense.

2. The issue is, assuming that the court reaches the issue of contract breach, how the court should resolve the summary-judgment motions on that issue.

Summary judgment is awarded when the proponent proves there is no genuine dispute of material fact. Motions for summary judgment will be construed in favor of the nonmovant.

Here, Tech filed a motion for summary judgment based on a statute of limitations defense (which was waived, as mentioned above) and the argument that Tech's contract with Diner required it to produce voice-recognition software capable of recognizing only "combination meal" orders and that it fully performed that obligation. Tech included in its motion an affidavit of its president asserting, in part, that she and Diner's president had agreed that the voice recognition software would cover "only combination meals identified by number." Diner, on the other hand, contends that the terms of the contract covered all menu items. Diner included in its motion the deposition testimony of eight witnesses to the agreement.

Clearly, there remains a genuine dispute of material fact; namely, whether the contract required Tech to produce voice-recognition software capable of recognizing all menu items or only "combination meal" orders. The fact that Tech submitted one affidavit and Diner submitted eight depositions does not mean Diner should prevail in its motion, as the court will construe Diner's motion in favor of Tech and vice versa.

Therefore, assuming that the court reaches the issue of contract breach, the court should dismiss both summary-judgment motions on that issue.

3. The issue is whether there is any significant action that the court should take on its own initiative unrelated to the merits of the parties' summary-judgment motions.

Subject matter jurisdiction is proper in diversity cases. Under diversity, a federal court will have subject matter jurisdiction when every plaintiff has a different residence than every defendant, and the amount in controversy exceeds $75,000. The good faith amount in controversy pled on the face of a complaint will be presumed accurate. A corporation's residence is determined by both their state of incorporation and their principal place of business. Lack of subject matter jurisdiction can be raised at any time, by either party, or sua sponte by the court.

Here, it is undisputed that the amount in controversy exceeds $75,000, as there does not seem to be any argument that Diner is arguing the amount in controversy in bad faith; moreover, the contract price was $125,000. However, the parties are not diverse. Although Diner is incorporated in State C and Tech is incorporated in State D, both corporations have their principal place of business in State A. In other words, Diner's residence is both State C and State A, and Tech's residence is both State D and State A.

Therefore, the court should dismiss the case on its own initiative because it lacks subject matter jurisdiction.

MEE Question 5

On February 1, Company acquired from Supplier a machine for use in Company's business. The price of the machine was $30,000. Supplier agreed that, in exchange for a down payment of $6,000 and a promise to pay the remaining $24,000 in 12 monthly payments of $2,000, Supplier would immediately deliver the machine to Company but retain title to it until Company paid the remaining $24,000. This arrangement was memorialized in a writing signed by both parties. The writing clearly described the machine. Company paid the down payment, and Supplier delivered the machine. Supplier did not file a financing statement with respect to this transaction.

On March 2, Company borrowed $1,000,000 from Lender. The loan agreement, which was signed by both parties, stated that, to secure its obligation to repay the loan, Company granted a security interest to Lender in "all of Company's personal property." Also on March 2, Lender filed a financing statement reflecting this transaction, listing Company as the debtor and Lender as the secured party and indicating "all of Company's personal property" as the collateral. The financing statement was filed in the proper filing office.

On April 3, Company borrowed $750,000 from BigBank. The loan agreement, which was signed by both parties, stated that, to secure its obligation to repay the loan, Company granted a security interest to BigBank in "all of Company's present and future equipment." On May 4, BigBank filed a financing statement reflecting this transaction, listing Company as the debtor and BigBank as the secured party and indicating "all of Company's present and future equipment" as the collateral. The financing statement was filed in the proper filing office.

By August 1, Company had defaulted on its obligations to Supplier, Lender, and BigBank. Each of those creditors is claiming an interest in the machine supplied to Company by Supplier and is asserting that its interest has priority over any interest of either of the other creditors.

1. (a) Does Supplier have an enforceable interest in the machine? Explain.

   (b) Does Lender have an enforceable interest in the machine? Explain.

   (c) Does BigBank have an enforceable interest in the machine? Explain.

2. What is the order of priority of the enforceable interests in the machine? Explain.

(1)(a) the issue is whether Supplier has an enforceable security interest in the Machine when the transaction involved Supplier retaining title to the Machine.

Article 9 of the UCC applies to security interests in personal property. Whether Article 9 governs a transaction is based on substance, not form nor the characterization of the transaction by the parties. Courts routinely consider attempts by a seller to retain title to goods sold on credit as creating an Article 9 security interest. Security interests become enforceable when they attach. Security interests attach when (1) the debtor has rights in the collateral; (2) the secured party gives value; and (3) the parties entered into an authenticated security agreement or the secured party obtains possession or control of the collateral. The security agreement must be signed by the debtor and contain a sufficient description of the collateral.

Here, Supplier has an enforceable interest in the Machine. While the parties did not characterize the transaction as a security agreement, the substance of the transaction created a security interest. In other words, Supplier's sale of the Machine on credit and attempt to retain title until Company repaid would likely be construed as a secured transaction under Article 9. Furthermore, Supplier's interest became enforceable because it attached. Company (debtor) had rights in the Machine because it was delivered to Company for use. Supplier (secured party) gave value because Supplier allowed Company to purchase on credit. Lastly, the parties entered into an authenticated agreement signed by Company which clearly described the Machine.

In conclusion, Supplier has an enforceable interest because all the requirements for attachment are satisfied and the substance of the transaction created a security interest.

(1)(b) the issue is whether Lender has an enforceable interest when Lender filed a financing statement but the security agreement describes the collateral as "all Company's personal property."

All the rules of attachment discussed above apply. When attachment is accomplished with an authenticated security agreement, the description of the collateral in the agreement must sufficiently identify the collateral. Super generic descriptions such as "all debtor's personal property" are typically considered insufficient to describe collateral. In contrast, description of the collateral by a type defined in Article 9, such as "equipment" is sufficient.

Here, Lender does not have an enforceable interest because Lender's interest never attached. Lender attempted to create a security interest, and even filed a financing statement, but these are insufficient for attachment purposes. Debtor had rights in the collateral, through having possession of the Machine, and Lender gave value, in the form of a million dollar loan. However, Lender's critical mistake was not sufficiently describing the collateral in the security agreement. Lender's super generic description of "all Company's personal property" is likely insufficient.

In conclusion, Lender does not have an enforceable security interest in the Machine because Lender's interest never attached.

(1)(c) the issue is whether BigBank has an enforceable security interest in the Machine
when the security agreement identified the collateral as "present and future equipment."

All the rules of attachment discussed above apply. As stated, a description in a security agreement must sufficiently describe the collateral. One method of sufficiently describing the collateral is to list the collateral as a type defined in Article 9. One type of collateral defined in Article 9 is "goods." Goods include all tangible, personal property that is movable at the time of attachment. There are four types of goods: (1) consumer; (2) inventory; (3) farm products; and (4) equipment. Consumer goods are used by the debtor primarily for personal, familial, or household purposes. Inventory encompasses goods held by a debtor to be sold, leased, consumed, or otherwise disposed of in the usual course of business. Farm products encompasses things used in connection to a farming operation. Equipment serves as a catchall for and goods that are not consumer, inventory, or farm products.

Here, BigBank has an enforceable security interest because BigBank's interest attached. Debtor had rights in the collateral via possession, and BigBank gave value in the form of a $750,000 loan. Moreover, the parties entered into an authenticated security agreement, signed by Company, that sufficiently described the Machine as "equipment." The Machine is equipment because it is a movable piece of property that does not fall within the definition of consumer, inventory, or farm products.

Thus, Big Bank satisfied all the requirements for attachment and has an enforceable security interest in the Machine.

(2) the issue is which of the three interested parties--an unsecured, an unattached, and a perfected--has priority in the collateral.

Priority refers to a secured party's rights in the collateral, or its proceeds following a foreclosure sale, that are superior to other claims. Generally, a secured party must perfect to have priority. Secured parties can perfect a security interest in equipment by filing a financing statement. Filing must be authorized by the debtor, but authorization is generally presumed when a debtor authenticates a security agreement. A financing statement must name the debtor, the secured party, and sufficiently identify the collateral. In contrast to a security agreement, a financing statement may sufficiently identify collateral through use of a super generic description, because a financing statement's primary purpose is to put other parties on notice when they contemplate loaning money to a debtor. In general, a perfected security interest has priority over an unperfected security interest, even if the unperfected interest was created earlier. Between unperfected parties, the common law rule of first in time, first in right decides priority.

Here, BigBank has priority, followed by Supplier, followed by Lender. BigBank has priority because BigBank has a perfected security interest. While BigBank was the last party to lend money to Company, BigBank is the only party to perfect. BigBank perfected by filing an authorized financing statement sufficiently describing the collateral as "all Company's present and future equipment." In contrast, Supplier's interest became enforceable earlier than BigBank, but Supplier never perfected its interest because Supplier never filed a financing statement. BigBank also takes priority over Lender because Lender's interest never attached. *See above.* Thus, even though Lender filed a sufficient financing statement, BigBank's interest has priority.

Supplier has priority over Lender because Lender’s interest never attached, and because Supplier's interest arose first in time when Supplier attached on February 1.

In conclusion, BigBank has first priority, because BigBank has a perfected interest, Supplier has second priority, and Lender has no enforceable interest.

MEE Question 6

Just after midnight, police in State A received a report of four men lurking in the alley behind a pharmacy that had been burglarized two weeks earlier. Five minutes later, Officers One and Two stopped a car operating illegally without headlights one block from the pharmacy. Four men were in the car: Adam, Ben, Carl, and Dillon.

Officer One told Adam, the driver of the car, "You were driving illegally without headlights. Step out of the car and hand me your driver's license." Although Officer One did not say so, he suspected that Adam had been involved in the prior burglary and in fact planned to arrest him. As Adam got out of the car, Officer One saw a bulge in Adam's jacket. He pat-searched Adam for weapons and felt nothing suspicious. Wanting to conceal his plan to arrest Adam, he said to him, "Just hold on here a couple of minutes. You're not free to leave now, but you will be as soon as I finish ticketing you for the headlight violation and verify that your license is valid. By the way, where were you guys coming from when we stopped you?" Adam responded, "I say nothing without a lawyer." Officer One said, "Relax, I'm just making small talk. We'll release you in a few minutes whether or not you answer questions. I'm just curious where you guys were tonight." Adam replied, "We were coming from behind the pharmacy."

Ten minutes into the traffic stop, based on incriminating evidence that other officers had just found behind the pharmacy, Officers One and Two arrested all four men on suspicion of burglary and drove them to the police department.

Officer Two took Ben into a room and said, "I need to tell you that you have all the rights the Constitution gives you, along with any Miranda rights you might have. Do you understand?" Ben replied, "Yes, but to avoid prison, I'll admit that me and my buddies broke into the pharmacy a few weeks ago. If you agree not to charge me, I promise to testify against the others."

Officer Three took Carl to a different room. He read this statement aloud: "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to an attorney and to have the attorney with you for questioning. If you cannot afford an attorney, one will be provided for you." Officer Three then gave Carl a copy of the statement and watched Carl silently read it. Carl said that he understood his rights, and through two hours of questioning, he sat staring sternly at Officer Three and said nothing. Finally, Officer Three said, "I'm not assuming you're exercising a right to remain silent; I don't read minds. So again, were you involved in the burglary?" Carl then said, "OK. I was there two weeks ago, but I was only sort of a lookout."

Officer Four sincerely but incorrectly thought that another officer had advised Dillon of his Miranda rights. Officer Four took Dillon to the county jail, and while there, Officer Four spoke privately with Cellmate, an inmate and police informant. Officer Four urged Cellmate to introduce himself to Dillon, gain his trust, and ask him about the burglary. Officer Four promised in exchange to give Cellmate $50 and to convince the prosecutor to offer him an early-release deal. Three hours later, Cellmate informed Officer Four,

"I did everything you asked, and Dillon bragged that he broke into the pharmacy two weeks ago and tried again last night."

Two days later, State A charged all four men with burglary and agreed to try them separately. Each moved the trial court to suppress evidence solely on the ground that admission of his statement into the criminal trial would violate his rights under *Miranda*. Specifically,

1. Adam moved to suppress the incriminating statement he made to Officer One.

2. Ben moved to suppress the incriminating statement he made to Officer Two.

3. Carl moved to suppress the incriminating statement he made to Officer Three.

4. Dillon moved to suppress the incriminating statement he made to Cellmate.

How should the trial court rule on each motion to suppress? Explain.

The court should deny each motion to suppress each suspect's statement.

1. Adam

The issue in Adam's case is whether Adam was in custody at the time that he made his incriminating statement.

Under *Miranda v. Arizona*, an incriminating statement made while a suspect was being interrogated in police custody is inadmissible unless the police have read the suspect a specific set of four rights to which he is entitled under the Fifth Amendment: the right to remain silent, anything you say can and will be used against you, the right to an attorney, and the right to have an attorney appointed if you cannot afford one. The Supreme Court reasoned that when a suspect is being interrogated in police custody, there are inherently coercive pressures that often lead to police violated a defendant's right to remain silent if he is not adequately informed of his rights. Evidence of a suspect's incriminating statements will be excluded if the statement was made while the suspect was (1) being interrogated, (2) in custody, (3) without having been read his *Miranda* rights.

When a suspect is detained during a traffic stop, the general rule is that the suspect is not in custody because traffic stops are generally quick and fleeting. However, where a traffic stop takes an unusually long time or is delayed for coercive reasons, the suspect may reasonably believe that he is in custody. A suspect is in custody when he reasonably believes, based on the officers' actions, that he is not free to leave. An officer's subjective motivations for a traffic stop will not be evaluated by the court. Rather, the court will only look to whether the stop was objectively reasonable based on a probable cause that a crime has been committed (to determine if the stop itself was lawful) and then to whether the officer's actions were such that it would make a reasonable person believe that he was not free to leave (which would mean that the suspect is in custody).

In Adam's case, although he was stopped only temporarily at traffic stop, the officer appears to have delayed the stop. The length of the stop--lasting ten minutes—and Officer One's statement "you're not free to leave now" could indicate that Adam was in custody. However, the government has a strong argument that Adam was not in custody, as the officer said that he would be free to leave as soon as the officer was done giving him a ticket and that he would be released in a few minutes whether or not he answered any questions. If Adam was in custody, a court could find that Adam validly invoked his right to remain silent by saying "I say nothing without a lawyer," and that the officer violated that right by continuing to make statements designed to elicit an incriminating response. However, a court is more likely to find that the totality of the circumstances indicates that Adam was not in custody, so his rights were not violated.

Therefore, the court should deny Adam's motion to suppress the incriminating statement that he made to Officer One because Adam was not in custody at the time.

2. Ben

The issue in Ben's case is whether Ben was being interrogated or merely spontaneously blurted out his incriminating statement. The same rules discussed above apply. An incriminating statement made voluntarily before police have had a chance to read a suspect his *Miranda* rights will not result in the exclusion of the statement because such a statement was voluntary and it was not made as a result of an "interrogation"--i.e., questions designed to elicit an incriminating response. It was not elicited by the coercive pressures of an in-custody interrogation.

In this case, the officer was about to read Ben his *Miranda* rights, but Ben immediately replied by admitting that they broke into the pharmacy. Ben made this statement without any questions other than "Do you understand?" At this point Ben was not being interrogated. This question was not designed to elicit an incriminating response.

Ben's statement is therefore admissible, and the court should deny Ben's motion to suppress.

3. Carl

The issue in Carl's case is whether Carl adequately invoked his right to remain silent or otherwise waived his right to remain silent.

The previously discussed rules apply. Once a suspect has been read his *Miranda* rights, he must then "clearly and unequivocally" invoke his right to remain silent by saying that he intends to remain silent. The Supreme Court has held that merely remaining silent is not sufficient to invoke the right.

In this case, the officer properly read Carl his *Miranda* rights and even gave him a copy of the statement. Carl also said that he understood his rights. Although he remained silent for two hours of questioning, he never said that he would like to remain silent--i.e., he never clearly and unequivocally invoked his right to remain silent. Consequently, when Carl answered the question, he waived his right.

The court should therefore deny Carl's motion to suppress because Carl waived his right to remain silent.

4. Dillon

The issue in Dillon's case is whether Dillon was interrogated in custody in violation of his Fifth Amendment Rights.

The Fifth Amendment only prohibits interrogation by government actors in circumstances that are inherently coercive. When a suspect does not know he is being interrogated by a government actor--e.g., where he is merely having a conversation with a cellmate who is an

informant--the Supreme Court has held that the environment is not inherently coercive, and the suspect's Fifth Amendment rights have not been violated.

In this case, Dillon was questioned by a jailhouse informant that Dillon did not know was a government actor. Although the police's actions were arguably coercive, they could not have coerced Dillon because he did not know he was being questioned by a government actor.

The court should therefore deny Dillon's motion to suppress the statement made to Cellmate.