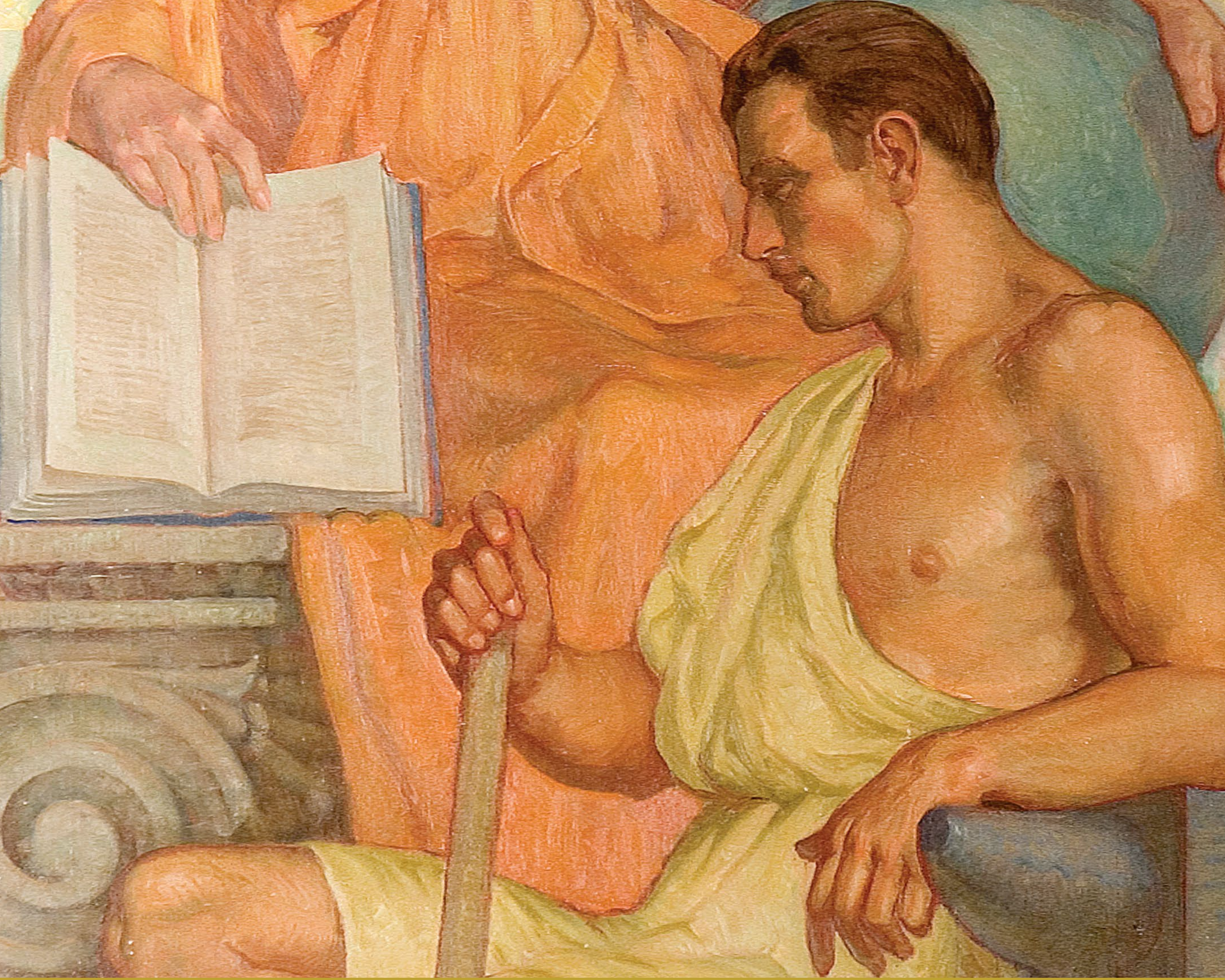

July 2024

Ohio Bar Examination

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

Published December 2024

Board of Bar Examiners

THE SUPREME COURT OF THE STATE OF OHIO

OHIO BAR EXAMINATION

The July 2024 Ohio Bar Examination contained 6 Multistate Essay Examination (MEE) questions. Applicants were given three hours to answer a set of 6 essay questions. These essays were prepared by the National Conference of Bar Examiners (NCBE).

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the NCBE. Applicants were given three hours to answer both MPT items.

The following pages contain the NCBE's summary of the MEE questions given during the July 2024 bar exam, along with the NCBE's summary of the MPT items given on the exam. This booklet also contains 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 have consented to the publication of their answers. See Gov. Bar R. I, Sec. 5(C). The answers selected for publication have been 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 July 2024 MPT and its corresponding point sheet are available from the NCBE. Please check the NCBE's web site at www.ncbex.org for information about ordering.

THE SUPREME COURT OF THE STATE OF OHIO

Question 1

QUESTION

Four years ago, Connie, a professional homebuilder, purchased a five-acre, rectangular tract of land. On its western side, the tract was bordered by land owned by Diane. One month after Connie purchased the tract, Diane sued Connie in state court to establish her adverse possession claim to a 12-foot-wide strip immediately inside the western border of Connie's tract, where Diane had maintained a vegetable garden. The court issued a judgment in Diane's favor, which was filed at the county recorder's office.

Three years ago, Connie built a house on the eastern half of the tract. One month after Connie completed the house, she contracted to sell the entire five-acre tract to Bert and convey it by warranty deed. The purchase agreement contained no express warranties regarding the quality of the house's construction. At the closing, Connie delivered to Bert the warranty deed, which excepted from warranties "all titles, covenants, and restrictions on record with the county recorder."

One year ago, Bert conveyed the five-acre tract to Adam by a quitclaim deed that contained no warranties. Adam had never inspected the tract.

Three months ago, a major crack appeared in the foundation of the house due to faulty construction. This resulted in frequent water intrusion and substantial water damage to the house.

Two months ago, when Adam started to construct a fence around the entire five-acre tract, Diane correctly told him that he could not lawfully build a fence that would block her access to the portion that she owned by adverse possession.

A gravel road runs from north to south through the middle of the five-acre tract. The gravel road connects the adjoining northern lot to the highway that abuts the tract to the south. One month ago, during Adam's fence construction on the north side of the tract, Adam's northern neighbor correctly told him that she had an implied easement of necessity over the gravel road, preventing her land from being landlocked.

1. Does Adam have a cause of action against Connie based on the crack in the house's foundation? Explain.
2. Does Adam have a cause of action against Connie based on Diane's ownership of a portion of the tract by adverse possession? Explain.
3. Does Adam have a cause of action against Bert based on Diane's ownership of a portion of the tract by adverse possession? Explain.
4. Does Adam have a cause of action against Connie based on the neighbor's easement over the tract? Explain.

In answering these questions, assume that none of Adam's claims are barred by any statute of limitations.

ANSWER

1. Does the implied warranty of fitness that Connie owed to Bert extend to Adam under these circumstances?

Under property law, an implied warranty of fitness exists when a professional homebuilder sells a newly constructed home to a buyer. The warranty of fitness warrants that the home will have quality workmanship such that it can be fit for home purposes (i.e., there are not construction defects with the house). Jurisdictions are split on whether this implied warranty from the homebuilder to the buyer extends to the buyer's successor in interest.

Here, Connie owed an implied warranty of fitness to Bert (buyer) since Connie was a professional homebuilder who built a newly constructed home and sold it to Bert (it does not matter that her deed did not have an express warranty about the quality of the house's construction). She would have violated this warranty if Bert was still the homeowner because the home did not have quality workmanship considering there was a major crack that appeared in the foundation of the house due to faulty construction. The only remaining question is if Adam, who is Bert's successor in interest to the home as evidenced by Bert's quitclaim deed to Adam, is owed this warranty from Connie too.

Therefore, if Adam lives in a jurisdiction that extends the implied warranty of fitness to a successor in interest, he has a cause of action against Connie based on the crack in the house's foundation. On the other hand, if the jurisdiction does not extend this warranty to Adam, he would not be able to have a cause of action.

2. Does Adam have a cause of action against Connie relating to Diane's ownership of a portion of the tract considering it was excepted by Connie's warranty deed to Bert?

Under property law, a warranty deed contains the covenant against encumbrances. The covenant against encumbrances can only be breached at the time of closing and warrants that there are no undisclosed encumbrances such as easements on the land being conveyed. A covenant against encumbrances will not be breached if the encumbrance was excepted in the deed.

Here, Connie did not breach the covenant against encumbrances since her warranty deed to Bert excepted "titles, covenants, and restrictions on record with the county recorder" and Diane's ownership of a portion of the tract (title) was recorded at the county recorder's office (when the court issued a judgment in Diane's favor and filed it at the recorder's office).

Therefore, Adam does not have a cause of action against Connie based on Diane's ownership of a portion of the tract by adverse possession.

3. Does Adam have a cause of action against Bert considering Bert made no warranties to Adam when he conveyed to Adam a quitclaim deed?

Under property law, a quitclaim deed contains no warranties and conveys to the grantee any interest the grantor had. The grantee cannot sue the grantor over an undisclosed adverse possession judgment if the quitclaim deed makes no warranties.

Here, Bert conveyed the five-acre tract to Adam by a quitclaim deed that conveyed no warranties. As such, Adam (grantee) cannot sue Bert (grantor) over the undisclosed adverse possession judgment in favor of Diane since Bert's quitclaim deed made no warranties.

Therefore, Adam does not have a cause of action against Bert based on Diane's ownership of a portion of the tract by adverse possession.

4. Does Adam have a cause of action against Connie based on the neighbor's easement when Adam would have had inquiry notice of this easement if he had inspected the land?

Under property law, a warranty deed contains the covenant against encumbrances and covenant of quiet enjoyment. The covenant against encumbrances can only be breached at the time of closing and warrants that there are no undisclosed encumbrances such as easements on the land being conveyed. The covenant of quiet enjoyment can only be breached when a third party appears claiming to have superior legal title to all or a portion of the land conveyed. A subsequent successor in interest could sue if there is no statute of limitations problem for breaches of the warranty deed's covenants. However, courts are split on if the successor in interest can sue when there is an undisclosed implied easement that would have been discovered by inquiry notice (i.e., a reasonable inspection of the land would have notified the purchaser of the easement).

Here, Connie granted a warranty deed of the five-acre tract to Bert and did not disclose the neighbor's implied easement of necessity since it was not one of the "titles, covenants, and restrictions on record with the county recorder" which was excepted from the warranties of the warranty deed. Therefore, Connie breached the covenant against encumbrances and the covenant of quiet enjoyment when neighbor approached Adam about this easement and prevented Adam from putting up a fence. Adam, as a successor in interest to Bert, did have inquiry notice of this easement considering the gravel road ran from north to south in the middle of the five-acre tract and the road connected to the neighbor's lot to the highway in the south. It does not matter that Adam did not inspect the tract; he is still under an obligation to inspect the land since a reasonable person would do so.

Therefore, Adam has a cause of action against Connie based on the neighbor's easement over the tract if the jurisdiction Adam lives in does not have the implied easement inquiry notice exception. On the other hand if it does, he has no cause of action.

Question 2

QUESTION

XYZ Corp owns all the common stock of CruiseCo, which operates a fleet of 24 oceangoing passenger cruise ships. In addition, XYZ owns 90% of the common stock of ResortCo, which operates several large hotels and marinas on ocean coastlines. As a result of its share ownership, XYZ has the power to choose all members of the boards of directors for both ResortCo and CruiseCo, and it has voted its shares so as to elect XYZ employees for all seats on each board. All three corporations are incorporated in State A, which has adopted a corporate statute identical in substance to the Model Business Corporation Act.

During the past two years, CruiseCo's profits have steadily declined because fewer people have booked cruises. Moreover, many of the marinas where CruiseCo's ships stop to refuel have increased their docking fees. CruiseCo's ships frequently dock at Resort Co-owned marinas as part of their ordinary operations. ResortCo charges CruiseCo the same docking fees as it charges other cruise lines.

Last year, XYZ demanded that ResortCo stop charging CruiseCo's ships docking fees. At a board meeting to consider this demand, ResortCo's directors voted unanimously to acquiesce to XYZ's demand, even though ResortCo was contractually entitled to those fees. Eliminating the fees would help CruiseCo by reducing its operating costs and hurt ResortCo by lowering ResortCo's revenues.

Six months ago, at a board meeting, ResortCo's directors voted unanimously not to declare or pay the usual yearly dividend. The directors' rationale for this decision was to retain funds to construct new hotels and increase ResortCo's market share. The board reached its dividend decision after considering for several hours a report on the financial implications of the potential dividend from the company's chief financial officer and its independent accountant, as well as an advisory opinion prepared by an outside law firm.

At ResortCo's properly called board meeting last week, the board considered an offer that had been presented to ResortCo's president half an hour before the meeting. The offer was from Ava, the owner of 1,000 acres of coastal land well suited for commercial property development, to sell her land to ResortCo for $50 million. Ava, who had no previous connection to ResortCo, had told the president that she would hold the offer open for only 48 hours. Citing the time-sensitive nature of the offer and the attractiveness of the property, ResortCo's directors discussed Ava's offer for only 15 minutes before unanimously voting to accept it. ResortCo's directors did not obtain any guidance about the transaction's fairness or potential impact on the company's financial condition from outside experts or from ResortCo's chief financial officer before voting. In fact, the price was above the property's fair market value.

1. Did XYZ, as a controlling shareholder of ResortCo, breach a fiduciary duty of loyalty to ResortCo or ResortCo's minority shareholders by causing ResortCo to stop charging CruiseCo docking fees? Explain.

2. If ResortCo's minority shareholders challenge the board's decision not to declare a dividend this year, are they likely to prevail? Explain.

3. Is the ResortCo board of directors' decision to purchase Ava's land protected by the business judgment rule? Explain.

ANSWER

1. The issue is whether XYZ owed a duty of loyalty to ResortCo's minority shareholders when it demanded that ResortCo stop charging docking fees.

Generally, a shareholder owes no fiduciary duty to any other shareholder. There is an exception to this duty when a majority shareholder owns such a percentage of the stock that it singlehandedly controls the corporation. At that time, the majority shareholder owes a duty of loyalty to the minority shareholders. The business judgment rule, which works as a presumption that a director or controlling officer acts in the best interest of the company and that their decisions are a valid exercise of business judgment, does not apply to cases where there has been a breach of loyalty. A breach of loyalty can be shown by a self-dealing transaction where an interested party is on both sides of the transaction, by competing against the company, or by usurping a business opportunity of the corporation.

When a director or in this case the majority shareholder, has potentially breached the duty of loyalty, there are three safe harbor provisions that will save an otherwise self-dealing transaction. These safe harbors are complete disclosure and approval by a majority of uninterested directors, complete disclosure and approval by a majority of uninterested shareholders, or that the deal is substantively fair to the corporation.

In this case, XYZ has engaged in a self-dealing transaction by forcing ResortCo to stop charging CrusieCo fees for docking. XYZ is the controlling majority shareholder of ResortCo and the sole shareholder of CruiseCo. This means that XYZ effectively controls both entities on either side of the transaction. For this transaction to be saved, it needs to fall under one of the safe harbor provisions stated above. There are no facts to suggest that XYZ sought complete disclosure and approval from the uninterested directors. Further, it is unlikely that any uninterested directors exist because XYZ appointed all of the members of the board. XYZ also did not seek approval from the other shareholders, so that safe harbor provision is also inapplicable. Lastly, the deal is not fair to ResortCo. ResortCo was contractually entitled to the fees from CruiseCo and will no longer get the revenue it should be getting.

Therefore, XYZ breached a duty of loyalty to the minority shareholders of ResortCo by engaging in a self-dealing transaction that was unfair to CruiseCo.

2. The issue is whether the minority shareholders can hold CruiseCo liable for not issuing a dividend. Shareholders are generally not entitled to force the issuance of a dividend.

Shareholders are entitled to receive their share of a dividend that is dispersed, but absent a breach of a fiduciary duty, a shareholder cannot force the distribution of a dividend. The decision to issue a dividend is subject to the business judgment rule. The business judgment rule is a presumption that a business director or officer acted in good faith, with full knowledge of the facts, and made a valid business decision. The business judgment rule can be overcome by showing a breach of the duty of loyalty or care. The duty of care requires the officers and board to act on an informed basis, within their authority as a reasonably prudent person would of similar skills.

In this situation there is no basis for a breach of the duty of loyalty. As discussed above, the distribution of a dividend is not a transaction where a director is on both sides of the transaction. There is also no breach of the duty of care in this situation. The board made a fully informed decision and deliberated for adequate time. The board deliberated on the decision to issue a dividend for several hours. In those several hours the board considered the report by the CFO, an independent accountant as well as an advisory opinion by an outside law firm. The board had a valid business decision basis for not issuing the dividend by wanting to use the money to expand and increase its market share. The board made its decision fully informed and in good faith, so there is no breach of the duty of care and the business judgment rule presumption will apply.

Therefore, the minority shareholders will not prevail on a challenge of the board's decision to issue a dividend.

3. The issue is whether the board breached the duty of care in its decision to purchase the land owned by Ava.

As discussed above the business judgment rule is a presumption that a business director or officer acted in good faith, with full knowledge of the facts, and made a valid business decision when that person makes a business decision. The business judgment rule can be overcome by showing a breach of the duty of loyalty or care. The duty of care requires the officers and board to act on an informed basis, within their authority as a reasonably prudent person would of similar skills.

In this situation, ResortCo's minority shareholders will be able to rebut the presumption of the business judgment rule because of a breach of the duty of care. The board breached its duty of care by hastily entering into this transaction with Ava. The board only discussed this decision for 15 minutes before deciding to enter into the transaction. Unlike the decision not to issue a dividend, the board did not get an opinion from the company's CFO, and it did not seek an independent opinion from an accountant or law firm. Further the board decided to enter into a 50-million-dollar real estate transaction without seeking an appraisal for the cost of the property. A reasonably prudent person would not have hastily made this decision and would have sought outside information, as well as considered the opportunity for more than 15 minutes. This will be seen as a breach of the duty of care that rebuts the presumption of the business judgment rule by a court.

Therefore, the minority shareholders are likely to be able to bring an action for the breach of the duty of care as a result of the Ava real estate transaction.

Question 3

QUESTION

Three years ago, CarCo, an automobile manufacturer located in State A, entered into contracts with several State A automobile dealers. Under these contracts, the dealers had the right to sell cars made by CarCo. The term of each contract was 10 years, but the contract gave CarCo the absolute right to terminate the dealer's rights upon 60 days' written notice. CarCo insisted upon this termination provision because badly performing dealerships impact CarCo's profitability. CarCo has never entered into a dealership agreement without this provision and, during contract negotiations with other potential dealers, has consistently refused to omit the provision from dealership agreements.

Two years ago, CarCo announced that it planned to terminate agreements with rural dealers in many states and to encourage potential car buyers in rural areas to use CarCo's website to purchase cars. CarCo estimated that this new business model would result in significant cost savings. CarCo relied on the ability to terminate dealers' rights when it invested in expanding its online business.

After learning that CarCo intended to terminate agreements with rural dealers, the State A legislature passed a statute regulating agreements between automobile dealers and automobile manufacturers. The statute provides:

> Notwithstanding the terms of any contract, an automobile manufacturer shall not, without good cause, terminate any contractual rights of a dealer located in a county with a population of less than 1,000. This provision applies to contracts entered into both before and after the effective date of this statute.

The legislature had not previously regulated agreements between automobile manufacturers and dealers, and State A's highest court had held that the state common law did not generally limit the enforceability of contract-termination provisions.

Prior to enactment of the statute, some members of the state legislature privately expressed anger that automobile manufacturers were terminating agreements with rural dealers and thought that the statute was a good way to "get back at them." The statute includes the following legislative finding and statement of legislative purpose:

> This Act addresses the imbalance of bargaining power between automobile manufacturers and dealers. We find that if the parties were able to freely bargain on an equal footing, their agreements would contain a provision allowing termination only for good cause.

Last month, CarCo gave a State A rural dealer timely written notice of termination as provided in the dealership agreement. The dealer sued CarCo, citing the statute and asserting that CarCo could not terminate its rights as a dealer because CarCo lacked good cause to do so.

CarCo asserts that the statute is unconstitutional for three reasons. First, applying the statute to the dealership agreement, which the parties entered into before the statute was enacted, violates the Contracts Clause of the Constitution. Second, the statute violates the Equal Protection Clause of the Constitution because it impermissibly discriminates between automobile-dealership agreements and contracts involving other products with similar provisions that allow termination without cause. For this second claim, CarCo has offered evidence of the legislators' private statements to prove that the state's actual purpose for the law was to effectuate the state's animus against automobile manufacturers. Third, the statute's good-cause requirement for terminating automobile-dealership agreements violates CarCo's substantive due process rights.

1. Does application of the State A statute to CarCo's rights under the dealership agreement with the dealer violate the Contracts Clause? Explain.
2. Does the State A statute violate the Equal Protection Clause? Explain.
3. Does the State A statute violate CarCo's substantive due process rights? Explain.

ANSWER

The application of the State A statute to CarCo's rights under the dealership agreement with the dealer does violate the Contract Clause.

The Contract Clause prohibits a state from enacting legislation that retroactively interferes with already existing contracts. The rights that a party is asserting which were violated must have been in existence at the time of the legislation. Generally, if a state is a party to the contract, the statute will not be held up on strict scrutiny, unless the state can prove that the statute is necessary to achieve a compelling government interest. However, if the state is not a party and the contract is between two private entities, the statute is subject to intermediate scrutiny, and the statute will be unconstitutional unless the state can prove that the statute is substantially related to an important interest.

Here, CarCo had already entered into contracts with several dealers in State A when the state enacted the statute in question. Undeniably, the statute interferes with some of the rights that CarCo bargained for in making the contracts, particularly the right to terminate the contract, which CarCo relied on in expanding to their new online business model. CarCo had the ability to enter into these contracts before the statute was enacted because the highest court in the state held that the contracts were enforceable. Since the statute takes away a contractual right of CarCo (and the state is not a party), the statute will be upheld only if the state can prove that it is substantially related to an important government interest. The imbalance of bargaining power between the contracting parties may be an important government interest. However, even if it is, the state's statute was not substantially related to such an interest as there are plenty of other ways to prevent the power imbalance. The state could subsidize having dealerships in small towns, prevent the prohibited clauses in future contracts (which this statute does), or take other action to improve the imbalance of power.

Therefore, the application of the State A statute to CarCo's right under the dealership agreement with the dealer does violate the contract clause.

The State A statute does not violate the Equal Protection Clause.

The Equal Protection Clause, as applied to the states through the Fourteenth Amendment, prohibits states from discriminating in their laws. To have a violation of Equal Protection, a plaintiff generally must show that the state acted with some discriminatory intent. This can be that the statute either discriminates on its face, or that there was a discriminatory application or effect, and the legislature acted with discriminatory intent. If there is discriminatory intent, discrimination against a suspect class (race, national origin, or alienation), will be subject to strict scrutiny and only upheld if the state law is necessary to a compelling government interest. If the discrimination is against a quasi-suspect class (gender or legitimacy), the statute will be upheld if it is substantially related to an important government interest. Finally, if the statute discriminates against a non-suspect class, the statute will be subject to rational basis review and upheld if the state interest is rationally related to a government interest. The burden is on the state for strict and intermediate scrutiny and on the plaintiff for rational basis.

Here, CarCo alleges that the statute discriminates based on agreements between automobile dealership contracts and contracts involving other products. There is evidence that this contract discriminates on the face against such automobile dealership agreements and that there is legislative intent to discriminate to "get back at them." However, being an automobile dealer or seller of another product is not a suspect class or quasi-suspect class. Consequently, the statute will be subject to rational basis review, and CarCo must prove that the statue is not rationally related to a legitimate government interest. The statute here relates to the legitimate government interest of protection from imbalance of bargaining power. The statute rationally relates to this legitimate interest by not allowing manufacturers to cancel contracts with dealers in small towns.

Therefore, the State A statute does not violate the Equal Protection Clause.

The State A statute does not violate CarCo's substantive due process rights.

The Due Process clause applies to the states through the Fourteenth Amendment. A substantive due process right has been violated when a right has been denied to everyone by state statue. If the right that was denied was a fundamental right (i.e., right to interstate travel, right to work, certain rights to privacy, right to raise a family, right to vote), then the statute will only be upheld under strict scrutiny if the state can prove that the statute is necessary to achieve a compelling government interest. If the right denied is not a fundamental right, the statute will be upheld under rational basis review if the plaintiff can prove that the statute is not reasonably related to a legitimate government interest.

Here, CarCo asserts that it has been denied a right because the statute requires good cause for termination of an automobile-dealership agreement. The most direct right that this can assert would be the right to freedom of contract. Freedom of contract is not a fundamental right under the Constitution, so the statute will be upheld unless CarCo proves that it is not rationally related to a legitimate government interest. Again, the state has a legitimate government interest in protecting rural companies with an imbalance in bargaining power. Further, the state statute is reasonably related to this interest because it requires good cause for an automobile manufacturer to terminate a contract with such a company.

Therefore, the State A statute does not violate CarCo's substantive due process rights.

THE SUPREME COURT OF THE STATE OF OHIO

Question 4

QUESTION

A store owner wanted a new sign for her store. On May 1, she met with a representative of SignCo, a sign company, which she had selected on the basis of its low advertised prices, and detailed her proposed specifications for the sign. The store owner and the representative, who was authorized to enter into contracts on behalf of SignCo, orally agreed that SignCo would deliver to the store owner a 10-foot-long sign, for which the store owner would pay $5,000. They agreed that the sign would bear the unique name of the store, would be constructed of bent red glass, and would meet quality and design specifications stated by the store owner. They also orally agreed that the sign would be delivered to the store owner no later than May 31.

On May 6, SignCo had made substantial progress in shaping the glass into the store's name. By May 8, however, SignCo determined that it would not be able to finish the sign on time. Without the store owner's knowledge, on May 9 SignCo entered into an agreement with another company (the "substitute manufacturer"). The agreement required the substitute manufacturer to complete work on the sign and supply it to the store owner in accordance with the agreement between SignCo and the store owner. In addition, the agreement assigned to the substitute manufacturer SignCo's right to be paid under the agreement with the store owner.

On May 12, SignCo and the substitute manufacturer jointly called the store owner to tell her that the substitute manufacturer would be furnishing the sign to her and that the sign would be ready for delivery by the May 31 deadline. The store owner was angry. She told SignCo and the substitute manufacturer that she had contracted to buy a sign made by SignCo, not by the substitute manufacturer, and that she had no intention of accepting a sign made by anyone other than SignCo.

On May 31, the substitute manufacturer delivered to the store owner a sign that conformed to all the specifications of the store owner's agreement with SignCo. The store owner rejected the sign and refused to pay for it, arguing that the May 1 agreement could not be enforced against her because she had never signed a document reflecting that agreement. She also argued that even if she was bound by the May 1 agreement, its terms required that she receive a sign made by SignCo, not by the substitute manufacturer.

1. Did the store owner and SignCo enter into a contract on May 1? Explain.
2. Assuming that the store owner and SignCo entered into a contract on May 1, is it enforceable against the store owner even though the store owner did not sign a document reflecting the agreement? Explain.
3. Assuming that the May 1 agreement constitutes a contract that is enforceable against the store owner, is the store owner bound to accept the sign from the substitute manufacturer? Explain.

ANSWER

Contract on May 1

There was a contract entered into on May 1 (albeit not an enforceable one as of that date). The issue is whether the parties entered into a contract.

Here, this is a contract for goods, movable tangibles, so it is governed by the UCC. The sale is primarily for the sale of a sign created by SignCo sold to the store owner. SignCo's services of designing and creating the sign are incidental to the goods and, as such, it is a contract for goods.

A valid contract requires mutual assent (offer and acceptance), consideration, and the absence of defenses. An offer is a manifestation by the offeror that they are willing to enter into an agreement with the offeree and be bound by the terms of the deal. An offer requires a certain degree of definiteness. A contract for goods requires a quantity term and must identify the offeree. The offeree accepts by manifesting, under the terms of the offer or, if not specified, by words or conduct, that they assent to the terms of the offer. Consideration is a bargained for exchange of a thing of value that induces the other party and the other party's consideration is likewise induced by the other consideration.

Here, on May 1, the store owner and the representative who was authorized to enter into contracts on behalf of SignCo orally entered into an agreement whereby SignCo would create a 10-foot-long sign according to the store owner's specifications and the store owner would pay $5,000. The agreement is mutual assent because they both manifested their intent to be bound under the agreement. SignCo's consideration was the promise to provide the sign and the store owner's consideration was the promise to pay $5,000. The offer and contract were definite as to its terms because it specified the quantity, one sign. There is an issue because there is an applicable defense, but that goes to the enforceability of the contract, not whether there was a contract at all.

As such, a contract (albeit unenforceable as of May 1) was entered into on May 1.

Enforceability

The issue is whether the sign was a specially manufactured good such that the contract falls into an exception of the statute of frauds.

There is a contract for the sale of goods, movable tangibles, because the sign is the primary purpose of the contract and it is a movable tangible. The statute of frauds requires certain contracts be in writing and signed by the party charged for them to be enforceable against that party. The statute of frauds applied to sales of goods for $500 or more.

Here, the contract was for the sale of a sign at $5,000. This is a sale for goods of $500 or more, and, as such, must be in writing and signed by the store owner to be enforceable against them. This was an oral agreement, and there was no writing, so, at least as of May 1, the contract was not enforceable.

However, there is an exception to the statute of frauds if the goods are unique or specially manufactured. Goods are specially manufactured goods if they are manufactured for the buyer in a way that makes them not reasonably available for sale to a third party. Once the party has made substantial progress in the special manufacturer of the goods, the contract is taken outside of the statute of frauds and is enforceable against the party. An example is if a buyer orally contracts with a company to embroider pillows with the buyer's first and last name. These are specially manufactured for the buyer, and, because they bear their name, they are not reasonable resellable to a third party. Once the seller makes substantial progress on embroidering the pillows, this contract would be enforceable against the buyer as an exception to the statute of frauds.

Here, the store owner orally contracted with SignCo to pay $5,000 if SignCo delivers a sign by May 31 matching her specific specifications: bear the unique name of the store, constructed of bent red glass, and meet certain design and quality specifications. This an oral contract for specially manufactured goods. However, the contract was not enforceable on May 1 because no substantial progress had been made and there was, as discussed above, no writing.

Instead, an enforceable contract arose on May 6 when SignCo made substantial progress in shaping the glass into the store's name. The store's name was unique, and once substantial progress was made in shaping the glass into this name, the product was not reasonably resellable to a third party. As such, this falls within the exception to the statute of frauds for specially manufactured goods and the contract is enforceable against the store owner.

Acceptance of the Sign

The issue is whether SignCo's duties under the contract were delegable to the substitute manufacturer.

A delegation occurs when one party enters into an agreement to delegate their duties under the contract to a third party.

Generally, a party to a contract can delegate duties under the contract unless provided otherwise. Additionally, a party cannot delegate their duty under the contract if special skill is involved (such as contract for a famous artist to paint my portrait). However, if no special skill is involved as it pertains to the duty, and there is no contrary provision in the contract, the party can delegate their duties.

In the case of a delegation, the delegee has all the rights against and obligations to the obligor as the delegor had to the extent of the delegation. Additionally, the obligor has the same defenses against the delegee as they would have against the assignor.

This is a contract for goods governed by the UCC, and the UCC requires perfect tender of goods whereby the goods conform exactly to the terms of the contract.

Assuming the May 1 agreement constitutes a contract that is enforceable against the store owner, the store owner is bound to accept the sign from the manufacturer.

Here, SignCo discovered on May 8 that they would be unable to finish the sign on time, so they entered into an agreement with the substitute manufacturer to delegate their duty to create and deliver the sign to store owner and assigned their right to payment under the contract. On May 12, SignCo and the substitute manufacturer called the store owner to tell her the substitute manufacturer would deliver to the store on time, but the owner was angry and said she would not accept.

If the May 1 contract was enforceable, then the store owner's statement that she would not accept was an anticipatory repudiation-it was a breach. However, the substitute manufacturer was still free to perform under the contract and seek performance from the store owner. The substitute manufacturer delivered the sign on May 31 that conformed to all the specifications of the agreement with SignCo.

The store owner argues that the agreement was for a sign made by SignCo, essentially that SignCo's duty was nondelegable. However, this creation of the sign did not require special skill beyond that generally within the industry, so it was delegable. The delegation was valid, the substitute manufacturer made a perfect tender of the sign pursuant to the terms of the agreement, and, as such, the store owner is bound to accept the sign.

THE SUPREME COURT OF THE STATE OF OHIO

Question 5

QUESTION

Wanda, who had been married to Harvey for 15 years, filed a complaint for divorce from Harvey shortly after she learned that he was having an affair with their married neighbor, Patrice. In the divorce proceeding, both Wanda and Harvey sought sole custody of their 13-year-old daughter.

Because Harvey and Wanda bitterly argued about and were highly critical of each other's parenting, the trial court appointed a neutral child-custody evaluator to investigate the family dynamics and provide an informed custody recommendation to the court. Both Wanda and Harvey told the evaluator that they were unwilling to share custody. The daughter told the evaluator that she was very upset because her parents were divorcing. She blamed her mother for the divorce and wanted to live with her father. The evaluator found that both parents were devoted to their daughter and recommended that the trial court grant Harvey sole physical and legal custody of the daughter, with Wanda to have liberal visitation with the daughter. The trial court granted the divorce and entered a custody order consistent with the evaluator's recommendation. Neither parent appealed this order.

Two months after the trial court entered the divorce decree and custody order, Patrice moved into Harvey's home. Wanda immediately petitioned the trial court to modify the custody order. She sought sole physical and legal custody of the daughter because of Harvey's nonmarital cohabitation with Patrice. Harvey opposed Wanda's petition, arguing that there was no justification for modifying the custody order. Neither Wanda nor Harvey requested joint custody, and the relationship between Wanda and Harvey remained bitter and acrimonious.

The trial court held a hearing on Wanda's petition to modify custody. The daughter testified, "I am still angry that my parents got divorced, but I do miss my mom and wouldn't mind seeing her more. Patrice is fine." Harvey testified that there had been no change in the daughter's behavior since Patrice moved into his home and that she and the daughter "get along well."

Wanda testified that the daughter should not be exposed to the nonmarital cohabitation of Harvey and Patrice. There was no other testimony.

1. Are the facts legally sufficient to authorize the trial court to consider whether to modify the existing custody order? Explain.

2. Assuming that the facts are legally sufficient to authorize the trial court to consider whether to modify custody, should the trial court modify the existing custody order to grant Harvey and Wanda joint physical and legal custody of their daughter? Explain.

ANSWER

1.) Trial court authorization of Custody Order Modification

No, the facts here are not legally sufficient to authorize that the trial court modify the child custody order. Child custody orders are modifiable, but typically are only modified if there has been a substantial change in circumstances warranting such modification or if it is in the best interest of the child to modify them. Best interest of the child considers a host of factors including child preference, parental preference, child's overall wellbeing and behavior, and community ties - any major changes to these areas should be scrutinized. Additionally, absent such a substantial event, custody orders usually remain in place for a period of years before they are revisited, especially if they are appealed. From a policy perspective, this promotes consistency for the child, but then also avoids the courts being mired in consistent requests for changes to custody orders from acrimonious spouses.

Here, Wanda's request for a modification of the custody order comes only two months after the court offered the initial divorce decree and custody order. She did not appeal the initial order. The only "substantial change" was that Patrice, Harvey's mistress, moved into Harvey's home that he shares with their daughter. Wanda said she does not want her daughter "exposed" to Harvey's nonmarital relationship. However, unless Wanda can prove that Harvey and Patrice are inappropriate in front of her daughter or have subjected her to illegality or other sexual behaviors that might impact her wellbeing, there is likely no basis for the court to change the child custody order. Otherwise, such a change does not require Wanda's approval because she does not have custody of her daughter. Also, there are no facts indicating that daughter is not amenable to the custody arrangement. She gets along with Patrice, and her typical behaviors remain unchanged - she seems fairly well-adjusted even if she is still angry about her parents divorce. While daughter would like to spend more time with mother, the current custody arrangement already allows for ample visitation with Wanda. The parties can exercise those rights without court intervention. Overall, because there are no facts to suggest that there was a substantial change in circumstance that adversely impacted the best interests of the child, it seems unlikely the court has sufficient authorization to update the custody agreement after two months.

2.) Should Custody Order be Modified

No, it is likely not in the best interests of the child to modify the custody order to grant Harvey and Wanda joint physical and legal custody of their daughter at this time. In granting physical and legal custody rights, the court closely scrutinizes the relationship of the parents as joint custody requires an effective and relatively harmonious working relationship between parents. Here, Harvey and Wanda simply do not get along. Their relationship is acrimonious and bitter. Harvey and Wanda argue and are highly critical of one another. It seems as if they would be unable to work together to meet their daughter's needs and make joint decisions for her welfare. If the court modified the order now, this might have an adverse impact on daughter's well-being as she will continue to be exposed to her parents' acrimonious relationship.

Daughter has requested more time with her mother. Under the current order, Wanda has liberal visitation rights. If daughter wants to spend more time with Wanda, she can do that today. There have also been no indications that daughter's wellbeing is compromised by the current order. Harvey indicates that his daughter and Patrice get along. Daughter chose to live with Harvey and still seems to like living with him - she seems less angry with her mother so it would benefit all to ensure that Wanda and daughter get needed time together. Otherwise, there is no reason for the court to modify the order.

THE SUPREME COURT OF THE STATE OF OHIO

Question 6

QUESTION

A woman was driving in State A when her sport-utility vehicle (SUV) collided with a car driven by a man. As a result of the accident, the woman, who is a citizen of State A, had significant injuries requiring treatment by a physician. The man is a citizen of State B and was in State A visiting his brother at the time of the accident.

Three passengers were in the man's car: the man's brother was in the front passenger seat, and two of the man's friends were in the backseat.

The man had a car insurance policy that provided coverage of up to $1,000,000 for personal injuries and property damage.

The man hired an attorney, who began investigating the accident. The attorney spoke to four people: a bystander who had witnessed the accident, the man's brother, and the man's two friends who had been in the car. The bystander recounted that the man had been looking at his phone at the time of the accident. The man's two friends also stated that the man had been trying to read directions on his phone at the time. The man's brother stated that the man had not been looking at his phone when the accident occurred.

Shortly after the man's attorney completed his investigation, the woman sued the man in the US District Court for the District of State A. Her complaint asserted a claim of negligence against the man and sought $250,000 in damages for personal injury and property damage. Pursuant to Federal Rule of Civil Procedure 26, the woman and the man exchanged initial mandatory disclosures. The man's initial disclosures included his brother's name and contact information, along with a summary of the information that the brother could provide concerning the accident. The man's initial disclosures did not identify or refer to the other passengers or the bystander, although the man later identified them in answers to interrogatories. The man's initial disclosures also did not include any information about his car insurance policy.

During discovery, the woman's attorney took the man's deposition. When the woman's attorney asked the man about his eyesight, the man's attorney objected and instructed the man not to answer, asserting that the line of questioning was not relevant. When the woman's attorney persisted in asking the man about his eyesight, the man's attorney abruptly ended the deposition, and the man and his attorney immediately departed.

Subsequently, the woman's attorney filed a proper motion to compel the man to answer deposition questions, but the court denied the motion, finding that "questions about the man's health and physical condition are irrelevant to this tort suit, and inquiry about them is improper."

Later, the woman's lawsuit was tried to a jury. At trial, the woman called the man's two friends and the bystander to testify. Each witness testified that the man had been looking at his cell phone at the time of the accident. The woman also called her treating physician to testify. The physician described the nature and extent of the woman's injuries. The only witness the man called was his brother, who testified that the man had not been looking at his phone when the accident occurred. Immediately after the man rested his case, the woman moved for judgment as a matter of law on the issue of the man's liability for negligence.

1. Was the man required to include in his initial disclosures information about the insurance policy and the identity of the three other witnesses to the accident? Explain.
2. Did the trial court rule correctly on the woman's attorney's motion to compel the man to answer deposition questions about his eyesight? Explain.
3. How should the court rule on the woman's motion for judgment as a matter of law? Explain.

ANSWER

1) The issue here is whether an insurance policy and known witnesses to the crime are required initial disclosures even if the man does not use him in his defense. Under the rules, a defendant is required to disclose insurance policies that may be used in the litigation as well as any documents, evidence, people/witnesses that the defendant plans to use in defense of the litigation at hand.

Here, the man had a $1,000,000 insurance policy for personal injuries and property damages and failure to disclose this at the forefront constituted a violation of his required initial disclosures. Such information was certainly relevant. In terms of witnesses, the defense is required to use all known witnesses that he expects to use in his defense. If the man had no intention to call such witnesses such as the bystander and the two friends, then he will not be in violation of the initial disclosure requirement. Interrogatories come after the initial disclosures and must be answered truthfully. The defendant will not be liable for knowing the existence and not disclosing the witnesses he did not plan to use especially if they were reasonably identifiable by the plaintiff. Here, the plaintiff called the two friends and the bystander showing she was able to identify them, and we have no evidence that the man used them in his defense. Thus, absent some showing that his responses maybe in the interrogatories used the bystander or friends in terms of defending his conduct, the man will not be liable for this failure to disclose them. He will only be liable for failing to disclose the insurance.

2) The issue here is whether the defendant had a right to refuse the woman's questions as directed by the attorney. Under the federal rules, a defendant is expected to answer truthfully questions asked by the other side in order to help ease the trial process and get more information out on the table during discovery. If an attorney takes issue with a question they may object, but the defendant still must be directed to answer. Such objections get straightened out later and certain answers will be inadmissible. However, if the question on objection is related to privileged information, the defendant can be instructed to not answer and the latter will be sorted out by the judge to determine if such information is truly privileged.

Here, the man was asked about his eyesight. The attorney objected and directed the man not to answer based on the fact the question was not relevant. In the instance of a car accident and whose fault is being considered, eyesight is certainly relevant. Further, this was not an objection based on privilege and therefore the attorney was incorrect to direct the defendant not to answer and storming out of the deposition. Had the attorney raised an objection based on some sort of doctor privilege this would have had more weight, but relevance was certainly not grounds to not answer and end the deposition. Thus, the trial court is incorrect in denying the motion to compel. Eyesight is certainly relevant to negligence if the man was not operating the vehicle with a reasonable degree of care as someone with bad eyesight (such as wearing glasses) and could have contributed to the accident.

3) The court should deny the woman's motion for judgment as a matter of law. The issue here is whether the defendant failed to present evidence to create genuine dispute of fact regarding the woman's negligence allegations. In order to grant JMOL, there must be no disputed question of material fact that

could lead a reasonable juror to find for the nonmoving party. This should be viewed in light most favorable to the non-moving party.

Here, the woman presented three witnesses who said the man was looking at his phone at the time of the accident. On the other hand, the man's brother testified on his behalf that he was not looking at his phone. While the woman had more witnesses than the defendant which a juror could find more credible, a reasonable juror could also find the brother more compelling and find him more credible since he was in the front seat and therefore closest to the driver. The number of witnesses here is not outcome determinative.

All in all, reasonable minds could differ on this and given that the driver has presented conflicting testimony refuting the woman's witnesses there is a genuine dispute. Thus, the court should deny the motion at this point and allow the jury to decide. However, the woman moving now preserves her right to move again for JMOL after the verdict in the instance the jury decides for the defendant.

MPT 1

IN RE GIRARD (JULY 2024, MPT-1)

This performance test involves a landlord-tenant dispute. The client, Laurel Girard, has received a "Three-Day Notice to Cure or Quit" from her landlord, Hamilton Place LLC, alleging that she has violated two provisions in the residential lease: (i) the lease payment provision and (ii) the no-pet provision. The Notice gives Girard three days to either "cure" the alleged lease violations or "quit" (vacate) the premises. Hamilton Place is threatening to file an action seeking a court order terminating the lease and evicting Girard if she remains in the apartment and does not cure the alleged violations within the allotted time frame. The examinee's task is to draft an objective memorandum analyzing the validity of the two alleged violations contained in the Notice and recommending what actions, if any, the firm should advise Girard to take. The File contains the task memorandum, a memorandum summarizing the client interview, excerpts from the Residential Lease Agreement, a letter from Hamilton Place notifying Girard of a $150 rent increase, the Notice to Cure or Quit, and a letter from Girard's therapist documenting her disability and the need for an emotional support animal, in this case, a cat. The Library contains excerpts from the Franklin Tenant Protection Act and the Franklin Fair Housing Act, as well as an appellate court opinion, *Westfield Apts. LLC v. Delgado* (Fr. Ct. App. 2021).

ANSWER

MEMORANDUM

TO: Hannah Timaku

FROM: Examinee

DATE: July 30, 2024

RE: Laurel Girard matter

Our client, Laurel Girard, has received a Three-Day Notice to Cure or Quit from her landlord, Hamilton Place LLC, alleging that she is in breach of her lease for failure to pay a portion of her rent and violating the no-pet clause in her lease. Pursuant to the Franklin Tenant Protection Act (FTPA), after a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner may not terminate the lease without just cause. Fr. Civ. Code § 500(a). "Just cause" includes (1) material breach of a lease and (2) maintaining or committing a nuisance. Fr. Civ. Code § 501(a). Ms. Girard has lived at Hamilton Place since January 2023 and therefore may only be evicted with just cause. For the foregoing reasons, Hamilton Place likely has just cause to terminate Ms. Girard's lease for failure to pay her full rent, but not for exercising her right to have an assistance animal under the Franklin Fair Housing Act. As a result, Ms. Girard should pay the extra $150 per month owed in rent or find a new place to live. Further, if she wants to stay at Hamilton Place, she should provide the letter documenting her disability to her landlord as soon as possible.

DISCUSSION

1. Outstanding rent payment of $150

A material breach goes beyond a "mere technical or trivial violation." *Kilburn v. Mackenzie* (Fr. Sup. Ct. 2003). Every violation of a lease is a breach, but not every breach justifies the termination of the landlord-tenant relationship. *Id.* To be considered a material breach, the breach "must go to the root or essence of the agreement between the parties, such that it defeats the essential purpose of the contract or makes it impossible for the other party to perform." *Walker's Treatise on Contracts* § 63 (4th ed. 1998). Even if a lease purports to dispense with the materiality requirement, the court will still read it into a lease. *Westfield Apartments LLC v. Delgado* (Fr. Ct. App. 2021). For example, in *Vista Homes v. Darwish* (Fr. Ct. App. 2005), a landlord tried to evict a tenant who failed to pay $10 of $1,000 owed in rent. The court stated that failure to pay rent goes to the essential obligations of the lease, but the failure to pay 1% of the rent owed was a *de minimus* violation and therefore not a material breach. Similarly, in *Pearsall v. Klein* (Fr. Ct. App. 2007), there was no material breach when a tenant left minor amounts of debris outside an apartment because it left no damage to the apartment. In *Westfield*, the tenant failed to obtain renter's insurance in violation of the lease. The lease contained a "forfeiture clause" which purported to make any breach of the lease a terminable offense. However, the court concluded that the breach was nonmonetary and intended for the benefit of the tenant, not the landlord. Therefore, failure to obtain the insurance was not a material breach.

The *Westfield* court also noted that public policy requires a landlord to terminate a lease only for a material breach. The purpose of the FTPA is to prevent frivolous evictions and to safeguard tenants from excessive rent increases. The FTPA replaces traditional freedom of contract principles to remedy the unequal bargaining power between landlord and tenant. A unilateral forfeiture clause violates public policy because it places obligations on the tenant without placing any new obligations on the landlord.

In the present case, Ms. Girard is possibly in violation of her lease for failure to pay the additional $150 per month in rent. The lease contains a "forfeiture" provision which states that any lease covenant that is not complied with is grounds for eviction. While this clause is not enforceable for public policy reasons, pursuant to *Westfield*, it is possible that a court could find that Ms. Girard is in breach of her lease for failure to pay her full rent. Under the FTPA, a landlord may not increase the rental rate more than 10 percent during any 12-month period. Fr. Civ. Code § 505(a). Hamilton Place raised Ms. Girard's rent by exactly 10% in June 2024, nearly a year and a half after she moved in. Hamilton Place was entitled to do this by law. Her failure to pay the increase is likely more than a *de minimus* violation. Unlike in *Vista Homes*, where the tenant failed to pay $10, Ms. Girard has failed to pay $150, which is more substantial. Further, unlike in *Westfield*, the failure to pay rent does go to the heart of the landlord-tenant relationship. The breach is monetary in nature and is for the benefit of the landlord, rather than the tenant.

Therefore, Ms. Girard is likely in a material breach of her lease for failure to pay the full amount of rent. On July 29, 2024, she received the notice to cure or quit. If she wants to stay in her apartment, she likely must pay the outstanding rent and late fee within 3 days. Otherwise, she will need to consider finding another place to live that is more affordable.

2. Possession of a cat as an emotional support animal

Pursuant to the Franklin Fair Housing Act (FFHA), a tenant with a disability may have an assistance animal. Fr. Civ. Code § 756. "Disability" must be broadly construed. Fr. Civ. Code § 755(c). It includes a mental disability, which is defined as a mental or psychological condition limiting a major life activity, such as anxiety or depression. *Id.* An "assistance animal" can be a service animal or a support animal and is an animal providing some kind of emotional, cognitive, or similar support to alleviate the symptoms or effects of a disability. Fr. Civ. Code § 755(o). A support animal is an animal providing some sort of emotional, cognitive, or other support to someone with a disability. Fr. Civ. Code § 755(n). The animal does not need to have any special sort of training or certification and may also be called a "comfort animal" or "emotional support animal." *Id.* To be eligible to keep an assistance animal contrary to the terms of a lease, a tenant with a disability may ask for confirmation to be sent to her landlord from a reliable third party who knows about the disability or the need for an accommodation. Fr. Civ. Code §756(b). The reliable third party may be a health care provider but does not include a certification from an online service without an individualized assessment. *Id.*

A tenant with a disability may keep an assistance animal subject to certain restrictions. While the tenant is not required to pay any sort of pet fee or additional security deposit, she may be required to pay for any damage not the result of ordinary wear and tear caused to the premises by the animal. Fr. Civ. Code § 756(c). The landlord may not impose any breed, size, or weight restrictions to a service animal. *Id.* However, the landlord may impose reasonable conditions on waste disposal and behavior so the animal does not become a nuisance, as long as the conditions do not interfere with the animal's duties. *Id.* An example provided by the FFHA is that a landlord may place a condition on a dog barking incessantly all night, but may not mandate that the dog not bark at all, as that would interfere with a service dog's responsibility to bark and alert its owner of dangers. *Id.* Further, the landlord may prohibit the use of an assistance animal if it creates a significant risk to the health or safety of others or substantial physical damage that cannot be mitigated. *Id.*

In the present case, Ms. Girard's possession of Zoey (1) is not a material breach and (2) does not constitute a nuisance. First, although the lease does not permit animals, Ms. Girard is entitled to keep Zoey as an assistance animal. The Residential Lease Agreement states that "No pets of any kind . . . may be kept on the Premises, even temporarily, absent Landlord's written consent. If Landlord consents to allow a pet to be kept on the Premises, Tenant shall sign a separate Pet Addendum and pay the required pet deposit and additional monthly rent." Harboring a pet in violation of a lease may considered a material breach, see *Sunset Apartments v. Byron* (Fr. Ct. App. 2007). However, Ms. Girard is an individual covered under the FFHA and entitled to have an assistance animal without being required to pay any sort of pet fee or being held in violation of her lease. Ms. Girard is a person with a disability. Disability must be construed broadly under the FFHA and includes mental illness. Ms. Girard has anxiety and suffers from panic attacks. She takes medication and sees a therapist, but these treatments have not completely eliminated her symptoms. Her therapist, Ms. Sarah Cohen, reports that Ms. Girard meets the definition of "disability" under the FFHA. Further, Zoey is an assistance animal under the FFHA. Ms. Girard's therapist recommended to her that she get an emotional support animal to help alleviate her symptoms. Ms. Girard reports that since she got Zoey, there has been a dramatic increase in her overall well-being. She has fewer panic attacks and feels less overwhelmed. Petting Zoey while she sits in her lap immediately makes Ms. Girard feel more relaxed, "like I can handle anything that comes my way, no matter how stressful or challenging." The improvement in Ms. Girard's symptoms indicates that Zoey is having the intended effect of alleviating her symptoms of mental illness as contemplated by the FFHA. Although Zoey does not have any special training, she is not required to be certified as an "emotional support animal," so long as her presence continues to alleviate Ms. Girard's symptoms. In addition, Ms. Girard followed the requirements of the FFHA by having her healthcare provider, Sarah Cohen, write a letter to her landlord confirming her symptoms and need for an assistance animal. It was Ms. Cohen's idea for Ms. Girard to obtain an assistance animal. Ms. Cohen has been treating Ms. Girard for four years, enough time to gain familiarity with her needs and limitations resulting from her mental health condition and is therefore a reliable third party as contemplated by the FFHA.

Second, Zoey does not present a nuisance to the apartment complex. When Ms. Cohen first suggested to Ms. Girard that she obtain an assistance animal, Ms. Girard responsibly believed that she would not have time to care for an animal due to her long and unpredictable hours. However, Ms. Girard soon got a new job as an office assistant, with set hours and a predictable work schedule. She is able to provide the necessary care to Zoey and does not leave her for long hours. She is very attached to Zoey and takes excellent care of her, as evidenced by taking her to the veterinarian for her 12-week booster shot. She contained Zoey within a cat travel carrier and did not let her roam freely around the premises. There is no evidence that Zoey will cause harm or presents a risk of harm to any person or the property.

Because Ms. Girard is entitled by law to have an assistance animal as an accommodation for her disability and that animal is not a nuisance, there is no just cause for the landlord to terminate her lease. However, Ms. Girard must immediately provide the letter from Ms. Cohen to her landlord to provide the requisite documentation of her disability and need for an assistance animal if she wants to stay at Hamilton Place.

MPT 2

CDI INC. V. SIDECAR DESIGN LLC (JULY 2024, MPT-2)

This performance test requires the examinee to assess a client's potential liability under a federal statute, the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. The client, Sidecar Design LLC, is a website design and programming business. Sidecar agreed to create a website and a web-based payment system for Conference Display Innovations Inc. (CDI). While Sidecar worked on the website and payment system and for one week after it completed work on the project, Sidecar's system password gave it full access ("technical access") to CDI customer data, including billing information. One of Sidecar's employees, John Smith, used that technical access to take money from a CDI customer on two occasions. CDI sent Sidecar a demand letter alleging that those transfers violated the CFAA and seeking damages in four categories: the costs of investigation and repair, restitution of funds improperly billed to the customer, loss of business resulting from the breach, and punitive damages. The examinee's task is to prepare a memorandum analyzing Sidecar's liability under the CFAA and the categories of damages that CDI can recover under the Act. The File includes the task memorandum, a summary of an interview with Sidecar's manager, a chronology of the key events, and the demand letter from CDI's counsel. The Library includes relevant sections of the CFAA and two cases, *HomeFresh LLC v. Amity Supply Inc.* (D. Frank. 2022) (discussing the meaning of "exceeds authorized access" under the CFAA) and *Slalom Supply v. Bonilla* (15th Cir. 2023) (explaining what damages are available under the CFAA).

ANSWER

MEMORANDUM

TO: Damien Breen

FROM: Examinee

DATE: August 1, 2024

RE: Sidecar Design Matter

This memorandum is prepared in response to your request regarding the Sidecar Design matter. As requested, this memorandum will analyze Sidecar Design LLC's ("Sidecar") potential liability to Conference Display Innovations Inc. (CDI) under the Computer Fraud and Abuse Act ("CFAA") and address any potential damages that may be recovered by CDI under the CFAA, assuming Sidecar is liable.

1. Sidecar Design's Liability to CDI Under CFAA

Under the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. 1030, a person may violate the Act in one of two ways. First, by intentionally accessing a computer without authorization (or exceeding authorized access), and thereby obtaining information from a protected computer. Or second, by knowingly and with an intent to defraud, accessing a protected computer without authorization (or exceeding authorized access), and by means of such conduct furthers the intended fraud and obtains anything of value. In other words, in either case, to maintain a civil action under the CFAA, a plaintiff must show, among other things, that the defendant accessed a computer either "without authorization" or in a way that "exceeds authorized access." 18 U.S.C 1030(a)(2), 1030(a)(4). Whether a person's access is without authorization or exceeds authorization depends on the status of their employment at the time of the access.

Therefore, the first issue here to determine is whether Sidecar Design is liable to CDI under the CFAA is whether John Smith accessed the CDI computer system "without authorization" or in a way that "exceeds authorized access." Further, the scope of Smith's authorization to access the customer data here depends on whether Smith accessed the information during the contract between Sidecar and CDI or after the contract ended.

A. Information Access During Employment

With regard to information accessed during the existence of the contract between CDI and Sidecar, the Supreme Court of the United States has clearly laid out the rule. In *Van Buren v. United States,* 141 S.Ct. 1648, 1662 (2021), the U.S. Supreme Court held that an individual "exceeds authorized access" when a person access data that the person does not have the technical right to access." In other words, a person exceeds authorized access when they access a computer *with authorization,* but then obtains information located in a particular area of the computer that are off limits to the person.

In that case, the Supreme Court reversed Van Buren's conviction under the CFAA, where Van Buren, a police officer, used his work computer and login credentials to access information on the police database for a non-law-enforcement purpose. The trial court's conviction of Van Buren was based on the court's reasoning that although there was no technical barrier accessing the information, Van Buren still exceeded his authorized access by violating a departmental policy that barred him from using the data for non-law enforcement purposes. However, on appeal, the Supreme Court reversed the conviction, explaining that even if the purpose of a person's access violates departmental policy, there is no violation of CFAA if the employee had a computer and login credentials that gave him access to the information.

The Franklin District Court, after reviewing the *Van Buren* decision, came to a similar conclusion in *HomeFresh v. Amity Supply*. In that case, an employee of Amity Supply, Flynn, similarly used his work computer and login credentials to access customer data. Although the employee violated HomeFresh's policy regarding access to customer data, the court explained that, like the case in *Van Buren,* the employee here did not violate the CFAA even though his use of the data violated HomeFresh's employment policies, because the employee "was not a hacker - he did not need to use technical means to circumvent the password protection in HomeFresh's system because he had valid password access."

Here, John Smith, like Flynn in the *HomeFresh* case and *Van Buren*, had access to the customer data that is the basis of the alleged violation of CFAA. John Smith's job at SideCar was to program the payment system for CDI and set up the customer accounts, which includes entering credit card information into the customers' accounts. Thus, John Smith accessed the information at issue here by using his login credentials and his access to customer data, including credit card information. Like the Supreme Court explained in *Van Buren* and the Court in *HomeFresh* explained, although Smith's purpose for accessing the information violated company policy and agreements between CDI and Sidecar that Sidecar would not use any of CDI's customer data once it had been entered, Smith did not violate CFAA because he had login credentials that gave him access to this information. Like Flynn in *HomeFresh* - Smith was not a hacker - he did not need to use technical means to circumvent any protection of the customer data here, because he had valid access to such information.

Therefore, it is likely that Sidecar will not be held liable to CDI for the customer data that Smith accessed in June 2024.

B. Information Accessed After Employment

However, a further issue remains - namely, whether Smith's access to CDI's customer data after Sidecar's work under its contract with CDI ended. Unlike the previous rule for information access during the employee's employment, the Supreme Court did not address this issue in *Van Buren* or make a determination regarding whether liability under CFAA turns only on technological or code-based limitations or whether it also looks to limits contained in contracts or policies. The Court in *HomeFresh*, addressed this issue and held that liability under CFAA does *not* turn "only on technological or "code-based" limitations, but rather looks at a person's "right to use" the computer program. Thus, *HomeFresh* held that once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passswords or login credentials to access those computers, and if the employee does, it is a violation of CFAA. However, the *HomeFresh* court noted that "other jurisdictions have reached differing results on this question." In other words, in some jurisdictions, technological or code-based limitations are the determining factor here.

Based on the holding in *HomeFresh*, once the contract between CDI and Sidecar ended, Sidecar and its employees no longer had the "legal right" to use the employer's computers or to use the passwords or login credentials that allow the employees to access those computers. Thus, Smith no longer had the legal right to use his password/login credentials to access CDI customer data once the contract between Sidecar and CDI ended. However, other jurisdictions using a more "technological" or "code-based" approach may come to the opposite conclusion. In jurisdictions taking this approach, an employee's access to information is not a violation of CFAA until technological limitations, such as password protections, are placed on access to the information. Thus, using this approach, Smith did not violate CFAA by accessing CDI's customer data after its contract with SideCar ended, because no technological limitations on Smith's access to this information Sidecar ended, because no technological limitations on Smith's access to this information had been put into place. Despite the fact that Sidecar instructed CDI to change the password for the payment system after the contract between the two ended, CDI did not do so or otherwise place any type of protections on the customer data to prevent unauthorized access.

Based on the Supreme Court's reasoning in *Van Buren* regarding technological barriers to information accessed, there is a strong argument that this technological/code-based approach should be used rather than the approach taken by the *HomeFresh* court.

As a result, Sidecar may be held liable to CDI for the customer data that Smith accessed in July 2024, after the contract between Sidecar and CDI ended if the court takes the approach in *HomeFresh* but is likely not to be held liable if the court takes a technological/code-based approach.

2. Damages CDI May Recover Under the CFAA

Assuming that Sidecar is liable to CDI, the next issue is what damages, if any, can CDI recover from Sidecar under the CFAA.

In its demand letter, CDI claims damages in the amount of $606,000.

Under the CFAA, where there is a violation of section 1030 of the Act, any person harmed or who suffers loss because of the violation may bring a civil action against the violator "only if the conduct involves [losses to the claimant during any one-year period totaling at least $5,000]." When such an action for civil damages is authorized under the Act, the person harmed may seek "compensatory damages and injunctive relief or other equitable relief."

Under the CFAA, "losses" are defined as "the cost of responding to an offense, conducting a damage assessment, and restoring data, program, system or information to its condition prior to the offense."

Further, CDI claims damages in the amount of $6,000 for the costs of investigating and correcting the "data breach" by Smith. This $6,000 consists of $4,000 spent to investigate the data breach, $500 to upgrade its security system, and $1,500 in overtime wages paid to its employees to help with the investigation.

A. Cost of Upgrading Security System

Based on the *Bonilla* case and the statutory language of the CFAA, is unlikely that Sidecar will be liable to CDI for the $500 spent by CDI to upgrade its security system. In *Slalom Supply v. Bonilla,* Slalom Supply, who was injured by Bonilla's violation of CFAA, similarly claimed damages in the amount of $1,500, for costs spent to update its security system after Bonilla hacked into Slalom Supply accounts. The court in the case denied Slalom Supply damages for the upgrade, because such costs do not relate to "restoring the . . . system . . . to its condition prior to the offense." The court explained that the plain language of the CFAA suggests that a "victim of hacking cannot use the violation as a means of improving its own security or system capability."

Similarly here, the $500 cost CDI expended to upgrade its security system after Smith's accessing of customer data did not relate to restoring the system to its condition prior to the offense - Smith's access to the data did not affect or change CDI's system in any way and thus does not need to be "restored." Therefore, Sidecar is not liable to CDI for the $500 it spent to upgrade its security system.

B. Costs of Investigation & Overtime Wages

However, Sidecar will be liable to CDI for the $4,000 it paid to a cybersecurity company to investigate the data breach and may be liable for all or part of the $1,500 paid in overtime wages to CDI employees, but only for the time the employees spent investigating/assisting the investigation and not for any time or work on upgrading CDI's security system.

The *Slalom* court similarly upheld damages for the cost of investigating a data breach as a result of a violation of CFAA, because such costs were incurred in "responding to an offense, conducting a damage assessment, and restoring data, program, system or information to its condition prior to the offense." Further, the *Slalom* court reasoned that "nothing in the language" of the CFAA "requires a hacking victim to rely only on external help to remedy the breach" and the costs were solely related to employee time for working on the investigation and was not related to upgrading the security system.

Thus, here, Sidecar will be liable for the $4,000 CDI paid to a cybersecurity firm to investigate the breach and also the $1,500 in overtime wages paid, but only if the employees were solely assisting the cybersecurity company in investigating the breach during that time, and their time was not spent working on the upgrade the security system.

C. Restitution to Improperly Billed Customer

Next, CDI claims damages in the amount of $75,000, as restitution for improperly billed customers by Smith. Based on *Slalom* and it's interpretation of the CFAA, it is unlikely that Sidecar will be liable to CDI for these damages.

The court in Slalom explained that "case law supports a narrow reading" of 1030(e)(11) of CFAA. That provision states that "loss" includes "any revenue lost, cost incurred, or other consequential damages incurred because of the interruption in service." However, based on the narrow interpretation of that provision, costs have held that "lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." *Bonilla,* citing *Selvage Pharm v. George* (D. Frank. 2018). In cases where lost revenue or consequential damages were awarded, they were based on things such as "deletion of critical files that cost the plaintiff a lucrative business opportunity," *Bonilla*, citing *Ridley Mfg.v. Chan* (D. Frank 2015), or the alteration of system wide passwords, *Marx Florarl vs. Teft* (D. Frank 2012).

Here, similar to the case in *Slalom*, there was no interruption of service caused by Smith's alleged violation of CFAA. Smith diverted or re-directed $75,000 in customer payments to CDI, but did not otherwise "impair or damage the functionality" of CDI's computer system or delete any files or change any passwords in the system, similar to *Slalom*. Therefore, the $75,000 improperly billed does not constitute "loss" that is recoverable under CFAA.

As a result, it is unlikely that Sidecar will be liable to CDI for the $75,000 improperly billed to customers by Smith.

D. Contract with Customer Terminated

In addition, CDI claims damages in the amount of $125,000, for the contract terminated by its customer as a result of Smith's access to CDI's customer data. It is unlikely that Sidecar will be liable to CDI for this amount of damages either.

Based on the reasoning provided above regarding the improper billings, the termination of this contract also did not occur "because of" any interruption in service. Further, it does not align with the examples of consequential damages that have been awarded under CFAA that are cited by the court in *Slalom*, like deletion of critical files.

As previously mentioned, CFAA defines "loss" to includes "any revenue lost, cost incurred, or other consequential damages incurred because of the interruption in service." 1030(e)(11). Under this definition, it is likely that a court would construe the canceled contract here "revenue lost" by CDI because the contract was canceled as a direct result of Smith's improper access to customer data and that customer's dissatisfaction with CDI's services and security.

E. Punitive Damages

Lastly, the rest of the $606,000 damages demanded consists of CDI's claimed $400,000 in punitive damages. Based on a review of the CFAA and relevant case law, Sidecar will not be liable to CDI for *any* amount of punitive damages, and certainly not $400,000.

Although the CFAA authorizes a civil action for damages for a violation of the CFAA, the Act specifically provides that damages under this section of the Act are "limited to economic damages." In *Slalom Supply v. Bonilla*, (15th Cir. 2023), the court explained that "[c]ourts have consistently refused to include punitive damages within the definition of "economic damages." The *Bonilla* court cited to *Demidoff v. Park*, (15th Cir. 2014), in which the court held that the plain language of the CFAA precludes an award of punitive damages.

Therefore, Sidecar cannot be held liable to CDI for any amount of punitive damages.

In sum, Sidecar may be liable to CDI for the $4000 it spent investigating the data breach and either all or part of the $1,500 in overtime wages paid to CDI employees to assist in the investigation.

Amity argues that its employee's access was authorized, because HomeFresh failed to create technical barriers that would prevent the employee's access to HomeFresh's customer data.

On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, depicting the availability of knowledge in printed books.

PUBLISHED BY
The Supreme Court *of* Ohio
www.supremecourt.ohio.gov