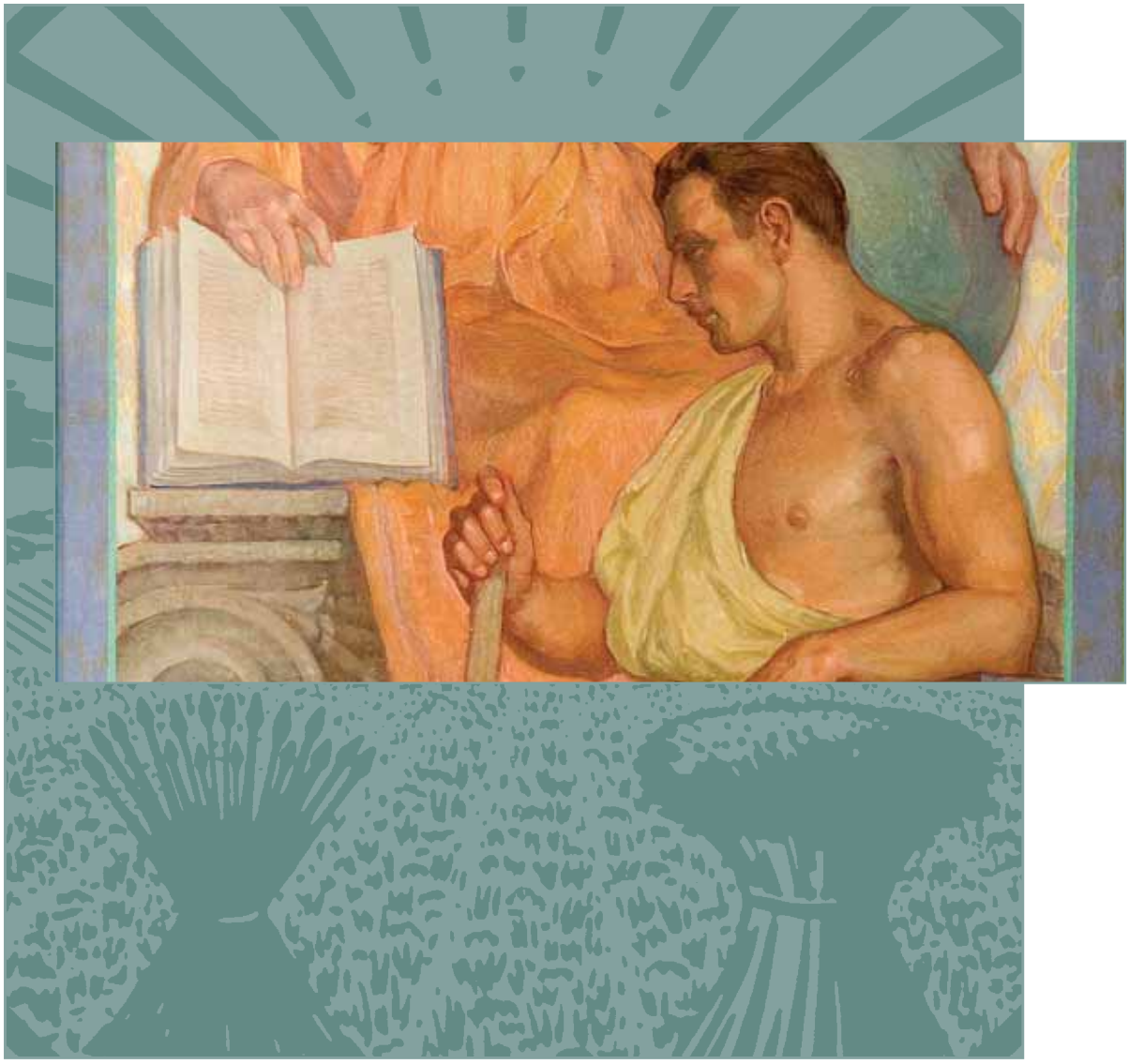
THE SUPREME COURT *of* OHIO

February 2011 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



On the cover:

Detail from Ohio Judicial Center Law Library Reading Room mural 7,
which depicts the availability of knowledge available in printed books.

The Supreme Court *of* Ohio

FEBRUARY 2011 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

February 2011
Essay Questions and Selected Answers
MPT Summaries and Selected Answers

The February 2011 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the National Conference of Bar Examiners (NCBE). Applicants were given 90 minutes to answer each MPT item.

The following pages contain the essay questions from the February 2011 exam, along with NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and consented to the publication of their answers. See Gov. Bar R. I, Sec. 5(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation and grammar to some of the answers.

Copies of the complete February 2011 MPTs and their corresponding point sheets are available from NCBE. Check NCBE's Web site at www.ncbex.org for information about ordering.

QUESTION 1

Acme Co., through its General Manager, Bill, was involved in the following transactions:

1. $25,000 Check to Vendor: In his capacity as General Manager of Acme Co., Bill was authorized to write and sign Acme checks to pay Acme's bills. He wrote a check in the amount of $25,000 to Vendor intending to sign it and mail it the next day. He inadvertently left the check sitting on top of his desk at the end of the day, instead of locking it up as was his duty. That evening, Sam, a member of the cleaning staff, took the check, forged Bill's signature on the face of the check, indorsed the instruction "Pay to the Order of Sam" on the back of the check, and forged Vendor's signature just below that instruction. Sam presented the check to Bank. Bank's teller was familiar with Vendor and its employees, but had never seen Sam before. She nevertheless cashed the check and Sam absconded with the money.

2. $10,000 Check to Sue: Acme retained Sue, an interior decorator, to refurbish its offices at Acme. On the day that Sue delivered a desk that she represented as being an antique, Bill gave her a check for $10,000 to pay for the desk. Later that day, Bill realized that the desk was a reproduction, not an antique. He immediately called Bank and placed an oral stop-payment order on the check. Ten days later, Sue indorsed the check and transferred it to John, who gave value and took the check in good faith. John immediately cashed the check at Bank, and Bank debited Acme's account.

3. The XYZ Co. Bearer Bond: Acme owned a bearer bond that it believed had been duly issued by XYZ Co. At the instruction of the owner of Acme, Bill transferred the bond to Michael for adequate consideration. Michael, in turn, delivered it to his sister, Beth, also for adequate consideration. When Beth sought to cash in the bond, XYZ Co. refused to pay it and was able to prove that it was counterfeit. Acme had no knowledge that the bond was counterfeit.

What defenses, if any, do the defendants in the following lawsuits have, and who should prevail in each:

1. **Acme's suit against Bank to recover $25,000 on the check Sam cashed?**

2. **Acme's suit against Bank to recover the $10,000 on the check to Sue?**

3. **Beth's suit against Acme to recover on the bearer bond?**

Explain your answers fully.

This is an Article 3 commercial paper question.

1. A check is a valid negotiable instrument. The issue here is whether the check from Acme that was cashed by Bank was properly payable. Generally, when a drawer's signature or an indorser's signature is forged, the negotiable instrument is not properly payable by a bank and the bank is liable if it cashes the check. However, when the drawer or indorser acts with negligence regarding the negotiable instrument, they may still be held liable. Here, Bill, as an agent duly authorized by Acme acted with negligence when he left the check on top of his desk, instead of locking it up as was his duty. Thus, Bill, as the authorized agent of Acme for check writing did act with negligence that aided in the forgery of the negotiable instrument by leaving it out over night. However, there is a sub-issue with Bank and Bank's teller. Generally, a Bank is supposed to verify that a check is properly signed and indorsed before accepting the check. Here, the Bank's teller was familiar with Vendor and the employees and should have known that Sam was not an employee. Furthermore, teller should have been able to check the signature of Vendor before paying and might have been suspicious due to the large amount. However, the negligence of Bill and Acme resulted in the wrongful issuance of the check and will probably override the teller's actions. Thus, Acme will probably not prevail over the Bank for the $25,000 check due to Bill's negligence, but a court will apportion the liability in this case between Acme and Bank.

2. The issue here is two-fold. Whether a holder in due course took free from fraud in the procurement and whether the oral stop-payment order should have been enforced. A holder in due course is one who is a holder, pays value, in good faith, and without notice of certain infirmities of the instrument or the maker/drawer. Here, John paid value, took in good faith, and did not know of any infirmities with the check. The check was properly negotiated by his possession and indorsement from Sue. Thus, John is an HDC and is not subject to certain personal defenses. One such personal defense is fraud in the inducement. This is where fraud is committed by a misrepresentation about a fact, which is the basis of the transaction. Here, the fact that the desk was not an antique (a base fact of the transaction) as represented by Sue is fraud in the inducement and is a personal defense. Thus, John is not subject to this defense as an HDC. However, there is the issue of the oral stop-payment by Bill/Acme. Under Article 3, an oral stop-payment is valid only for 14 days, while a written stop-payment is valid for 6 months. Here, Bill's oral stop-payment was made 10 days before the attempted payment on the check by Bank. Thus, Bank was under an obligation to not cash the check. Thus, because Bank failed to comply with the stop-payment order, it is technically liable to Acme for the losses that resulted. Because, however, Acme would have to pay John anyway as an HDC, Acme has no claim for damages against Bank.

3. Here, the issue is whether Acme is liable under transferor warranties. Where a negotiable instrument, such as a bearer bond, is transferred for consideration, indorsement is not required, but the transferor warrants certain things: (1) the signatures are authorized and authentic; (2) the transferor is entitled to enforce; (3) the transferor does not know of any forgery; (4) the transferor does not know that the instrument is subject to any real defenses; and (5) the transferor does not know that the issuer or drawer is insolvent. Transferor warranties run from the transferor to any immediate subsequent transferee only for non-indorsed instruments. Here, Acme transferred the bond to Michael for consideration, who then transferred the bond to Beth for consideration. Thus, Acme owes the transferor warranties only to Michael. The issue is whether the finding of the bond being counterfeit is a breach of one of the warranties. Here, Acme believed that the bond was duly issued by XYZ Co., so Acme did not have knowledge of any real defenses to the bond. However, the bond is probably forged because it is counterfeit. Thus, Acme is liable to Michael, but not to Beth.

QUESTION 2

The following conduct has been reported to disciplinary counsel in four separate grievances filed against Barrister, an Ohio lawyer practicing in Anywhere, Ohio:

Grievance 1
Alice and Barrister were in court for Alice's sentencing after her conviction for driving while impaired. The judge appeared to be examining Alice's driving record when he commented that he would grant leniency in her case due to her "unblemished driving record." Barrister was surprised by the court's comment, because he knew from his representation of Alice that Alice had many prior offenses, including several for driving while impaired. However, Barrister remained silent.

Alice was so impressed with Barrister's success in obtaining such a favorable outcome that she went out with him after court for drinks. They ended up going to Alice's house, where they engaged in sex. They have been a couple ever since.

Grievance 2
Carl was dissatisfied with his lawyer, Diligent, for not filing his personal injury suit, even though it had only been six months since the underlying accident occurred. Carl met with Barrister and told him about his dissatisfaction with Diligent. Barrister said that, if Carl retained him, he would file the case within two weeks and would charge the same contingent fee that Carl and Diligent had agreed upon. Carl signed a fee agreement reflecting the agreed-upon contingent fee, and Barrister sent a letter telling Diligent that Barrister was Carl's new counsel and that Diligent was off the case. Barrister requested that Diligent please send him Carl's file.

Grievance 3
Barrister appeared at a meeting of the Anywhere City Council to object to an ordinance that would increase the speed limit on a particular street. He appeared on behalf of himself and as counsel for some neighbors who had retained him to represent their interests. Believing that it would help develop a more sympathetic reception from the City Council, Barrister intentionally dressed casually. He identified himself as a homeowner and parent of small children, without disclosing that he was also there as an attorney for the neighbors. In fact, Barrister is single, childless, and does not own any real property himself.

Grievance 4
Barrister sued Jefferson Dry Cleaners, Inc. (JDC) on behalf of his brother, Brother. He alleged that JDC had ruined Brother's custom-tailored tuxedo. Shortly after suit was filed, Barrister learned that Inspector, an employee of a government agency with jurisdiction over dry cleaners in Anywhere, frequented a tavern after work. Barrister approached Inspector after Inspector had consumed several alcoholic drinks and began a conversation about the lawsuit. Barrister soon realized that Inspector thought that Barrister was the attorney representing JDC. Barrister did nothing to correct Inspector's erroneous assumption. Instead, he listened as Inspector stated that he (Inspector) was concerned that Brother's lawyer might find out that Inspector had mistakenly failed to cite JDC for code violations. Inspector explained that he had failed to cite JDC even though he had discovered that JDC had mishandled toxic chemicals. Inspector then sought Barrister's advice on how best to protect his job. Barrister recommended that Inspector declare himself a "whistleblower" and immediately provide a truthful written disclosure to Barrister.

For each grievance, did Barrister's alleged conduct violate the Ohio Rules of Professional Conduct? Explain your answers fully.

You are not required to cite the Ohio Rules by number, but you are required to demonstrate knowledge of the substance of the relevant rules.

Grievance 1

In this case, Barrister's silence regarding Alice's prior record violates the rules, though it is a close question. Generally, lawyers are required to keep all information relating to the representation confidential, where that information has been gained in confidence and in furtherance of the representation (the attorney-client privilege). Attorneys are also required to conduct themselves in a way that is not prejudicial to the administration of justice. That conflict is resolved in this case by the fact that Alice's driving record is public record. Lawyers are required to divulge such information to the court where it is relevant in the case. By not advising the judge, Barrister is participating in conduct prejudicial to the administration of justice. While attorneys are free to seek their client's advantage, this goes too far.

Sex with Alice also violated the rules. Lawyers are forbidden from engaging in a sexual relationship with a client that does not pre-exist the representation. Here, it is clear that Alice and Barrister met through the representation. As such, this is an impermissible conflict of interest, and Barrister will face sanctions (written reprimand, suspension, or disbarment) as a result.

Grievance 2

Barrister has not violated the rules. Lawyers as a general rule are forbidden from in-person solicitation of new clients, and must respect the attorney-client relationships of others. In this case, however, Carl solicited Barrister. This freed Barrister to make an offer to Carl regarding his own ability to represent him. While Diligent's failure to file quickly did not violate the rules or prejudice Carl in any way, Carl was within his rights to terminate the relationship with Diligent at any time and seek new counsel. That is the essential character of what took place here, and Barrister's acceptance of a new client was acceptable.

Grievance 3

While Barrister's appearance by itself does not violate the rules, his misrepresentation about his status and motives does. Lawyers are free to present themselves in a public forum and be heard on issues of public concern. When they appear in an official capacity before a governmental body, however, lawyers must disclose that they are representing other parties and make reasonably clear the nature of that representation. They must also not seek to "trick" a public body for the same reasons.

Here, Barrister's act implies to his clients an improper ability to influence public officials, which violates the rules. In addition, his misrepresentations about himself is most certainly conduct prejudicial to the administration of justice. Though Barrister's statements are outside court, his duties as an attorney exist at all times. Thus, by lying and implying an ability to influence a governmental body, he has breached his ethical duty.

Grievance 4

Barrister has violated the rules in this case as well. There are two issues present: Barrister's communication with Inspector and the legal advice Barrister provided him.

Lawyers and their agents are not permitted under the rules to utilize false identities or pretenses to gain information from parties who may be material to an active suit. Here, it is clear that Inspector believed (falsely) that Barrister was representing JDC, and as a result, Barrister gained knowledge he otherwise would not have had. Barrister had an affirmative duty once that mistake on Inspector's part became clear to notify Inspector of his status (as well as JDC's counsel). His failure is a violation.

In addition, providing legal advice to Inspector was improper. Such advice is in conflict with a current client, and lawyers cannot represent adverse parties in the same case. Providing such advice creates an attorney-client relationship, an in this case, a conflicting and impermissible one.

QUESTION 3

While driving down I-71 to Columbus for the Ohio Bar Examination, Mark was talking on his cell phone to Karen. He suddenly exclaimed, "Oh my gosh! A big blue pickup truck just sideswiped me and crashed into the Cadillac in the lane next to me. He's driving off without stopping!" His call to Karen then terminated when he dropped the cell phone on the floor of his car. The Cadillac was disabled by the wreck, and Mark stopped to give assistance.

Mark called Karen back a few minutes later, related the incident to her again, and told her this time that he had remembered seeing a sticker on the right-rear bumper of the blue pickup truck that said, "Fort Knox, Kentucky." That information enabled the police to find the driver of the pickup.

Mark called Karen the next day and told her he had been very upset by the accident and that Carrie, the poor lady in the Cadillac, was frightened out of her mind when Mark approached her after the accident.

Three days later, Mark went to the hospital and told his doctor (Doctor) that he had had a constant dull headache since the accident. Mark told Doctor that he had bumped his head on the driver's side window when the blue pickup truck sideswiped his car. He also told Doctor that he had exactly the same symptom as a child when he got hit in the head with a baseball bat.

Mark subsequently sued the driver of the blue pickup truck in a state court in Ohio. At the trial, even though Mark was available to testify, Karen was called to the stand by Mark's attorney to give testimony as to what Mark told her. Doctor was also called to the stand to testify concerning his diagnosis and treatment of Mark for the dull headache.

At trial, Mark's attorney asked Karen the following questions:

1. What did Mark tell you about having been sideswiped by the pickup truck?

2. What did Mark tell you about remembering the "Fort Knox, Kentucky" sticker?

3. What did Mark tell you later about his being very upset by the accident?

4. What did Mark tell you about Carrie being frightened?

At trial, Mark's attorney also asked Doctor the following questions:

5. What did Mark tell you about his symptoms and the cause of them?

6. What did Mark tell you about his childhood injury?

After each question, the defendant's attorney objected on the ground that the testimony would be inadmissible hearsay.

How should the court rule on each objection? Explain your answers fully.

Admissibility of evidence in Ohio is governed by the Ohio Rules of Evidence ("Rules"). Under the Rules, all relevant evidence is admissible unless it is expressly prohibited by the Rules. Relevant evidence is anything that tends to make any material fact more or less likely. Hearsay is generally excluded, even when relevant. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Courts tend to doubt the accuracy of such statements. Nevertheless, some statements will still be admitted as exclusions or exceptions to hearsay.

1. The court should overrule the objection. Under the Rules, an excited utterance is an exception to hearsay. An excited utterance is a statement made while perceiving an incident that gives rise to some form of excitement. Such statements are deemed more trustworthy because they are made in an excited state at the time of the incident, leaving little time to think about how to formulate the statement. Here, Mark exclaimed "Oh my gosh!" and relayed what was happening while being sideswiped by the truck. Therefore, the objection should be overruled.

2. The court should overrule the objection. Under the Rules, a present sense impression is an exception to hearsay. A present sense impression is an observation made while perceiving an incident or immediately thereafter. Such statements are generally deemed trustworthy in much the same way as an excited utterance. Here, Mark was relaying his observations of the accident, including the Fort Knox bumper sticker, to Karen "a few minutes" after the accident. Therefore, the objection should be overruled.

3. The court should sustain the objection. The Rules do provide an exception to hearsay if it is a statement of the then-existing mental state of the declarant. Here, Mark made a statement a day after the accident about his mental state during the accident. This is clearly not an excited utterance or present sense impression. It also does not meet the mental state exception because it is a statement of a previous mental state, not Mark's current mental state. Therefore, the objection should be sustained.

4. The court should sustain the objection. There is no hearsay exception or exclusion that applies to Mark's statement about Carrie's mental state. Furthermore, such a statement is irrelevant (see Rule above). Carrie's mental state makes no material fact in Mark's case more or less likely. Therefore, the court should sustain the objection.

5. The court should sustain in part and overrule in part. The Rules allow statements made for the purposes of medical diagnosis or treatment. The exception is kept narrow: it only allows for the statements that would lead to a diagnosis or treatment. It should be noted that Ohio recognizes the doctor-patient privilege, but by calling Doctor to testify, Mark has waived this privilege. Here, Mark made statements to Doctor about a constant dull headache as a result of bumping his head on the window. He then further stated that the bump on the head happened when the truck sideswiped his car. The first statement about the symptoms and cause are relevant to his diagnosis and treatment. The statement about the accident is not. Therefore, the court should overrule the objection as to the statements about the headache and bump to the head, but should sustain as to the statement about the accident.

6. The court should probably sustain the objection. The Rule allowing statements made for medical diagnosis is narrow. Statements about past injuries are not allowed unless they directly help inform the current diagnosis or treatment. More facts would be needed to establish this point, but based on these facts alone, the court should sustain.

QUESTION 4

Patty was involved in an automobile accident in Anytown, Ohio. The collision occurred when a car owned by Olivia and driven by her husband, Dan, crossed over the centerline and hit Patty's car head on. Patty suffered severe personal injuries requiring extensive medical treatment.

Patty's attorney first presented a claim against Olivia and Dan to their automobile insurance company, MegaInsurer, but the claim could not be resolved to the parties' satisfaction.

Patty's attorney then filed a lawsuit against Dan, Olivia, and MegaInsurer alleging the following claims:

a. Against Dan, for negligently causing the accident and, as a direct and proximate result of his negligence, causing Patty to sustain injuries and incur damages;
b. Against Olivia, for negligently entrusting her car to Dan; and
c. Against MegaInsurer, for not handling Patty's claim in good faith prior to Patty's filing suit.

Patty's attorney properly served the complaint on the defendants on February 15, 2011. Each defendant retained a separate attorney. After serving the complaint on Olivia, Patty's attorney decided that Patty would be better off pursuing the claims against Dan and MegaInsurer without having Olivia in the lawsuit, but wants to preserve Patty's claim against Olivia.

Upon meeting Dan, Dan's attorney learned that Dan had suffered a seizure and lost consciousness, which was the cause of the accident. The seizure was the result of a medical condition of which Dan had no prior knowledge and which was diagnosed only after the accident. Dan's attorney believes this fact presents a basis for getting Dan released from the lawsuit without a trial, but realizes that it will take several months to gather the necessary medical records to establish the fact.

As a matter of law, Ohio courts do not recognize or permit third-party, bad-faith claims by an injured party, such as Patty, against the alleged tortfeasor's insurer. MegaInsurer's attorney believes this presents a basis for getting MegaInsurer released from the lawsuit without a trial.

None of the defendants has yet answered the complaint.

1. **What procedures are available to Patty's attorney to take Olivia out of the lawsuit and still preserve the right to pursue the claim against her, and does it matter which of the procedures Patty's attorney uses? Explain fully.**

2. **What procedures can Dan's attorney use to get Dan released from the lawsuit and, under the facts, which of the procedures will be more likely to succeed? Explain fully.**

3. **What procedural mechanism is available to MegaInsurer's attorney to secure the earliest possible release of MegaInsurer from the lawsuit? Explain fully.**

DO NOT DISCUSS the merits of the individual claims or any professional responsibility issues that might arise from Patty's attorney's ignorance of the Ohio law relating to third-party claims.

The answers printed in this booklet were selected because they were among the better answers written

All of these issues are governed by the Ohio Rules of Civil Procedure.

1. Patty v. Olivia: The issue is whether Patty can dismiss Olivia from the suit without prejudicing her claim against Olivia. Patty can voluntarily dismiss her claim against Olivia. A party may, at least once, voluntarily dismiss a defendant from a lawsuit without prejudice. In the alternative, Patty can amend her complaint as of right because none of the defendants have yet answered. When she amends, she should exclude Olivia as a party. Patty should amend her complaint because that retains Patty's ability to pursue Olivia without subjecting her to a dismissal with prejudice at a later date. Multiple dismissals can lead to a dismissal with prejudice, thus barring the claim.

2. Patty v. Dan: Dan can try to be released through either a motion to dismiss or, later, a motion for summary judgment. A motion to dismiss is based on the pleadings only. The standard is whether the plaintiff states a claim for relief on the face of the pleadings. All facts and inferences are resolved in favor of the non-moving party. Patty would defeat Dan's motion to dismiss because his defenses go beyond the pleadings to facts at issue – Dan's medical condition – which cannot be considered by the court.

   Dan may be successful on a motion for summary judgment. The standard of review on a motion for summary judgment is whether there is any genuine dispute of material fact. If not, summary judgment should be entered for the moving party as a matter of law. Summary judgment occurs after discovery and necessarily requires consideration of the facts developed. Even though the facts are construed against Dan, if he proffers sufficient proof of his defense, he should succeed. Therefore, he should file a motion for summary judgment.

3. MegaInsurer: The earliest MegaInsurer can obtain release is through a motion to dismiss. A motion to dismiss is filed before responding. Specifically, pursuant to Civil Rule 12(B)(6), MegaInsurer can argue that Patty failed to state a claim as a matter of law under the standard described above. MegaInsurer has a good chance of success. Even if everything in the complaint is accepted as true, Patty has not stated a claim against MegaInsurer as a matter of law, since Ohio does not allow third-party, bad-faith claims against insurers, such as MegaInsurer. Therefore, on its face, Patty's complaint fails to state a claim, unlike Dan's fact-based defenses. MegaInsurer should win.

QUESTION 5

Andy, who is Jewish, was a teacher at Lyceum, a private high school in the State of Franklin. Lyceum received 85% of its funding from the state. To maintain its eligibility for state funding, Lyceum was required to comply with a variety of state regulations, which were generally applicable to all schools in Franklin. One day, Andy showed up at Lyceum wearing a button on his shirt objecting to the State of Franklin's recognition of the Palestine Liberation Organization as a political party. This was in violation of a strict policy promulgated by Lyceum's board of regents prohibiting teachers from displaying their political views on Lyceum's campus. Lyceum dismissed Andy for violating the policy. Andy sued Lyceum, asserting that Lyceum had violated his rights under the 14th Amendment to the U.S. Constitution.

Andy was invited by his best friend, Ben, to go for an evening of drinks to Club, a private social club of which Ben was a member. Club held a liquor license issued by the State of Franklin. There were numerous nearby bars, restaurants, and hotels holding liquor licenses issued by the State of Franklin, but Club was the only private establishment within 50 miles holding a state-issued license. Club's bylaws limited membership to Catholics and prohibited service to non-Catholics. Club refused service to Andy and asked him to leave. When Andy refused, Club's manager called the police, who arrested Andy and charged him with criminal trespass. Andy sued Club, asserting that Club had violated his rights under the 14th Amendment to the U.S. Constitution.

During the jury selection stage of Andy's trial on the trespass charge, the prosecutor (State) used most of his peremptory challenges to exclude seating Jewish jurors. The trial proceeded, and Andy was convicted. Andy appealed his conviction on the ground that State had violated his rights under the 14th Amendment to the U.S. Constitution.

Andy owned a home in a neighborhood where all the homes were subject to a private restrictive covenant, in effect since 1920, that prohibited the sale of any home to anyone of the Catholic faith. Ignoring the covenant, Andy contracted with Ben, a Catholic, for the sale of his home to Ben. A number of neighbors (Homeowners), whose homes were subject to the same restrictive covenant, sued Andy and Ben in a Franklin state court to enforce the covenant and restrain Ben from taking possession of the property. The state court ruled in favor of the Homeowners. Ben appealed on the ground that the state court's decision violated his rights under the 14th Amendment to the U.S. Constitution.

1. **What is the likely outcome of Andy's suit against Lyceum?**

2. **What is the likely outcome of Andy's suit against Club?**

3. **What is the likely outcome of Andy's appeal of his conviction?**

4. **What is the likely outcome of Ben's appeal of the state court's decision?**

Discuss your answers fully.

1. Andy will not prevail against Lyceum under the 14th Amendment claim. The 14th Amendment protects individuals from being treated differently by the government. The protection is only afforded against state actors. State action can be found if the state itself acts under the color of its power – e.g., by legislation, by officers or officials of the state, by state public schools, etc. State action can also be found if the state is significantly involved with private entities. Significant involvement would be sufficient for state action purposes where the state is in symbiotic relationship with the private entity, such as doing business together, or receiving benefits from the private entity. Also, state action can be found where a private party's action would traditionally and exclusively be performed by the state (e.g., running a corporate town, or election procedures). Here, a private school is involved. Although it is 85% funded by the state, it is still a private entity. Mere financial support from the state would not establish state action. Therefore, there was no state action, which means Andy has no claim against Lyceum (private actor) under the 14th Amendment. Even if Lyceum was a state actor, Andy would not prevail because at issue is speech, and not discrimination. Lyceum's regulation does not discriminate on its face, nor is it applied in a discriminatory manner. Further, there is no showing of discriminatory impact supported by evidence of an ill motive. In conclusion, there is no state action. Even if state action were to be found, the 14th Amendment is inapplicable.

2. Andy will not prevail against the private Club under the 14th Amendment. As mentioned above, 14th Amendment applies only against state actors. Here, a private social club, presumably with no ties to the government, limits its membership to Catholics. It may do so. Andy has no right to be there if the Club says so. Club's calling the cops is not sufficient to find state action. Mere incidental use of the state's enforcement resources to enforce certain rights does not constitute state action. Here, Club has the right to discriminate against anyone, so long as the government is not benefiting from its practice (or it's not acting like a state entity). The mere use of the police service is insufficient to find state action. Further, merely granting a liquor license is not sufficient. Therefore, Andy will not prevail.

3. Andy will prevail on appeal. A prosecutor is an employee of the state. Here, he was acting on the job – a government job – as a government employee. Therefore, there was a state action and the 14th Amendment applies. There was a discriminatory practice by a government actor – the prosecutor challenged prospective jurors solely based on race (or national origin). Discrimination based on race is tested under the strict scrutiny review. The state has the burden to show that what the prosecutor did was necessary to further compel state interest. Using peremptory challenges to discriminate against certain racial minority is never a compelling reason. Therefore, Andy will prevail. Further, it should be noted that the prosecutor is subject to discipline for his unethical behavior. No attorney may discriminate based on race, gender, national origin, sexual orientation, marital status, etc.

4. Ben will prevail on his appeal on 14th Amendment grounds. First, there was discrimination by the private Homeowners because they restricted the sale of homes only to Catholics. However, when the court enforced the racially discriminatory restriction in favor of Homeowners, that act was sufficient to constitute state action. Therefore, by virtue of the court's enforcement of the racial restriction, state has discriminated against Catholics. Strict scrutiny applies (religion). Ben will prevail; state cannot meet the test.

QUESTION 6

John, a resident of Ohio, owned an original oil painting by an almost famous 18th century French painter. He met with Carl, an art dealer, who told him that the painting was worth between $150,000 and $200,000. John responded, "I would gladly sell it for $180,000 if anyone would offer me that amount." Carl said, "I will purchase it from you for $180,000." John did not respond.

Instead, John decided that the best way to sell the painting for the highest price would be to put an advertisement in the local fine arts magazine. He placed an ad with a photograph of the painting and stating, "This painting can be inspected at Xavier's art gallery, and I will sell it to the first person who delivers to me a certified check in the amount of $250,000, provided that I receive the check by no later than 11:59 p.m. on Friday, July 15, 2011."

Ralph visited the art gallery, saw the picture, and mailed a letter to John stating, "I accept your offer, and I will deliver to you a check for $250,000."

Mary also visited the gallery, saw the painting, and sent a certified check by courier to John in the amount of $250,000, which was delivered to John on Saturday, July 16.

Kayla visited the gallery, saw the painting, and went to John's house on Friday, July 15, at noon. She said, "I will buy the painting for $225,000, but I may not be able to deliver a certified check to you until Monday." John, said, "OK, I will sell the painting to you for $225,000 if I get your check no later than Monday, unless someone meets the terms of my ad before I get your check." At 6:00 p.m. Friday, July 15, John died. Kayla, concerned that someone might beat her to the punch, managed to deliver to John's home, a certified check in the amount of $225,000 at 7:00 p.m. on Friday, July 15.

Two weeks later, the executor of John's estate decided to have an auction to sell the painting with a minimum bid of $225,000. He delivered the painting to the auctioneer and, at the auction, there was spirited bidding. Sean made the highest bid, $240,000. As the auctioneer was ready to say, "Sold," the executor of John's estate said, "Call off the sale. I do not want to sell the painting." The auctioneer ignored the executor and shouted, "Sold to Sean!" The executor re-took possession of the painting and refused to deliver it to anyone.

Carl, Ralph, Mary, Kayla, and Sean each sues John's executor for specific performance. You may assume in each suit that the executor has not raised the defense of the statute of frauds, so do not discuss the statute of frauds.

What is the likely outcome of each suit? Explain fully.

In order for specific performance to be granted as a remedy, the item sold must be either real property or unique personal property. Unique personal property can include a variety of things, including art. Whether it is real or personal property, specific performance is granted in equity because not receiving the item cannot be adequately remedied through payment of money damages. The painting concerned here should be sufficiently unique in order to allow for specific performance.

Carl's Suit

Carl will not be successful in suing for specific performance. In order for a contract to be made, there must be an offer, acceptance, consideration, and mutuality. An offer must clearly show an intent to enter into a binding agreement. An offer can be accepted by anyone to whom the offer was made. In Carl's case, his offer to purchase the painting for $180,000 did not constitute the acceptance of an offer because John did not offer it to him. His statement that he would sell to anyone who would pay between $150,000 and $200,000 was a general statement about his intent to sell, not that he was offering to Carl. Carl's statement was merely an offer to buy it for $180,000, which was not accepted by John. Therefore, no contract was formed and Carl cannot get specific performance.

Ralph's and Mary's Suits

Ralph and Mary will also fail in their suits. Generally, an advertisement is not considered an offer, unless it mentions specifically who may accept and how to accept. These requirements appear to be met in this case since it stated how to accept and that it was first-come, first-served. Ralph, however, did not meet the condition placed in the offer that John actually receive the check for $250,000. The promise to provide a check later in time is insufficient. Likewise, Mary has not met the time constraint placed in the offer. Her check, though for the proper amount, was not received by John until July 16, the day after the deadline. No contract was formed. Therefore, Ralph and Mary will not be able to get specific performance.

Kayla's Suit

Kayla will also fail for lack of a valid contract: Kayla's statement that she would purchase at a lower price was a counteroffer that John was free to accept. John did so, but with the express condition that she deliver a check before the following Monday. An express condition must be strictly complied with. This appears to have been complied with except that John dies before she could deliver the check. The deal of either an offeror or offeree terminates the offer unless it is an option contract. Option contracts require consideration in order for the offer to be left open for a stated time. John is not a merchant so the firm offer rule does not apply. From the facts, John was not given any consideration to hold the offer open, and therefore, his offer terminated upon death. No contract was formed and Kayla is not entitled to specific performance.

Sean's Suit

Sean should prevail in his suit for specific performance. When an item is offered for public sale through an auction, the item is given to the auctioning company effectively forming a trust that allows the company to sell the painting to the public. After this has taken place, the seller cannot revoke the offer to sell once a valid offer has been made to the auctioning company. The company is free to accept reasonable bids for the item. Here, Sean made a bid that was accepted by the auctioneer prior to the declaration of "sold." Therefore the executor could no longer revoke his desire to sell. His calling off of the sale is of no consequence because the painting was validly sold to Sean. Therefore, Sean should be granted specific performance.

QUESTION 7

Henry and Winnie married in Franklin, Ohio in 1970. They had two children, Ben and Gina, both of whom are now adults.

In 2000, Winnie developed a serious illness, and she wanted to make certain that her estate affairs were in order. Winnie contacted Attorney who prepared a valid Ohio will for Winnie ("2000 Will"). The dispositive provision of Winnie's 2000 Will, the original of which Attorney kept in his office safe, provided as follows:

> I give my diamond necklace, which I inherited from my mother, to my sister, Sarah. I give the rest and residue of my property to my husband, Henry, if he survives me by twenty-four (24) hours or more. If Henry does not survive me by twenty-four (24) hours or more, I give the rest and residue of my property to my children, Ben and Gina, in equal shares.

In 2005, Henry began spending a considerable amount of time at the neighborhood pub. Henry became infatuated with a young waitress and had a brief, but torrid affair. Winnie became aware of Henry's illicit activities and, although they remained married, Winnie ordered Henry out of the house.

Winnie eventually made a full recovery from her illness. In 2006, she wrote out by hand, signed, and sent a letter to Attorney stating, "You have possession of my original 2000 Will. I wish to revoke the 2000 Will, and I direct that you destroy the same. I will contact you shortly to make arrangements to create a new will." Winnie is the only person who signed the 2006 letter. Attorney clipped the letter to Winnie's 2000 Will, and without tearing up, marking, or otherwise obliterating the 2000 Will, placed the documents intact back in his office safe.

As a result of Henry's affair, Henry's daughter, Gina, refused to have any further contact with him. In 2008, after trying to reconcile with Winnie and as a result of his estrangement from Gina, Henry created a valid Ohio will, which stated:

> I wish for the entire world to understand that I still deeply love my wife, Winnie, and will always ask for her forgiveness. Even though we are separated, I give all of my property to Winnie if she survives me. If Winnie does not survive me, I give all of my property to my son, Ben; however, I disinherit my daughter, Gina.

To Henry's joy, Winnie eventually forgave him in early 2010. Henry and Winnie decided to take a trip in celebration of their 40th anniversary. While returning from their trip, Henry and Winnie were involved in a tragic automobile accident. Winnie died within minutes after the accident. Henry survived Winnie by four days, but eventually died from his injuries.

During Henry's last few days, Gina visited him twice in the hospital. Remorseful that he had disinherited Gina, Henry said out loud in the presence of Gina and his nurse, Nurse, "I wish to amend my last will. In its place, I wish to give all my property to Ben and Gina in equal shares." Neither Gina nor Nurse ever reduced Henry's oral statement to writing.

At the time of Winnie's death, Winnie owned the diamond necklace that she had inherited from her mother, and she was also the sole owner of a $50,000 bank account. At the time of Henry's death, Henry was the sole owner of a $100,000 brokerage account. Both Winnie and Henry are survived by Sarah, Ben, and Gina.

Winnie's 2000 Will and her 2006 letter to Attorney were submitted for probate, as was Henry's 2008 Will. Gina and Nurse are prepared to testify as to Henry's oral deathbed statement.

To whom, and in what proportions, should the estates of Winnie and Henry be distributed? Explain your answers fully.

In Ohio a valid will requires a writing, signed at the end by the maker, and the signatures of two disinterested witnesses. Wills may be written or signed at the express direction of the maker. The witnesses need not sign in each other's presence, but must sign in the conscious presence of the maker. In order to revoke a will, a maker must personally or direct someone else to physically destroy the will; create a subsequent valid contradictory will; or execute a valid codicil. A codicil is a supplementary writing that modifies or republishes a will, requiring the same will formalities as expressed above. Physical destruction of a will must touch the words of the will. Survivorship, if not altered by the will, must be proven to have continued for 120 hours by clear and convincing evidence.

Winnie's Estate: Sarah will take the diamond necklace and Henry's estate will take the $50,000 bank account as residue under Winnie's 2000 Will. Winnie's 2000 Will was valid and altered the default 120-hour rule to only 24 hours. Here, the 2000 will was validly executed and devised the necklace to Sarah at Winnie's death. The codicil executed by Winnie in 2006 purporting to revoke the 2000 Will is invalid because it does not fulfill the will formalities for a codicil to modify a prior valid will. Merely tacking Winnie's note onto the front of her 2000 Will is not sufficient to physically destroy a prior valid will. In addition, Winnie ordered Attorney to destroy the 2000 Will to revoke it, which did not take place. Furthermore, the will only required Henry survive Winnie by 24 hours in order to take the residue. Winnie's alteration of the default 120-hour rule also prevented the residue gift to Henry from lapsing and passing to Ben and Gina in equal shares under the will. Henry survived Winnie by 4 days, sufficient to take the residue under the 2000 Will. Therefore, Winnie's 2000 Will is still valid and Sarah will take the necklace and Henry will take the residue.

Henry's Estate: Ben will inherit the entirety of Henry's estate, the $100,000 brokerage account and the $50,000 bank account that passed to Henry from Winnie's estate – since Henry survived Winnie by more than 24 hours. Henry's 2008 will was not modified by a valid nuncupative will. A nuncupative will is an oral will made during the maker's last sickness. A nuncupative may amend, but not revoke a prior will and is only valid as to personal property. For a nuncupative will to be valid, it must be reduced to writing within 10 days. Here, Henry's 2008 Will gives his son, Ben, the entirety of his estate and disinherits Gina. During his last days, Henry attempted to amend his will to include Gina, but the oral will amendment in the form of a nuncupative will was never reduced to writing. Because of the failure to reduce Henry's oral will amendment to writing, the 2008 Will remained in effect. Gina may challenge the 2008 Will by using Nurse's testimony to show Henry's testamentary intent to include her in his estate; however again, the written 2008 Will will control. Therefore, Ben will inherit the entirety of Henry's estate including the residue from Winnie's estate totaling $150,000.

QUESTION 8

Company is an Ohio corporation that has 500 shares of without-par-value common stock authorized under its Articles of Incorporation. Its founders were Charles Brown ("Brown"), John Jones ("Jones"), and Carol Small ("Small"). Company properly issued 100 shares as follows: 55 shares to Brown; 40 shares to Jones; and 5 shares to Small. The Articles of Incorporation are silent as to the rights of shareholders.

Over the course of time, Brown undertook the following initiatives:

I. Promptly after the Articles of Incorporation were approved by the Ohio Secretary of State and the shareholders paid for their stock, only Brown signed a writing appointing the three shareholders as directors. The writing also appointed Brown as president and treasurer, Jones as vice-president, and Small as secretary. Brown provided a copy of the writing to all of the shareholders. No one objected to these appointments.

II. Several years later, Brown decided to assume complete control. On January 4, 2010, he sent Jones and Small an e-mail notice that a special meeting of the Board of Directors would be held on January 20, 2010, at 9:00 a.m. at the offices of Company. The notice did not specify the purpose of the meeting. Brown, Jones, and Small attended the meeting, at which Brown proposed (i) that Jones and Small be removed as officers, (ii) that they be replaced by two of Brown's business associates, and (iii) that Brown's salary be increased to $200,000. Jones and Small opposed all three of Brown's proposals. After this meeting, Brown sent Jones and Small a document signed by Brown, which stated that Jones and Small were no longer officers of Company, Brown's business associates were now officers and Brown's salary was increased.

III. Following the January 20 meeting, Brown personally delivered to Jones and Small a written notice of a special meeting of the shareholders, which would be held on January 22, 2010, at 9:00 a.m. at the offices of Company. The notice of the meeting of shareholders stated that the purpose of the meeting would be to do the following:

a. Sell 400 shares of the authorized stock to a business associate of Brown for cash at fair market value, without giving Jones and Small an opportunity to purchase any of the shares;
b. Reduce the size of the Board of Directors from three persons to one;
c. Elect Brown as the sole director;
d. Dispense with any requirement that the shareholders receive Company's annual financial statements; and
e. Sell substantially all of the assets of Company for cash at their fair market value and liquidate Company.

Brown, Jones, and Small attended the January 22 shareholders' meeting. Brown voted his 55 shares to adopt each of the items listed in the notice; Jones and Small voted their total of 45 shares against adoption of items (a) through (d); Jones voted his 40 shares against adoption of item (e); and Small voted her 5 shares in favor of adopting item (e).

1. **Was the writing signed by Brown in Initiative I effective to constitute the Board of Directors and the roster of officers?**

2. **Was the notice of the Board of Directors meeting described in Initiative II effective?**

3. **Were the actions taken by Brown in Initiative II effective to implement the proposals presented by Brown at the January 20 meeting and in his subsequent writing?**

4. **Was the shareholders' meeting of January 22 described in Initiative III and the votes taken at that meeting effective to adopt each of the items recited in the notice of the meeting?**

State separately the reasons why each of the actions was either effective or ineffective. Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

1. The writing signed by Brown in Initiative 1 was not effective to constitute the Board of Directors and the roster of offices.

   Corporations are governed by General Corporation Law (GCL). In order to form a corporation, articles of incorporation must be filed with the secretary of state. If the articles are silent on anything, the GCL controls. A corporation in Ohio must have three officers: a president, a treasurer, and a secretary. The Board of Directors is created by a shareholder vote. Shareholders can be directors, but they must vote and here, Brown made a unilateral decision and signed by himself. While all three positions can be held by the same person, a majority shareholder vote is necessary to take effect.

2. The notice of the Board of Directors meeting was effective. In order to have a meeting, the secretary or chairman of the board has to send out a notice to each of the board members in writing (in any form they have decided is acceptable). It must be at least two days in advance, state where and state when. It does not have to identify the purpose. If a board member is not alerted to the meeting, all actions taken at the meeting are void. If the member did not know about the meeting, but arrives in time to attend, he can waive his right to be informed of the meeting and the actions taken will have effect. Here, all the members knew of the meeting, came, and voted. The actions taken by the board will have effect.

3. The actions taken at the second meeting were not effective to implement the proposals Brown initiated. In order to remove officers, the board of directors has to vote. The officers are removed by majority vote. The board can also increase its salary by majority vote. Voting, however, is not based on how many shares the director owns. Directors get one vote per director. In all cases in the meeting, Brown was outvoted by his fellow directors.

4. The meeting had effect despite a faulty announcement. A shareholder meeting must be announced between 7 and 60 days with the where, the when, and the why attached to the announcement. If a shareholder does not know about it, the actions taken will not be effective. However, by showing up at the meeting, the shareholder waives his rights in that respect. Here, everyone came to the meeting so the actions potentially have effect. Efficacy of actions: all actions must be voted on by a majority of the quorum of shareholders. In Ohio, a minimum of one shareholder creates quorum. Majority needed here is by shares – Brown had 55, Jones had 40 and Small had 5. Majority would be 51.

a. Effective. Without specific pre-emptive rights in the articles of incorporation, the GCL states that shareholders do not have the right to maintain their percentage of a share. The Board did not have to offer the shareholders more shares to maintain their percentage. The action is effective because Brown voted his 55 shares.

b. Ineffective: Despite the fact that Brown had majority voting shares, if there are more than 3 shareholders, the GCL dictates there cannot be less than 3 directors. Brown cannot reduce the number.

c. Ineffective: As stated above, there must be at least 3 directors.

d. Ineffective: GCL and Sarbanes Oxley Act dictate that there must be annual reports given out to shareholders in order to keep them apprised of the company's financial state. Brown cannot remove this obligation by director vote.

e. Ineffective: Selling off all assets is a fundamental change. For this, board majority vote and 2/3 shareholder approval are needed. Brown had the majority of directors, but not the 2/3 shareholder vote even with Small's 5 shares. Also, any dissenting shareholders would have the right of appraisal for their shares if it went through. In this case, the vote is ineffective and Brown cannot sell off the assets.

QUESTION 9

Homeowner wanted to replace the windows in his two-story home in Anytown, Ohio. He saw an advertisement for windows manufactured by Safe Windows ("Safe"), in which Safe advertised a 20-year warranty, and the ad stated that a specially manufactured locking device allowed the window to be locked into place so that it could not be opened more than six inches. This, the ad stated, was "guaranteed fail-safe and prevents children from getting out and intruders from getting in." The locking feature was especially attractive to Homeowner because he had small children whose bedrooms were on the second floor of the home, so he could lock the windows to prevent the children from opening them and falling out.

Homeowner and his wife visited the Safe showroom, where a Safe salesperson showed them samples of the windows. They told the salesperson they wanted windows that would keep children from opening them and crawling out. The salesperson showed them how the locking mechanism worked and said, "I'm obviously much stronger than a small child and, as you can see, I can't budge the window past the six-inch space when the locking mechanism is engaged." Convinced by the representations in the ad and the salesperson's demonstration, Homeowner ordered the windows, which were then manufactured and installed by Safe in 2008.

In 2010, Homeowner's youngest child, Child, climbed up on a chair next to the window and, applying pressure, managed to open the window despite the locking device. Child leaned out and fell from the second story to the ground, sustaining serious and permanent injury.

Investigation of the incident revealed the following facts: Homeowner had properly engaged the locking mechanism in the window from which Child fell; Safe had purchased the locking mechanisms that it installed in windows manufactured in 2008 from a particular supplier named Locks, Inc.; Safe had received a number of complaints about failures of the Locks, Inc. mechanisms, which Safe later discovered were defective and did not meet Safe's specifications; and, commencing in early 2009, Safe ceased buying from Locks, Inc. and began purchasing the locking mechanisms from a new supplier.

After learning of Child's injury, Safe issued its first post-sale communication to purchasers of the 2008-manufactured windows advising the purchasers to schedule an appointment with a Safe representative to have the locking mechanisms replaced and warning them in the meantime to keep children away from the windows.

Homeowner plans to file a civil action on behalf of Child against Safe in an Ohio state court.

What theories based on strict products liability do the foregoing facts suggest, and can Homeowner state a prima facie case for each such theory? Discuss your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

Strict Products Liability.
In Ohio, strict products liability may be asserted against manufacturers, but not retailers who sell a dangerous or defective product as a result of a design or manufacturing defect, which was present when it left the party. Furthermore, the use or misuse of the product must be foreseeable. Additionally, causation and damages must be proven. Ohio, unlike other states, also permits subsequent remedial measures to be considered.

Safe is a manufacturer.
Safe was both a manufacturer and a retailer. Therefore, it will be party subject to strict liability. Even though it did not manufacture the lock in question, they were built by a supplier to its specifications. Therefore, Safe Windows may be held strictly liable.

The dangerous nature of the product caused a manufacturing defect.
The locking mechanisms were designed properly; however, they were not manufactured properly. This made them dangerous for the foreseeable users, home occupants, including their families and guests, and considering the ad, especially children.

The use and user were foreseeable.
This was a child-protection lock, so the most foreseeable user was a child. Child was in fact injured.

Causation.
But for the manufacturing defect, Child would not have fallen through the window. Again, for the reasons stated above, the proximate cause of the injuries were a foreseeable result of a defective child-proof window that resulted in a child falling through (actual and proximate cause are satisfied).

Damages.
The parents should document their child's injuries for damages, which the facts indicate are serious and permanent.

Foreseeability of alternatives, failure to warn and the remedial measures.
Safe knew of the problems and incidents and failed to warn users to keep their children away from the windows, because it received "a number of complaints." It ceased using the defective parts prior to Child's injury and yet failed to warn or recall until afterward. Here, the timing of the subsequent remedial measures show that Safe was aware of the defect, yet failed to warn or remedy it. Therefore, because the product contained a dangerous manufacturing defect, the retailer was also the manufacturer, the dangerous defect was the cause of the child's injury, a foreseeable victim would be a child, and they failed to warn or recall the product, Safe should be held strictly liable and Homeowner can state a prima facie case.

Homeowner should alternatively plead Breach of Express Warranty, Breach of Fitness for Particular Purpose, and Breach of Implied Warranty of Merchantability. Since the statements of Salesperson would suffice to create them. Additionally, ordinary negligence is available.

QUESTION 10

Last year, Manufacturer had 100 flat screen televisions available for sale. The televisions were subject to a properly perfected security interest in favor of Bank, which had loaned money to Manufacturer. Bank's security interest included "any proceeds from sales of the televisions." DiCo is a distribution company that purchases consumer goods and re-sells them to retail outlets. DiCo, which was aware of Bank's security interest, purchased the 100 televisions from Manufacturer and provided a promissory note to Manufacturer for their cost. Manufacturer sold the promissory note it received from DiCo to Note Co. at a discount.

Note Co., which is in the business of buying and selling commercial paper, took possession of the promissory note. Note Co. was unaware of Bank's security interest in the televisions.

DiCo sold 50 of the televisions to Retailer. George purchased two of the televisions from Retailer for use in his family room and bedroom. George purchased the televisions on credit and signed a financing statement with Retailer. Retailer did not file the financing statement with any government agency.

When the televisions were delivered, George realized they were too big for his bedroom. He sold one of them to Friend, who paid cash and installed the television in her home. Friend was unaware of George's arrangement with Retailer.

Manufacturer defaulted on its obligation to Bank. George defaulted on his obligation to Retailer.

Bank makes a claim for the 50 televisions still in DiCo's possession and the promissory note from DiCo that is held by Note Co. Retailer seeks possession of the televisions held by George and Friend.

1. **Can Bank enforce its security interest in the televisions in possession of DiCo?**

2. **Does Bank have a right to the promissory note held by Note Co.?**

3. **Does Retailer have the right to repossess the television held by George?**

4. **Does Retailer have the right to repossess the television held by Friend?**

Discuss your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

1. Bank v. DiCo.: This is a secured transactions situation that is governed by Article 9 (as are the following 3 situations). Bank can enforce its security interest in the televisions against DiCo if DiCo knew that its purchase of the televisions would interfere with Bank's security interest. A buyer in the ordinary course (BIOC) of business who purchases collateral takes the collateral free of the perfected security interests of a secured party that were created by the seller, even if the purchaser is aware that his purchase is subject to a security interest, so long as he does not know that the purchase will interfere with the secured party's rights in the collateral. Here, DiCo was a BIOC because it purchased the televisions from a merchant who sells televisions. The security interest was created by the seller (Manufacturer). Unless DiCo knew that its purchase would interfere with Bank's security interest, and the facts do not indicate that DiCo knew that its purchase would interfere with Bank's interest, DiCo takes free of Bank's security interest in the televisions. DiCo probably did not know that its purchase would interfere with Bank's interest because Manufacturers normally sell their products to purchasers despite a security interest in the products. The sale appeared authorized, so Bank loses.

2. Bank v. Note Co.: Bank does not have a right to the promissory note held by Note Co. because Note Co. is a holder in due course and in possession of the note. Generally, a perfected security interest under Article 9 does not prevent a holder in due course from taking a negotiable instrument free of the security interest. Note Co. was a holder in due course of the note because it took the note in good faith, for value, will without notice of Bank's security interest in the televisions. Generally, because Bank had a perfected security interest in the televisions and the proceeds of the televisions, Bank would have a perfected security interest in the note. However, because Note Co. was a holder in due course, Note Co. takes the note free of Bank's perfected security interest in the proceeds of the collateral (in this case the note).

3. Retailer v. George. Retailer can repossess the television from George because Retailer's security interest was automatically perfected upon the sale to George. A purchase money security interest in consumer goods automatically perfects when the debtor takes possession of the consumer goods. A purchase money security interest arose when George purchased the televisions from Retailer on credit and signed a financing statement giving Retailer a security interest in the televisions. Despite the fact that Retailer did not file a financing statement, Retailer's security interest perfected when George obtained an interest in the goods. As a result, Retailer's perfected security interest in George's television is superior to George's interest as the purchaser.

4. Retailer v. Friend. Retailer cannot repossess the television from Friend because Friend bought the goods in a consumer to consumer transaction and Retailer did not file a financing statement with respect to the televisions. The issue is whether Retailer's perfected security interest has priority over Friend's interest as a consumer purchaser of consumer goods from another consumer. A consumer who purchases consumer goods from another consumer when both parties are using the goods as consumers takes free of a perfected security interest in those goods if the secured party did not file a financing statement with respect to those goods (garage sale rule). Here, Retailer had a perfected security interest in the televisions, but failed to file a financing statement. Because Friend's purchase meets all the elements of the garage sale rule, Retailer does not have priority over Friend's interest in the television and cannot repossess Friend's television.

QUESTION 11

Defendant parked his car in front of the high school in Anytown, Ohio and waited for Beauty to leave school. He followed her to her place of after-school employment, where he waited and then followed her to her home. After Beauty entered her residence, Defendant left some flowers on her doorstep, which she discovered the next morning when she left home to go to school. A note Defendant left with the flowers described his car as a blue convertible and asked Beauty to meet him in the parking lot when she was done working that night.

Beauty was willing to meet up with the unknown admirer who had left her the flowers and the note, so after work, she walked over to Defendant's blue convertible and sat down next to him in the front passenger's seat. Defendant and Beauty began kissing one another and both agreed they should go to a place where they could become more intimate. Defendant drove his car to a deserted road, where he parked, and he and Beauty engaged in sexual intercourse. Defendant then drove Beauty back to her home and kissed her goodnight.

The next day, while sitting in his car in the high school parking lot, Defendant was arrested. Defendant was charged with the following offenses: (i) rape, (ii) kidnapping, and (iii) sexual battery. Defendant's written confession freely admitted all of the foregoing facts and stated that all of the acts with Beauty were mutually consensual.

At trial, the State introduced Defendant's entire confession without objection. The State also proved that, at the time of the alleged offenses, Defendant was 20 years old and Beauty was 14 years old.

Over objection by Defendant's attorney, the State offered evidence that Defendant had engaged in sexual activity with another high school girl just six weeks prior to his conduct with Beauty. The judge overruled the objection on the ground that the evidence was admissible to show "other acts" of Defendant.

Neither Defendant nor Beauty testified at the trial.

1. **What are the necessary elements of each of the offenses with which Defendant was charged, and was he guilty of each?**

2. **Was the judge's ruling regarding the evidence of Defendant's sexual activity with the other high school girl correct?**

Explain your answers fully.

1. Defendant is not guilty of each of the crimes he was charged with, as discussed individually below.

   i. In Ohio, rape can be proven based on either of two theories. The first theory requires sexual intercourse, against the victim's will, by force or the threat of force. The second theory requires that the defendant engage in sexual intercourse with a person under the age of 13. Here, Defendant is not guilty on the first theory because the sexual intercourse between he and Beauty was consensual, and because Defendant did not use force or the threat of force. Defendant is also not guilty on the latter theory, because Beauty was 14 years old at the time of the crime, and thus not younger than 13. However, if Defendant engaged in sexual intercourse with Beauty knowing she was 14, he can be convicted of unlawful sexual contact with a minor, which one is guilty of in Ohio when he engages in sex with someone between 13 and 15 years old.

   ii. Kidnapping is the unlawful restraint of another, meaning confining another to a bounded area against her will by force or the threat of force, and moving or concealing the person unlawfully restrained. Here, Defendant is not guilty of the crime because Beauty consented to going with Defendant in his car. Thus, Defendant did not confine Beauty against her will and did not use force or the threat of force.

   iii. Sexual battery is an unwanted or offensive contact of a sexual nature with the victim's person. As with the crimes above, Defendant is not guilty here because his contact with Beauty's person was neither unwanted nor offensive, since Beauty willingly participated in the same.

   The state may try to argue that Beauty was not able to give valid consent because of her age, but even if it establishes this fact, the Defendant will still be not guilty because necessary elements of each of the crimes above would still be missing. Specifically, with regard to rape, Defendant still did not use force or the threat of force. With regard to kidnapping, Defendant did not confine Beauty against her will and did not use force against her. Lastly, with regard to sexual battery, the contact with Beauty's person was not unwanted or offensive.

2. The judge's ruling regarding Defendant's prior sexual activity was incorrect. Unlike under the Federal Rules of Evidence, Ohio does not follow the rule that – as an exception to the general rule that evidence of other acts is inadmissible to prove conduct in conformity therewith – a defendant's past sexual acts are admissible to show his propensity to engage in such acts. Thus, in Ohio, the general rule applies and the evidence of other acts is not admissible unless it is offered for a non-character purpose, i.e,. to show motive, intent, absence of mistake or accident, identity of the defendant, or a common scheme or plan.

   Here, the mere fact that Defendant engaged in a sexual act with one other high school girl does not satisfy a valid non-character purpose. The most possible potential uses would be to demonstrate intent or a common scheme or plan. However, here, the event was isolated to a single other act that occurred six weeks prior, which does not establish a consistent course of conduct sufficient to show Defendant intended to engage in the crimes alleged here, that he had a common scheme, or that any of the other non-character purposes apply.

   Further, even if the evidence satisfies a valid non-character purpose above, it should be excluded because its probative value is substantially outweighed by its prejudicial effect. The jury will likely give undue weight to the Defendant's prior conduct and the likelihood that he would do it again merely because he has done it before, which is the result that this rule is designed to prevent.

QUESTION 12

Developer wants to purchase the following tracts of land to build a new vacation resort. All deeds referred to below are properly recorded. In each transaction, the conveying language is in the granting clause of the deed.

Tract 1
Matt transferred Tract 1, which he owned in fee simple absolute, by a deed stating, “I convey Tract 1 to Casey so long as Tract 1 is used only as a park.” Ten years after the conveyance, Casey ceased using Tract 1 as a park and began to operate a self-serve car wash on Tract 1. When Matt learned about the car wash, he notified Casey that he was taking Tract 1 back. He demanded that Casey vacate Tract 1 immediately. Casey refused to vacate and stated that he is the owner of Tract 1. Matt entered upon the property, chained the doors to the building, and cut off the water.

Matt has offered to sell Tract 1 to Developer in fee simple absolute.

Tract 2
Nina conveyed Tract 2, which she owned in fee simple absolute, by a deed stating, "I convey Tract 2 to my sister, Susan, for life and then to my children equally." Susan later died. Nina is sixty-five years old. Nina’s only living child is her son, Dan.

Dan has offered to sell Tract 2 to Developer in fee simple absolute.

Tract 3
Marc conveyed Tract 3, which he owned in fee simple absolute, by a deed stating, "I convey Tract 3 to Larry for life and then to John, if John marries Cathy." Larry is seventy years old and very ill, and John has never married.

John has offered to sell Tract 3 to Developer in fee simple absolute.

What real property interests, if any, do other persons have in each of the tracts that might prevent Developer from acquiring immediate fee simple absolute from Matt, Dan, and John respectively? Explain your answers fully.

Tract 1
Matt owns Tract 1 in fee simple absolute, and so Developer can acquire immediate fee simple absolute from Matt. Matt conveyed Tract 1 to Casey, and Casey obtained a defeasible estate, namely, a fee simple determinable. This means that Matt reserved a possibility of reverter in the land if Casey fails to continue to use the land as devised to him by Matt. When a person with a fee simple determinable violates the condition of the conveyance, the estate automatically ceases, and reverts back to the owner or his/her heirs. Here, when Casey ceased using the land as a park, and began to operate a self serve car wash on Tract 1, he lost title to the property, and title reverted back to Matt. Matt did not even need to re¬enter as he did here, because the reversion is automatic. However, Matt properly evacuated Casey, and owns Tract 1 in fee simple absolute. Developer can acquire immediate simple fee absolute from Matt.

Tract 2
Although Dan is the only living child of Nina currently, Developer cannot acquire immediate fee simple absolute from Dan alone. Nina conveyed Tract 2 to her sister for life, and then to her children equally. This means that her sister had a life estate, and then her children have a vested remainder in fee simple that is partially subject to open. The interest is a remainder interest, because it will naturally follow after the death of Susan without any preconditions, but it is subject to open because it is a class gift to Nina's children, so that if Nina has other children, the number of those who will share the estate will increase. The fact that Nina is sixty five years old currently does not matter. Under the law, she is assumed to be capable of having more children until she dies. So suppose she has another child, that child will partially divest Dan of his interest, so that both will have one half of the estate as tenants in common. So, if Dan should convey Tract 2 now to Developer, and then in the future before Nina's death another child is born, then that would divest Dan's interest, and Developer's interest will be subject to that of the future child that is born. So, Developer cannot acquire an immediate fee simple absolute from Dan. Developer should wait until Nina's death. At that point, Dan's interest will be indefeasibly vested, because the class will close, and then Developer can acquire an immediate fee simple absolute.

Tract 3
Developer may not acquire an immediate fee simple absolute from John. In Marc's conveyance, Larry has a life estate, and then John has a vested remainder interest in fee simple absolute, but with a condition subsequent. It is vested because John will naturally take at the termination of Larry's life estate. However, it is condition subsequent because John has to marry Cathy before his interest can be indefeasibly vested. Larry is still alive; it is immaterial that he is seventy years old and very ill. If John sells Tract 3 to Developer, Developer will take subject to Larry's life estate. And if Larry dies and John has not yet married Cathy, the title to the land will go back to Marc, until John marries Cathy. If John fails to do so, Developer may then never get a fee simple absolute. So, John, for now, unless he marries, Cathy, cannot convey an immediate fee simple to Developer.

MPT 1

Butler v. Hill

Applicants' law firm represents Jennifer Butler in a divorce action against Robert Hill. Jennifer was 17 when the marriage ceremony was performed, and Robert forged the required signatures on the parental consent form. However, the couple lived together, had two children and presented themselves as a married couple. When Jennifer learned that Robert had been having an affair, she decided to end the marriage. Shortly thereafter, she discovered that Robert had been married before, and that he and his first wife were divorced in 2008—that is, several years after Jennifer and Robert's marriage ceremony. Applicants' task is twofold. First, they are asked to draft a brief objective memorandum for the supervising partner analyzing whether the parties' marriage ceremony in September 2003 had any legal effect under the Franklin Family Code. Second, applicants are to prepare a closing argument in which they persuasively set forth the case for why the court should conclude that Jennifer and Robert are married under Franklin law (Franklin recognizes common law marriage) and that Jennifer should be awarded more than 50 percent of the marital property. The File consists of the task memorandum, the partner's memorandum to the file, a transcript of an interview with a neighbor, the couple's marriage certificate, the divorce judgment for Robert's first marriage, the deed for the parties' residence, and an invitation to their anniversary party. The Library contains the relevant sections of the Franklin Family Code and three cases relating to void marriages, common law marriages, and the division of marital property.

I. MEMORANDUM

To Sophia Wiggins
From Applicant
Date February 22, 2011
Re Jennifer Butler - legal effect of September 1, 2003 ceremonial marriage

The ceremonial marriage of Jennifer Butler and Robert Hill on September 1, 2003 had no legal effect under Franklin Family Code 301 et seq. At the time of the marriage, Jennifer was 17 years old. Per Section 301, Jennifer may nonetheless have married Robert if she had consent of a parent or guardian who swore that she was at least 16, or if a physician certified that she was pregnant or had given birth to a child. Neither of these criteria were satisfied. The parties married with a forged parental consent and, though Jennifer was pregnant, no certificate from a licensed physician to that effect was presented to the court. Part (b) of Section 301 notes that a marriage entered into by an underage person, though voidable at the time it is entered, may be ratified and become valid and binding when the underage party reaches consent.

Additionally, and unbeknownst to Jennifer, Robert was already married to Serena Hill and had not yet been legally divorced. Thus, Jennifer and Robert's marriage was a bigamous one. Pursuant to Section 310 of the Code, "a marriage entered into prior to the dissolution of an earlier marriage of one of the parties" is prohibited. The Hager case further notes that a bigamous marriage is void ab initio and cannot be ratified under Section 301. Accordingly, had Robert not been already married on September 1, 2003, his marriage to Jennifer could have been ratified and become valid when Jennifer reached the age of majority. However, because Robert was married at the time he married Jennifer, their marriage could not have any legal effect until after he was divorced from Serena.

II. CLOSING ARGUMENT

May it please the court:

Today you have heard the story of a young woman who entered into a marriage with a man who took advantage of her and abused her for nearly ten years. Jennifer Butler was merely 17 years old when Robert Hill came into her life. Robert, who was a worldly man of 22 at the time, told Jennifer that he was single. In a short time, he had impregnated Jennifer with a child and convinced her to marry him. Jennifer's parents protested, but Robert convinced her to go through with the ceremony. Jennifer's parents objected to the marriage and refused to consent. Robert, knowing the Court would not marry them without consent of Jennifer's parents, forged a consent form. Robert and Jennifer married in a civil ceremony on September 1, 2003. The Court performed the marriage ceremony believing it complied with Franklin Family Code Section 301.

Unbeknownst to Jennifer, Robert had been through the marriage rites before. In fact, at the time he married Jennifer, he was still married to a woman named Serena. Pursuant to the Hager case, Jennifer's marriage to Robert was therefore void as bigamous. Nonetheless, Jennifer moved in with Robert immediately after the September 1 ceremony. Shortly thereafter, as you've heard from Jennifer's testimony, Robert began verbally abusing Jennifer. Young, pregnant, and shunned by her parents, Jennifer felt she had no choice but to stay with Robert. She bore their first child, Christina, on November 14, 2003. Their second child, William, was born on February 22, 2007. From 2003 to the present, Jennifer lived with Robert, took care of their children, contributed financially to the support of the family, and endured Robert's emotional abuse.

On April 15, 2008, the Court issued a final divorce decree and thus ended Robert's marriage to Serena. The judgment became final on May 15, 2008. At that point, the legal barrier to the validity of Robert and Jennifer's marriage had been removed. Jennifer and Robert continued to live with one another, and Jennifer still had no knowledge that Robert had ever been married before. At that time, after Robert's divorce was final and until

Jennifer filed for divorce, she and Robert had a valid common law marriage pursuant to Section 309 of the Franklin Family Code.

Four months ago, Jennifer learned that Robert had been having an affair with a coworker and had lent this woman $10,000. This discovery was the breaking point for Jennifer after suffering years of abuse. She decided immediately to end the marriage. She and the children stayed in the marital home, and Robert moved out. Recently, however, Robert has threatened Jennifer with selling "his" house. He has told her he expects her and the children to be out by the end of March.

According to the Franklin Court of Appeals in Owen v. Watts, "cohabitation continued after the removal of a legal impediment cannot ripen into a common law marriage unless it was pursuant to a mutual consent or agreement to be married made after the removal of a barrier." In this case, the legal impediment to Robert and Jennifer's marriage was removed on May 15, 2008, the date Robert's divorce became final. Since then, the parties have shown at least two manifestations of consent to be married after Robert's divorce was final. First, in the summer of 2008, the parties purchased the home they had rented and lived in together for nearly five years. You've heard testimony that they used their joint income tax refund for the down payment and purchased the home on August 12, 2008. This manifestation of agreement to be married was affirmed in September of 2009, when Jennifer and Robert had a wedding anniversary barbeque in their backyard. You have heard Ms. Louisa Milligan testify about this party. Mr. Hill will argue that the parties weren't married because they never had a ceremony after his divorce was finalized. However, the law doesn't require a ceremony, but merely proof that the parties agreed to be presently married. Both the purchase of the house using joint funds and the anniversary party confirm that Jennifer and Robert consented to be married and considered them such within a few months of Robert's divorce becoming final.

The law as stated in Owen requires that the parties be able to enter into a valid marriage, that the parties manifest an agreement that they are presently married, and that the parties cohabitate, including holding themselves out to the community as being husband and wife. Here, Jennifer and Robert could enter into a valid marriage as of May 15, 2008. Jennifer had reached the age of majority at that time and Robert's divorce was final. As discussed previously, the parties manifested their agreement that they were presently married when they purchased their marital home. Finally, Jennifer and Robert lived together continuously and held themselves out to the community as husband and wife. Ms. Milligan, a close friend of the couple, told you that she believed Jennifer and Robert to be married and that Robert gave a toast at their anniversary party stating that marrying Jennifer was the smartest thing he'd ever done. Given these facts, it is indisputable that Robert and Jennifer entered into a valid common law marriage almost immediately after the legal impediment to actual marriage was removed.

Now, Robert Hill threatens to sell what he calls "his" house and to kick Jennifer and the children out of the home. Mr. Hill considers the house "his" because only his name is on the deed. However, Mr. Hill has mischaracterized the nature of the property pursuant to Franklin law. Section 410 of the Franklin Family Code states that upon entry of a final decree of divorce, as is sought here, the court shall assign to each party his sole and separate property acquired prior to the marriage, and distribute all other property and debt accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties. Thus, the mere fact that only one party's name is on the deed is of absolutely no consequence. The key is when the property was acquired.

As previously noted, the parties manifested their agreement to be presently married and thereby solidified the elements of a common law marriage pursuant to Franklin law in the summer of 2008 by deciding to use joint funds to put a down payment on the home. Thus, the purchase of the house itself was the first action taken by the newly married couple. Because it was purchased after the elements of a common law marriage had been satisfied, the home is considered marital property pursuant to Franklin law.

As further guidance to the Court in division of marital property, Section 410 provides that such division shall be equitable, just and reasonable, after considering certain relevant factors. These include the duration of the marriage; the age, health, occupation, employability, sources of income and needs of each party; each party's contribution as a homemaker or otherwise to the family unit; and the circumstances which contributed to the estrangement of the parties. It is important to note that according to the statute and the Shephard case, the division of marital property need not be equal, but must only be fair and equitable given the circumstances of the case.

Mr. Hill will argue that because the marriage was relatively short and Jennifer has her own savings account, Jennifer is not entitled to a significant share of the value of the marital home upon divorce. However, his analysis ignores the remaining factors to be considered by the court. First, Jennifer has acted as homemaker and caretaker for the parties' young children throughout the marriage. Because the children are not old enough to care for themselves, she must either continue to care for them or, if she must work more in order to pay bills after the divorce, hire outside help to do so. She has not had significant education since she has been caring for young children since the age of 17. Thus, her employability is adversely impacted. She makes less than half the income of Mr. Hill and therefore cannot afford to care for herself and the children at her current income level. Most significantly, though, the district court must consider the conduct of the parties during the marriage. Though the court cannot use a disproportionate division of marital property to punish a spouse (which Mr. Hill will argue is the case here), the Charles and Nelson courts noted that it is appropriate that misconduct affect the property distribution where the misconduct of one spouse "changes the balance so that the other must assume a greater share of the partnership load."

According to the Charles court, an extramarital affair can be an added burden sufficient to justify a disproportionate division of marital property provided that the evidence establishes the specific added burdens that the non-offending spouse suffered as a result of such misconduct. In that case, the court granted the wife only 40 percent of the marital property after receiving proof of her affair during the marriage and its effect on her husband. In the present case, the record clearly establishes that Robert Hill's extramarital affair placed an added burden on Jennifer during the marriage. Jennifer's testimony and financial records show that Robert lent his mistress $10,000 – money that would normally go to the household. This does not even take into account the funds that Robert surely spent wining and dining this woman.

We must also not forget that Jennifer endured almost seven years of emotional abuse from Robert before he finally moved out of their marital home. This conduct of Robert, along with his extremely expensive extramarital affair, clearly establish that he is not entitled to equal distribution of the marital property in divorce.

In closing, your honor, we ask that the Court recognize the clear existence of a common law marriage between Robert and Jennifer Hill, which began in the summer of 2008, just before the parties purchased their marital home. In determining the division of assets acquired during the marriage, we further ask the Court to consider the statutory factors, particularly Robert Hill's long history of abuse and his infidelity, and award Jennifer more than 50% of the value of the property. Such a division is clearly warranted and justified by Mr. Hill's outrageous actions and the burden they have placed on Jennifer.

Thank you for your attention.

MPT 2

In re Magnolia County

In this performance test, applicants are employed by the Magnolia County Counsel's Office. The county wants to build a new road connecting two state highways. To do so, the county will have to obtain an easement from the Plymouth Railroad Company over a portion of Plymouth's railroad track and install an at-grade crossing of the track. If Plymouth refuses to grant the easement, then the County will need to exercise its eminent domain powers under state law and file a condemnation action in state court to force Plymouth to grant the easement. Plymouth contends that a condemnation action would be preempted by the Interstate Commerce Commission Termination Act (ICCTA), a federal statute that governs railroad operations. Applicants' task is to draft an objective memorandum analyzing whether a condemnation action to acquire the easement for the crossing of Plymouth's railroad track would be preempted under the ICCTA. The File contains the instructional memo from the supervising attorney, notes from a meeting between the supervising attorney and the county's senior civil engineer, and a memo summarizing the preliminary meeting between the supervising attorney and railroad representatives. The Library contains three cases involving federal preemption under the ICCTA.

MEMORANDUM

To: Lily Byron, Deputy County Counsel
From: Applicant
Date: February 22, 2011
Re: Proposed Condemnation Action

The County is considering building a four-lane road connecting State Highway 44 ("SH44") to State Highway 50 ("SH50"), but needs to obtain a 60-foot-wide easement from Plymouth over a portion of its railroad track. The County's only option is to construct the connector road at ground level and have the road directly cross the railroad track, i.e., an "at-grade crossing," which will require the installation of warning lights, railroad crossing arms, and other equipment designated to prevent cars and pedestrians from attempting to cross the railroad while it is being used by a train. The County has informed Plymouth that if an agreement cannot be reached, then the County will exercise its eminent domain powers under state law and file a condemnation action to acquire the easement. Plymouth contends that if such actions are taken that the condemnation action will fail as it is preempted by federal law, the Interstate Commerce Commission Termination Act (ICCTA).

Issue

The issue presented is whether a condemnation action to acquire the easement for the at-grade crossing of Plymouth's railroad would be preempted under the ICCTA.

Factual Background

SH44 and SH 50 are north-south roads that run parallel to each other. SH44 is the primary means for suburban County residents who live north of the City of Harley to commute into and out of the City. Most commuters who live northeast of the City and work northwest of the City drive several miles out of their way south on SH44 into the City and then out again, North, on SH50 to get to the Business Park. This pattern results in one giant U-turn. Building a connector road between SH44 and SH50 north of the City will create a shortcut to the Business Park, thus easing traffic congestion. The connector road will also provide access to a large residential subdivision, Red Bluff, which is proposed for development adjacent to the connector road. The development is proposed to be 1,300 acres consisting of retail, office, institutional, multi-family, and single-family buildings, as well as recreational and greenbelt spaces. The connector road will be a four-lane boulevard with two lanes in each direction and be designated as s major thoroughfare. The proposed connector road will have to cross the railroad track owned and operated by Plymouth Railroad Inc. Building an overpass or underpass has been determined cost prohibitive after extensive and detailed engineering analysis, thus leaving the at-grade crossing as the only viable and cost-effective option. Traffic safety and control devices for the at-grade crossing include a range of passive and active devices designed to warn of the railroad track and prevent cars and pedestrians from accessing immediately before, during, and after the time that the track is in use by the train. There will be passive devices in place as well. The at-grade crossing may qualify as a "Quiet Zone" if enhanced safety features are installed, such as "constant warning" technology and quadruple gate systems. The County's budget for the project includes sufficient funds to cover the cost of implementing a Quiet Zone. No single standard system of traffic safety and control devices is universally applicable for all at-grade crossings. The appropriate control system should be determined by an engineering study involving both the government agency that is constructing the road and the railroad company.

Plymouth has expressed concern about the potential impact of the at-grade crossing on the company's railroad operations, declining to mention specifics, but stating that based on past experiences any track crossing would increase track maintenance costs and interfere with rail operations. Plymouth is also concerned with heavy use of the connector road by commuters and the potential safety hazards surrounding such use. This is because this track is very active between Franklin to Columbia and used by as many as 20 trains per day, most of which are heavy freight trains. One such hazard mentioned is that it takes an average of a half a mile to stop a heavy freight

train when an emergency break is used, which would expose the railroad to potential liability in the event a car or pedestrian was struck. Plymouth also does not want to grant an easement unless the County agrees to indemnify them for any harm that might result from the at-grade crossing. It is Plymouth's contention that any attempt by the County to institute condemnation proceedings if they refuse to grant the easement will be preempted by federal law.

Short Answer
The ICCTA will not pre-empt Magnolia's condemnation action because it can show that the intended use of the rail property would not be prevented nor will the at-grade crossing unreasonably interfere with railroad operations and the County will be able to show that the intended use will not pose undue safety risks.

Analysis
Condemnation is the power of the federal, state, or local government to take private property for "public use" so long as the government pays "just compensation," which is typically the fair market value of the property as of a certain date. See, Butte County v. 105,000 Square Feet of Land, Fn.1. Examples of public use include roads, schools, libraries, police stations, and other similar public uses and may involve taking ownership of the property of a lesser property interest, such as an easement. Id. In the instant matter, Magnolia County is seeking to use its condemnation power to take Plymouth's private property. Therefore, Magnolia must show that this taking is for "public use" and that "just compensation" is paid. The proposed public use of the connecting road is to ease traffic in and out of the City and to provide access to a large residential subdivision that will include retail, office, institutional, multi-family, and single-family buildings, as well as recreational and greenbelt space. Therefore, the County has met the public-use requirement.

Magnolia County must show that the ICCTA does not pre-empt their ability to proceed with the condemnation action. The ICCTA was enacted to reinforce the federal government's continued goals "to promote a safe and efficient rail transportation system" and to "ensure development and continuation of a sound rail transportation system with effective competition amount rail carriers." 49 U.S.C. Section 10101(3), (4). The Statute provides that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Id. Section 10501(b)(2). However, the ICCTA does not foreclose on a County's ability to pursue its condemnation power. As the Court in Butte County stated, "if [i]t is well settled that state and local regulation is permissible where it does not interfere with interstate rail operations. Rather, routine, non-conflicting uses, such as nonexclusive easements for at-grade road crossings . . . are not preempted so long as they do not impede rail operations or pose undue safety risks." Id. (emphasis added). Accordingly, the Butte County Court laid out the following two-part inquiry when determining whether the ICCTA pre-empts: (1) whether the intended use of railroad property would prevent or unreasonably interfere with railroad operations and (2) whether the County's intended use would pose undue safety risks.

A. Will the Intended Use of Rail Property Prevent or Unreasonably Interfere with Railroad Operation
In Butte County, the court found that a proposed bicycle path for pedestrian use would not impede the railroad's use or operations so long as the railroad still had vehicle access to maintain the railroads and vehicle access to maintain its signal equipment. As to safety risk, the court noted that safety risks are always present when dealing with an active railroad, but that proper action that reduces that risk, here a 50 foot set-back distance from the railroad along with fencing to prevent access to the active railroad, would prevent any undue safety risk. Thus, the court found the Butte County's condemnation was not preempted. Applying Butte County to our case, we can argue the proposed use will not impede railroad operations. Although traffic might increase over the railroad, as long as the County allows for Plymouth to access its signal boxes and railroad track for maintenance, then the County should be able to meet its burden to show that its proposed project will not impede, prevent, or unreasonably interfere with railroad operations.

Further, Plymouth has failed to articulate how the at-grade crossing would affect its continued use of the track for rail transport. The Court in City of Elk Grove noted that the railroad's failure to articulate how replacing and restoring track would impede its continued use of the track for rail transport and that such blank arguments are questionable and too speculative to justify preemption. Accordingly, if Plymouth fails to articulate such standards, this provides another ground for success on this action.

Plymouth may attempt to argue that Controe County is controlling because the City is taking a track solely to benefit the proposed development and that there are other feasible outlets, such as an over or underpass. In that case the Court found that the ICCTA did pre-empt the county's condemnation action when they sought to take a passing track and make it a public crossing with a four-lane boulevard that would access a planned residential development. However, this case is distinguishable because in that case there was another crossing available to access the proposed development at one end of the passing track. In our case, the proposed use would be the only access to the proposed development. Further, the facts show that the City conducted extensive engineering analysis that showed the only viable and cost-effective option was the at-grade crossing and they could not feasibly build an over or underpass. Thus, unlike in Controe County, there does not exist another viable option.

Plymouth also fails to make a strong case for how the at-grade crossing will impact its use of the railroad. In Controe County, the railroad presented ample evidence to bolster its position that the proposed crossing would impact its operations, such as affidavits and testimony detailing the interference. In our case, Plymouth has failed to present any such evidence, but instead relies on a general assertion that based on past experiences, "any" crossing would increase interference. Controe can be relied on to show that Plymouth must offer something more than blank assertions to succeed on their claim of interference. At best, Plymouth contends the use of the railroad by 20 heavy freighters a day. However, Plymouth does not argue that a crossing would interfere with these 20 freighters, rather that they impose a safety risk. Thus, there is no factual evidence provided by Plymouth showing how the crossing would interfere with their use of the railroad.

B. Whether the County's Intended Use Would Pose Undue Safety Risks

As to the safety risk, the Court recognizes that safety risks are going to be involved when dealing with a live railroad. However, the proposals by the County should sufficiently alleviate such safety risks thus showing the intended use will not pose undue safety risks. The City's proposal of traffic safety and control devices for the at-grade crossing, which include a range of passive and active devices designed to warn of the existence of railroad track and prevent automobile and pedestrian access to the track immediately before, during, and after the time that the track is in use, should alleviate Plymouth's concern that cars or pedestrians will be struck on the stretch of track between Franklin and Columbia. Additionally, Plymouth is not entitled to indemnification. The court in City of Elk Grove stated that "[i]ndemnifcation provisions involve allocation of risk not regulation of rail transport." Thus, any attempt by Plymouth to argue that the ICCTA preempts because the City will not indemnify them will fail. The County's budget also provides for installing "constant warning" technology and quadruple gate system that block vehicle traffic and prevent cars from driving around or between crossing arms into the path of oncoming train; this would also mean that train speed would have to slow near the crossing, thus alleviate Plymouth's concern that its freight trains would not be able to stop in time.

Conclusion

Based on the foregoing, I believe the County will succeed in its condemnation action they can show how the at-grade crossing will not affect Plymouth's use of the railroad or impose an undue safety risk.

Published by
The Supreme Court *of* Ohio
Office of Bar Admissions
www.supremecourt.ohio.gov
June 2011

The Supreme Court *of* Ohio

Office of Bar Admissions
65 South Front Street
Columbus, Ohio 43215-3431