MPT 1
JULY 2015

In re Bryan Carr (MPT-1)

In this performance test item, examinees are associates at a law firm representing Bryan Carr, who seeks legal advice regarding his potential liability for certain credit card purchases that his father made using Bryan's credit card account. There are a number of credit card transactions (automotive repair, groceries, fuel, books, and power tools) made at different vendors over a period covered by four credit card statements. Bryan has not yet paid the most recent statement, but he paid the others before realizing that his father had used the credit card for items other than the automotive repair (which is the reason he gave his father the card). Examinees' task is to draft an opinion letter to the client. In the letter, examinees are to analyze each of the credit card transactions in light of the facts, relevant statutes, and case law to determine the client's responsibility for payment for each charge. The File contains the instructional memorandum from the supervising attorney, the firm's guidelines for drafting opinion letters, a transcript of the partner's telephone conversation with the client, a copy of a letter Bryan Carr wrote authorizing his father to use the credit card, and credit card statements for the months at issue. The Library contains various sections of the federal Truth in Lending Act, excerpts from the Restatement (Third) of Agency, and two cases.

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REPRESENTATIVE GOOD ANSWER
MPT 1

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6241 Lowell Street

Franklin City, Franklin 33205

July 28, 2015

Mr. Brian Carr

6226 Lake Street

Franklin City, FR 33244

RE: Payment Liability for Your Father's Unauthorized Credit Card Charges to Acme

State Bank

Dear Mr. Carr:

This letter follows our telephone conversation of July 28, 2015. When we spoke, you wanted to know whether or not you are legally obligated to pay Acme State Bank for various purchases that your father incurred using your credit card/your credit card number. There is a federal statute called the Truth in Lending Act (TILA) that offers protections to credit card holders when someone uses someone else's credit card to make unauthorized purchases. The sections below will review the past four months' worth of credit card statements and discuss your potential for liability for your father's purchases.

Is Cardholder liable for the $1,850.00 March bill? Yes.

Summary: This appears to be the charge that you actually intended to authorize and for which you gave your father your credit card and the letter dated March 12, 2015 (Authorization Letter). While the actual, incurred charge exceeded the initial estimate of $1,500.00, you granted your father actual authority to use the Acme Bank credit card to make this purchase, so you are liable payment of this transaction. *See* May Credit Card Bill.

Discussion:
TILA provides protection for "unauthorized use" of a credit card under certain circumstances. Federal Truth in Lending Act, 15 U.S.C. §§ 1602 & 1643. Unauthorized use is defined as, "a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." *Id*. at § 1602 (o). "Agency" is a legal concept in which someone (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement 3d Agency, §1.01 (2006). What this essentially means is that you acted as the principal by granting your father permission to use your credit card. The discussions you had with him are sufficient to do this by granting him authority. When coupled with the other manifestations of giving him physical control of your credit card and a letter that identifies him as an authorized user, he effectively became your agent. As your agent, he is able to enter into actions that have legal consequences for you so long as he has the authority (permission) to do so. Actual authority is created by "a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf." *Id*. at §3.01.

Using your credit card to pay for the van repair was an authorized act of your agent for which he had actual authority to enter into -- as such you are responsible for these incurred charges.

Is Cardholder liable for April and May Bills? Yes.

Summary:
The April bill has three charges to two different stores for a total of $206.50. While you didn't intend to grant your father the authority necessary to make these transactions and he appears to have no actual authority, the totality of the circumstances he likely had “apparent” or “implied” authority. Further, TILA only protects in the form of limiting cardholder liability in excess of $50.00. As the only May purchase of $45.70 did not reach that threshold, you are responsible for this payment.

Discussion:
At this point your father still had your credit card and the Authorization Letter in his possession. The letter imparted no restrictions on his use, and while your intent was for him only to use it for the van repair, the Authorization Letter had no limitations. His possession of the card and the letter are sufficient to create apparent authority that he is acting on your behalf by making these purchases. "The test to determine whether or not apparent authority exists rests on a principal's conduct which, reasonably interpreted, causes a third person to believe the agent has authority to act for the principal." Transmutual Ins. Co. v. Green Oil Co., Franklin Ct. App. (2009) . The Transmutual decision quoted Farmers Bank v. Wood, Franklin Ct. App. (1998) that, "if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him." *Id.*

As mentioned above, TILA only provides protection for "unauthorized purchases." In *BAK Aviation Systems, Inc. v. World Airways, Inc.*, Franklin Ct. App. (2007), the court examined liability made by "a card bearer who was given permission by the cardholder to make a limited range of purchases but subsequently made additional charges on the card." Id. While this case is somewhat different from your case in that the cardholder was a company rather than a person, the rational that led the court to determine that the principal was liable for the outside-of-scope purchases should apply to your situation. The court stated that, "a majority of courts have declined to apply the Truth in Lending Act to limit the cardholder's liability, reasoning that the cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges." *Id*.

While your father's possession of your card and the Authorization Letter, if presented together to a merchant would undoubtedly grant him apparent authority, it is unclear whether or not the merchants with whom your father transacted actually asked to see the letter. If they simply allowed him to use someone else's card, you may be able to argue that there was no basis to conclude that apparent authority existed.

Is Cardholder liable for the June purchases? No.

Summary: TILA most likely limits your liability for the $1,200 purchase of the power tools to $50.00. It is unlikely that your father had any required authority to enter into this transaction. Because you received no benefit from this transaction and he was an "unauthorized purchaser" under the statute, your liability will be limited to $50.00.

Discussion:
It is unlikely that your father acted with the necessary authority to bind you by using your credit card to purchase the power tools. The *Transmutual* decision quoted *Farmers Bank v. Wood*, Franklin Ct. App. (1998) that, "if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possess authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him." *Id*. Because your father no longer had your card or the Authorization Letter, there is no reason for the hardware store to believe that he had been granted any apparent authority by you.

The decision in *Transmutual* barred TILA protections for a company whose employee fraudulently acquired and utilized a company credit card. The court found that the company was barred from protection because it was negligent in its oversight of the payment of the bills. Since you noticed this charge and made Acme aware of it prior to paying it, you are unlikely to be found to be negligent. However, the previous charges incurred by your father should have put you on notice, so Acme can argue that it was your negligence that allowed the final charge. I believe that this argument will fail, however. In *Transmutual* the fraud took place over the course of three years; here we have unauthorized transactions taking place over three months.

Conclusion

My research indicates that you should be able to successfully contest the June charges. The ones made prior to your revocation are less likely to be successfully contested. Please feel free to call me with any questions, and let me know if you would like me to draft a letter to Acme. Thank you.

Very Truly,

/s/

Miles Anders

MPT 2
JULY 2015

In re Franklin Aces (MPT-2)
Examinees are associates at Franklin Arts Law Services, a pro bono provider of legal services for the Franklin arts community. The client, Al Gurvin, is seeking legal advice regarding whether he has a claim against ProBall Inc., the owner of the Franklin Aces football team, for copyright infringement resulting from unauthorized use of his design for a team logo for the Franklin Aces. The task for examinees is to draft a letter to the client addressing the likelihood of success of an infringement claim against the team, and recommending whether Gurvin should pursue litigation or accept the settlement offer that the team has made (tickets to the Franklin Aces' first season in their new stadium). Because the client is not an attorney, the letter should explain the legal standards for infringement and fully evaluate the strength of Gurvin's claim and the proposed settlement, but in language that a nonlawyer can understand. The File contains the instructional memorandum, a newspaper article about the team's relocation to Franklin City, a transcript of the client interview, descriptions of Gurvin's orginal sketch and of the logo ultimately chosen by the team, a letter from the team's General Counsel denying liability and making a final settlement offer, and two affidavits. The Library contains three cases.

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Dear Mr. Gurvin:

You recently contacted our office about the copyright dispute you were having with the new Franklin Aces team logo and requested information about your potential claim and recommendations of how to proceed with the claim or potential settlement. This information and recommendation is broken down into several topic below.

Litigation

First, as you may remember discussing with Ms. Eileen Lee during your interview with our office, in order to bring a copyright infringement suit the artwork must be registered with the US copyright infringement office (17 USC § 411). While this registration is not required to make a copyright effective, which means you can still have copyright on your work of art without registering, it is required to sue anyone over infringement of the copyright. Therefore, we need to discuss whether your artwork would meet US Copyright Office approval.

Section 202.1(a) of the Copyright Office's regulations, which deals with the copyright ability for "familiar symbols or designs, mere variations of typograph ornamentation, lettering or coloring...", is most relevant for our purposes. In the *Cardova* case, the court shot down a red, white and blue triangle for failure to be original or expression of authorship, claiming it was just a familiar symbol with mere variation of coloring. However, in *Bleinstein* case, Justice O'Connor stated that any minimal degree of creativity gives rise to authorship and that this standard is an extremely low standard to meet. This means that it should be clear that there is just familiar symbols with no additional authorship, such as the triangle, to overcome the low standard of meeting authorship and originality. In your case, the playing card aces symbols might be construed as familiar symbols by the Copyright Office, like the triangle from the previous case. However, the fact that you drew them fanned out and held by a hand should easily meet that low standard of creativity referenced by Justice O'Connor. The drawing of a holding of cards is not a familiar symbol, therefore, you should be able to obtain Copyright for your design.

Next, your case as it stands on the facts known to us, is unclear as to whether you would win or lose. The United States District Courts of Franklin have uniformly applied a two-prong test for copyright infringement: (1) Are the works "substantially similar"? and (2) Did the alleged infringer have access to the copyrighted work? (*Savia v. Malcolm, 2003*). It sounds pretty obvious that your design and the design of the Franklin

Aces is substantially similar, including the placement of the Ace of Spades as the predominant card in the design. The only deviation seems to be a slight difference in the drawing of the hand that holds the card, which to restate, is a slight difference. In Macolm, the court found that a song with completely different lyrics, but the same melody easily met the test for substantially similar, so two designs that are almost identical besides a small dissimilarity in the drawing of a hand would most likely be substantially similar. The problem arises with prong (2), whether the Franklin Aces, more accurately their owner, Proball, Inc. had access to your design in order to copy it. While the court in Malcolm acknowledged that direct evidence of access can be very difficult to find, it stated that circumstantial evidence of such is allowed and that the standard it will always look for is at least plausible evidence. This simply means we must be able to make a showing that Proball, or its designer ForwardDesigns, could have plausibly seen your design. Your email was sent to Mr. Luce, who is CEO of Franklin Sport Authority which owns the stadium where you work. This is a problem, because he is not affiliated with the operation of Proball or ForwardDesigns. However, they are working together on the deal to bring Franklin Aces to Franklin, so there is interaction between the groups. Most helpful is the fact that Franklin Spots Authority has provided office space for both Proball and ForwardDesigns, both located on the 5th floor, while Luce's office is located on the 2nd floor. Luce claims he does not remember what happened to your fax, besides not showing to anyone and probably destroying it, which seems convenient for his purposes and may seem that way to the court as well. It is not hard to fathom your design floating around an office building. Luce was instrumental in setting plans for the new stadium and getting the team to change venue to Franklin. The office is no doubt excited for the new team as you are. Designs that are good enough to eventually become the actual logo would not be easy to contain from spreading through that office. I think this is plausible, but there are arguments on both sides. Proball will argue that they are not even on the same floor of the building and that the affidavits of employees claim they have never met or discussed design work. The issue could go either way and would be costly litigation.

Recovery (Damages)

In *Herman v. Nova* Franklin Courts set forth the recovery allowable for damages in copyright infringement cases. If the copyright is not registered with the US Copyright Office before infringement, damages are limited to actual damages and the infringer’s profits. If the copyright is registered with the Copyright office before infringement, statutory damages are recoverable in lieu of actual damages/profit damages. In your case, you have not yet registered your copyright, therefore, you would only be able to recover actual damages to you, or profits made by Proball due to your infringement. Since the Franklin Aces have just released their new logo, it appears no merchandise has been sold, or money made off the design and its infringement, therefore, there is no profit damages. In regard to actual damages to you, the court will look to what your previous works in art design would yield (*Nova*). In this case, you do not have a history of selling designs. Proball paid Forward Designs $10,000 for its services, but it will have

a reputation and experience, which means the court could decide to lower that amount for your compensation. The estimate would most likely range for anything under $10,000. This would be the only recoverable damages you could receive through litigation, which would be costly, and furthermore, your recovery could not include court costs and attorney fees (*Nova*).

Your Goals

You requested a figure of $20,000 in your conversation with Eileen, but as discussed above, that amount may be very difficult to achieve. You originally stated in your fax to Mr. Luce that you were only seeking tickets for Franklin Aces games. Those tickets are worth $5,000 and would fit your original desires and your proclaimed love of the new team and football. The choice of whether to take the settlement, counteroffer for settlement, or litigate will depend on your current goals in regards to the infringement.

Settlement

As stated above, the current choices are, Settlement, counteroffer for settlement, or litigation. I will remind you that the team claims their settlement offer is final and only offer. Counteroffering may offend them and they could withdraw the offer. Given that your recovery would most likely be under $10,000 if you were to win at litigation (which may be risky and costly in itself) and the team's settlement of the tickets (worth $5,000), the best option might be to settle for their offer and not risk a counteroffer. With the settlement, you could either enjoy the tickets yourself, or sell all or some of the tickets for additional money as well.

If you do choose to litigate, our office will not be able to represent you, but we will assist you in finding representation. If you have any questions or wish to discuss further, please contact our office.

Thank you,

Examinee

MEE Question 1 (Torts)

A boy lives in a northern state where three to four feet of snow typically blankets the ground throughout the winter, creating excellent conditions for snowmobiling. The boy is an experienced snowmobiler and a member of a club that maintains local snowmobile trails by clearing them of rocks, stumps, and fallen tree limbs that could cause an accident when buried under the snow. In January, the boy received a snowmobile as a present on his 12th birthday. The following Sunday, the boy took his friend, age 10, out on the boy's new snowmobile, which was capable of speeds up to 60 miles per hour. The friend had never been snowmobiling before.

The boy and his friend went snowmobiling on a designated and marked snowmobile trail that follows the perimeter of a rocky, forested state park near the friend's home. The trail adjoins forested property owned by a private landowner. Neither the boy nor his friend had previously used this trail.

The landowner's property is crossed by a private logging trail that intersects the snowmobile trail. The logging trail is not marked or maintained for snowmobiling, and access to it is blocked by a chain approximately 30 inches above ground level on which a "No Trespassing" sign is displayed. However, on the day in question, both the chain and the sign were covered by snow.

On impulse, the friend, who was driving the snowmobile, turned the snowmobile off the designated snowmobile trail and onto the logging trail. The snowmobile immediately struck the submerged chain and crashed. Both the boy and the friend were thrown from the snowmobile and injured. As a result of the accident, the snowmobile was inoperable.

About an hour after the accident, a woman saw the boy and his friend as she was snowmobiling on the snowmobile trail. After the woman returned to her car, she called 911, reported the accident and its location, and then went home. Emergency personnel did not reach the boy and his friend for two hours after the woman's departure. No one other than the woman passed the accident site before emergency personnel arrived.

As a result of the accident, the boy suffered several broken bones and also suffered injuries from frostbite. These frostbite injuries could have been avoided had the boy been rescued earlier.

The boy has brought a tort action against the friend, the landowner, and the woman.

1. Could a jury properly find the friend liable to the boy for his injuries? Explain.

2. Could a jury properly find the landowner liable to the boy for his injuries? Explain.

3. Could a jury properly find the woman liable to the boy for his injuries? Explain.

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MEE 1

1. The jury could find the friend liable for negligence because he was engaged in an adult activity and acted negligently in his operation of the snowmobile.

The issue is whether the friend is liable in negligence, and given his age, what standard of care he will be held to. Negligence consists of four elements: duty, breach, cause, damages. A person engaging in activity owes a duty to foreseeable plaintiffs, and he must act as a reasonably prudent person under similar circumstances. It is also worth noting that a minority of jurisdictions would presume he is not negligent because he is under the age of 14. Here, the child is merely ten years old and generally children are held to a standard of care of persons of similar age, education, experience and background. The friend is probably not liable for breach if this is the case because he had never driven a snowmobile before, and ten-year-olds might have difficulty knowing exactly which paths to drive on.

However, there is an exception to the rule of the standard of care for children when children are engaging in an adult activity. This is likely the case here because the child is driving a motorized vehicle that reaches speeds of 60 miles per hour. This is generally not a sport for children, and is reserved for adults. Thus, the friend will be held to an adult standard of care, and must act as a reasonably prudent snowmobile driver in conditions in which there are high snow levels that may contain traps hidden underneath.

Under the standard of care of a reasonable snowmobile driver, the friend likely breached the duty when he moved off of a clearly marked snowmobile trail and onto a trail that is not marked or maintained for snowmobiling. Driving on trails not maintained for snowmobiling when there is deep snow is surely a breach of this standard of care.

As to cause, there usually must be cause in fact but-for and proximate cause. But-for friend turning off of the maintained trail, the boy would not have been hurt and the snowmobile would not have crashed. Proximate cause is a limitation on liability, and a person is liable for all injuries within the risk of the activity involved. Here, the direct cause of the boy's breach was to crash into the chain, and these injuries, crashing a snowmobile, are exactly the type within the risk of breaching the duty of care when driving a snowmobile.

As to damages, personal injury is certainly compensable and will suffice, including those injuries unexpected but foreseeable. Here, the boy had broken bones and also the frostbite, which is foreseeable as to cause noted above, because it is foreseeable that a crash in a rural area could cause persons to be stranded.

It should also be noted that in a comparative negligence state the boy is likely negligent as well, by entrusting his 10-year-old friend with no experience snowmobiling to drive him on the snowmobile, especially given the high rate of speed it can travel, and the fact that the boy knew the risks involved given his experience, even as a 12-year-old. If under a traditional state, contributory negligence will result in no recovery. In a modified comparative state, so long as the boy was no more than 49-50% negligent, he may recover. If a pure comparative state, the boy would recover less his percentage of fault, no matter the amount of fault so long as he was not deemed 100% at fault. It should be further noted that the boy's negligence will eliminate or cut down his reward in question 1, 2, 3, according to the state law and a jury's eventual determination as to the boy's fault.

2. A jury could properly find the landowner liable for the boy's injuries. A landowner under the common law owes duties to person on his land in accordance with the nature of the person on the land, and if injured by a static condition. Generally, persons are classified as trespassers, known or expected trespassers, licensees, and invitees. The boy is likely a known or expected trespasser because it seems likely that the landowner knew of the state park nearby, and his land is adjacent thereto, and further because he acknowledged it when warning "no trespassers." The boy did not have permission to enter the land, and therefore was a trespasser that the landowner could foresee.

A known trespasser must be warned of all known artificial conditions that cause danger to the trespassers. Here, that would amount to a warning of the warning sign. Clearly, the landowner did not have this, and he would be liable under this theory. Landowner indeed created the artificial hazard himself, failed to warn, and he is liable to the boy.

It should be noted that if the boy is deemed a strict trespasser, not known or expected, the landowner breached no duty to the boy and his friend.

As noted, there may be preclusion or an offset of damages in accordance with the boy's negligence as noted in answer 1.

3. A jury would probably not find the woman guilty of negligence for failure to rescue. The same elements of negligence from above apply. Generally, there is no duty to rescue and therefore a person is not liable for failure to rescue. However, when one undertakes the duty to rescue, that person must act reasonably. Here, the woman saw the boy and her friend and could have done nothing, however, when she called 911 she at least arguably took on the duty of rescue. Because she failed to take them in, or help them in any other manner, she may be held liable as undertaking a duty but leaving two children out in the cold. It could also be argued that she did not undertake a duty to rescue because she merely called and reported, which is far from attempting to retrieve the children. This is a close call, but because it seems that the woman made reasonable actions and at least attempted to help, a jury would likely not find her liable of any form of negligence.

As noted, there may be preclusion or an offset of damages in accordance with the boy's negligence as noted in answer 1.

MEE Question 2 (Federal Civil Procedure)

A woman attended a corporation's sales presentation in State A. At this presentation, the corporation's salespeople spoke to prospective buyers about purchasing so-called "super solar panels," rooftop solar panels that the corporation's salespeople said were 100 times as efficient as traditional solar panels. The salespeople distributed brochures that purported to show that the solar panels had performed successfully in multiple rigorous tests. The brochures had been prepared by an independent engineer pursuant to a consulting contract with the corporation.

Based on what she was told at this presentation and the brochure she received, the woman decided to purchase solar panels from the corporation for $20,000. The corporation shipped the panels to the woman from its manufacturing facility in State B. The woman had the panels installed on the roof of her house in State A. The panels failed to work as promised, even though they were properly installed.

A federal statute prohibits "material misstatements or omissions of fact in connection with the sale or purchase of solar panels" and provides an exclusive civil remedy for individuals harmed by such statements. This remedy preempts all state-law claims that would otherwise apply to this purchase.

Relying on this federal statute, the woman has sued the corporation and the independent engineer in the U.S. District Court for the district of State A. She alleges that the statements made by the engineer in the brochure and the statements made by the corporation's salespeople at the presentation were false and misleading with respect to the solar panels' performance and value. She seeks damages of $30,000 (the cost of the solar panels plus the expense of installing them).

The woman is a State A resident. The corporation is incorporated in State B and has its principal place of business in State B. The engineer, who has never been in State A, is a State B resident with his principal place of business in State B. He prepared the brochures in State B and delivered them to the corporation there. He knew that the brochures would be distributed to prospective buyers at sales presentations around the country.

The federal statute has no provision on personal jurisdiction. State A's long-arm statute has been interpreted to extend personal jurisdiction as far as the U.S. Constitution allows.

The engineer has timely moved to dismiss the complaint against him for lack of subject-matter and personal jurisdiction. The engineer has also filed an answer (subject to his motion to dismiss) denying the claims against him and asserting a cross-claim against the corporation. The engineer's cross-claim alleges that the corporation must indemnify the engineer for any damages he may have to pay the woman. The indemnity claim is based on the terms of the consulting contract between the corporation and the engineer.

The corporation has filed timely motions to dismiss the woman's complaint for lack of subject-matter and personal jurisdiction and to dismiss the engineer's cross-claim for lack of subject-matter jurisdiction.

1. Does the State A federal district court have personal jurisdiction over
    (a) the corporation? Explain.
    (b) the engineer? Explain.

2. Assuming that there is personal jurisdiction over both defendants, does the State A federal district court have subject-matter jurisdiction over
    (a) the woman's claim against the corporation and the engineer? Explain.
    (b) the engineer's cross-claim against the corporation? Explain.

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MEE 2

1. The court has personal jurisdiction (PJ) over the corporation.

A court must have PJ to adjudicate case over a defendant (D). PJ exists when there is either general jurisdiction or specific jurisdiction existing. General jurisdiction exists when the court sits in a state where is the home of the corporation. Corporation is at home where it is incorporated, or where it is its principal place of business. Here, the corporation is both incorporated and has its principle place of business in state B. Therefore, state A court does not have general jurisdiction over him.

However, the state long-arm statute might grant State A federal court specific jurisdiction, if the corporation contact with state reasonably haled him into the court in state A. The long-arm statute in state A has been interpreted to extend PJ as far as the US constitution allows.

The US constitution allows PJ as long as the D has sufficient contact with the state, and the exercise of PJ does not violate the rule of relatedness and fairness, meaning that the exercise of jurisdiction must be related to the conduct that brought D into state A's court and it does not violate the general fairness and justice principles.

Here, there is likely to be sufficient contact between state A and corporation. We know from the fact that corporations' salespersons introduced the product at the corporation's presentation in state A. The corporation's act purposefully avails itself into the jurisdiction of A. It uses state A's facilities for the presentation, made profits by selling products, and probably used its roads and other public infrastructure. The contact is exactly the reason why the woman brought the suit, and it does not violate the general principal of justice and fairness. Therefore, there is specific jurisdiction over corporation.

2. The court probably does not have PJ over engineer.

The issue is whether there is specific jurisdiction, meaning whether the engineer can reasonably expected to be haled into the court in state A based on his contact with the corporation.

All the rules discussed above apply to the engineer's PJ question. For general jurisdiction, a person's home is where he domiciles. Engineer (E) lives in state B, so state A court does not have general jurisdiction.

For specific jurisdiction, E has contact with the corporation in state B. He is an independent contractor, so his time and work manner is flexible and not subject to the corporation's control. He drafted the brochures in state b, and sent it to the

corporation's State B address. There is no contact here with state A. The only contact is that the brochure is brought to state A for presentations. However, the fairness principle probably works for him because he probably does not expect to be brought into any state courts since the brochure is distributed all around the country. It might be too burdensome for him to litigate all around the country. He is only an independent contractor. Thus, the court will not likely find personal jurisdiction over him.

3. The question here is whether there is federal question (FQ) jurisdiction or diversity jurisdiction over the woman's case.

Federal court is only allowed to hear cases when there is subject matter jurisdiction (SMJ). SMJ exists when there is either FQ question asserted in a well-pleaded complaint that seeks remedy based on the federal question, or there is diversity jurisdiction, which means that all plaintiffs are from different states than all defendants, plus the amount in controversy exceeds $75,000.

Even though the woman is from state A, and both defendants are from state B, so there is complete diversity between the plaintiff (P) and d, the amount in controversy is only 30k, so there is no diversity jurisdiction.

However, the court has FQ jurisdiction because a federal statute provides the causes of action that the woman is claiming here - the federal statute prohibits material misstatements or omissions of fact in connection with the sale or purchase of solar panels, which is the case for the woman. Based on her well-pleaded complaint, it can be said that federal question is at issue between the plaintiff and the defendants. Therefore, there is FQ jurisdiction for state A.

4. There is SMJ over the cross-claim against the corporation.

For E's cross-claim, there must be federal question jurisdiction, diversity or supplemental jurisdiction in order for the court to have SMJ.

There is no FQ jurisdiction between this is the indemnity claim, which is based on state law. There is no diversity between the two because they both are from state B. However, there is supplemental jurisdiction over the cross-claim.

Supplemental jurisdiction exists when the claim is based on the same transaction or occurrence, and it is not a claim by plaintiff who tries to invoke supplemental jurisdiction to destroy diversity. Here, the claim is from the defendant, and it is based on the same transaction -- the woman's purchase of the solar panel. As a result, supplemental jurisdiction exists here. The court has SMJ over the cross-claim.

MEE Question 3 (Contracts)

A seller and a buyer both collect antique dolls as a hobby. Both live in the same small city and are avid readers of magazines about antique dolls. The seller placed an advertisement in an antique doll magazine seeking to sell for $12,000 an antique doll manufactured in 1820.

On May 1, the buyer saw the advertisement and telephoned the seller to discuss buying the doll. During this conversation, the seller and the buyer agreed to a sale of the doll to the buyer for $12,000 and also agreed that the seller would deliver the doll to the buyer's house on May 4, at which time the buyer would pay the purchase price.

The next day, May 2, the buyer changed his mind and decided not to buy the doll. He signed and mailed a letter to the seller, which stated in relevant part:

> I have decided not to buy the 1820 doll that we agreed yesterday you would sell to me.

The seller received the letter on May 3, immediately telephoned the buyer, and said, "I consider your letter of May 2 to be the final end to our deal. I will sell the doll to someone else and will hold you responsible for any loss."

On May 4, the seller received a telephone call from another antique doll collector. The collector had seen the seller's advertisement for the doll and expressed interest in buying it. After some discussion, the seller and the collector agreed to a sale of the doll to the collector for $11,000. Because the collector lived in a distant part of the state, the agreement provided that the seller, at her expense, would arrange for delivery of the doll by an express delivery service. The express delivery service that they selected charges $150 for deliveries of this type. The sale, the method of delivery, and the fee were all commercially reasonable. The seller acted in good faith in entering into this agreement with the collector.

On May 5, the buyer telephoned the seller and said, "I made a mistake when I sent the letter, and I will buy the doll from you on the terms we agreed to. Come to my house tomorrow—I'll have the $12,000 for you." The seller replied, "You're too late. I've already sold the doll to someone else." The seller then took the doll to the delivery service and paid the $150 delivery fee. The delivery service delivered the doll to the collector, who immediately wired the $11,000 payment to the seller. Two weeks later, the seller sued the buyer for breach of contract.

1. Is there a contract for the sale of the doll that is enforceable against the buyer? Explain.

2. Assuming that there is a contract enforceable against the buyer, did the buyer breach that contract? Explain.

3. Assuming that there is a contract enforceable against the buyer and that the buyer breached that contract, how much can the seller recover in damages? Explain.

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1. The parties have an enforceable contract for the sale of the doll against the buyer because price of the doll was over $500, and the buyer signed a writing acknowledging the contract.

The issue is whether the parties' contract for the sale of goods satisfies the statute of frauds for the sale of goods over $500. The UCC covers the sale of goods, and requires a contract for a sale of goods over $500 to be acknowledged in writing by the party against whom enforcement is sought. An oral contract for the sale of goods over $500, without the signed writing, is otherwise not enforceable. To satisfy the Statute of Frauds SOF, the UCC does not require any essential terms as to the writing except quantity, and the fact that the writing is sufficient to indicate that the parties entered into a contract.

Here, we have a sale of a doll, which the UCC considers a good, for $12,000. To be enforceable as against the buyer, there must be a writing signed by the buyer acknowledging the contract existed and the quantity, 1 doll. Here, the buyer's letter stated, "I have decided not to buy the 1820 doll that we agreed yesterday you would sell to me," signed by the buyer is sufficient to evidence the fact that a contract existed between the parties because it was signed by the buyer and discusses their agreement. It is not important that the contract failed to have a price term under the UCC. As a result, the letter is sufficient to satisfy the statute of frauds. Given this, the contract is enforceable as against the buyer.

2. The buyer breached the contract when he mailed the letter on May 2nd stating his decision not to buy the doll because the letter operated as a repudiation.

Here, the issue is whether the seller was entitled to treat the buyer's communication as an anticipatory breach of the contract and sell to another person.

Under the doctrine of express conditions and the UCC requirement for perfect tender, a party's obligation to perform in a contract does not arise until certain events express conditions occur. The UCC treats all terms as express conditions under the perfect tender rule. The parties do not have to wait for the time of performance or the time of payment to determine whether a contract has been breached. When one party makes a repudiation, that is, definite statement that he will not perform his part of the contract, the other party is entitled to treat that statement as an anticipatory breach, without asking for reasonable assurances, or waiting to see if the other party will perform. If, however, the party merely expresses an opinion that they might not be able to perform, the seller is required to ask for reasonable assurances and give the party reasonable time to respond, and act only when the assurances have not been given.

Here, the letter operates as a repudiation, not merely an uncertain expression of the buyer's prospective inability to perform. The buyer specifically wrote that he decided that he would not be buying the doll. As a result, the seller is entitled to treat that letter as an anticipatory breach and immediately turn around and sell the doll to someone else. It does not matter if the buyer later phoned the seller and said that he made a mistake and offered to pay the full purchase price since his repudiation was definite, and terminated the seller's offer and any ability the buyer had to accept the offer. The seller was entitled, and indeed had to duty, to immediately turn around and cover. Given this, the buyer breached the contract.

3. The seller is entitled to recover $1,150 - the "cost of cover" $1,000 plus any expenses that he incurred for the sale to the collector ($150).

The issue is how much the seller is entitled to recover from the buyer given that seller sold the doll to another party for $1,000 less, and incurred an additional $150 in shipping fees.

Under the UCC and common law contracts, the seller is entitled to recover his expectation damages to the extent that they were foreseeable, reasonably certain, and taking into consideration his duty to mitigate damages. That is to say, the difference between the amount that would have put the seller in the position he expected to be if the contract were performed ($12,000) and the seller's actual position as a result of the buyer's breach sold the doll for $11,000 and incurred $150 in expenses. Under the UCC, the seller has a duty to cover, that is, to make reasonable effort to sell the goods elsewhere when the buyer breaches the contract. When the seller covers, he can recover the difference in the amount he sold the item for, and the amount originally contracted for. Furthermore, he can recover reasonable incidental expenses he incurred as a result of the breach. Reasonable cover does not require the seller to breach his existing contracts.

Here, the seller and the buyer originally contracted for a sale of doll for $12,000. It does not matter if the buyer later phoned the seller and said that he made a mistake and offered to pay the full purchase price because by then the seller had already entered into a new contract. Reasonable cover does not require the seller to breach his existing contracts. The seller incurred a loss of $1,000 when he had to cover as a result of the buyer's breach. He further incurred an expense of $150 express shipment. Both these amounts were commercially reasonable. As a result, he is entitled to recover $1,150.

MEE Question 4 (Corporations)

The board of directors of a commercial real estate development corporation consists of the corporation's chief executive officer (CEO) and three other directors, who are executives at various other firms.

The corporation owns a commercial office tower, the value of which is approximately 10 percent of the corporation's total holdings. The corporation uses one floor of the tower as its corporate headquarters, but it wants to vacate that floor as soon as it locates suitable replacement space.

Two years ago, the board obtained an independent appraisal of the tower, which indicated a fair market value of between $12 and $15 million. After considering that appraisal, the board authorized the corporation's CEO to seek a purchaser for the tower.

The CEO immediately showed the tower to several sophisticated real estate investors and received offers ranging from $8 million to $13 million. The CEO decided that these offers were insufficient, and after he reported back to the board, no further action to sell the tower was taken.

Two months ago, the CEO and the other three directors of the corporation formed a limited liability company (LLC) in which each holds a 25 percent ownership interest.

One month ago, the corporation's board unanimously authorized the corporation's sale of the tower to LLC for $12 million. The minutes of the board's meeting at which the tower sale was authorized reflect that the meeting lasted for 10 minutes and that the only document reviewed by the corporation's directors was the two-year-old appraisal of the tower.

The minutes of the board's meeting further state that the transaction was to be carried out with "a friendly company so that the corporation will have time to relocate to a new headquarters" and that the board "authorized the transaction because the $12 million price is toward the high end of the range of offers received in the past from sophisticated real estate investors and is within the range of fair market values listed in the appraisal."

After the board's authorization of the tower sale, the corporation entered into a contract to sell the tower to LLC. The board did not seek shareholder approval of the transaction.

A non-director shareholder of the corporation is upset with the board's decision authorizing the sale of the tower to LLC. The shareholder believes that the corporation could have obtained a higher price for the tower.

1. Does the business judgment rule apply to the board's decision to have the corporation sell the tower to LLC? Explain.

2. Did the directors breach their fiduciary duties by authorizing the tower sale? Explain.

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The business judgment rule does not apply to the board's decision to have the corporation sell the tower to the LLC.

In corporations, the board of directors is able to direct the actions of the corporation. However, the corporation must remain accountable to its shareholders for its actions because the shareholders are owners of part of the corporation. In accordance with this responsibility, the directors have fiduciary duties of care and loyalty. The power of these duties is tempered, however, by the business judgment rule.

The business judgment rule provides that absent fraud, illegality, or self-dealing, the directors of a corporation are presumed to have acted in the best interest of the corporation. The business judgment rule is essentially a presumption that the directors are acting for the good of the corporation and will protect directors from judgment errors. The business judgment rule, however, doesn't apply to self-dealing transactions.

Here, the directors have engaged in a self-dealing transaction. The directors formed an LLC, consisting of the four directors of the corporation, and bought a significant asset of the corporation from the corporation. The transaction is self-dealing because the directors entered into a transaction that could be to the detriment of the corporation in order to enter into a potentially lucrative opportunity for themselves as members of the LLC. Thus, their conduct is not protected by the business judgment rule.

The directors also breached their duties in authorizing the tower sale.

Directors of a corporation have two fiduciary duties: the duty of care and the duty of loyalty.

Duty of Care

The duty of care essentially requires that a director act as a reasonably prudent person would given the circumstances and their position. If a director has heightened knowledge for any reason, the director is held to a higher standard of care. The duty of care requires that the directors fully investigate the transactions that they enter into, in order to ensure that their acts are consistent with what is best for the corporation.

The directors of this corporation have breached their duty of care because they chose to ratify the sale of the tower to the LLC with very little discussion. The meeting that resulted in the sale of the tower to the LLC lasted only two minutes and the only document reviewed by the corporation's directors was a two-year-old appraisal of the tower. Prices in the real estate market may fluctuate a great deal in two years. The lack

of investigation into whether the $12 to $15 million dollar market value purchase price range is still applicable suggests that the directors breached their duty of care in failing to ascertain the current market value of the property. Furthermore, it only took the directors ten minutes to decide to sell the tower. The tower, however, constitutes approximately 10 percent of the corporation's total holdings. The sale of such a major asset would normally require more discussion. Because of the lack of precision and investigation that the directors took in deciding to sell the tower, the directors are probably liable for breaching their duty of care.

Duty of Loyalty

Directors also owe a duty of loyalty. The duty of loyalty essentially requires that the directors act in the best interest of the corporation. Directors frequently breach the duty of loyalty when they enter into self-dealing transactions, when they act when there is a conflict of interest, when they usurp corporate opportunities, or when they steal money from the corporation.

The directors here clearly breached their duty of loyalty. The entire board of directors formed a separate LLC. That LLC purchased the tower, a major asset of the corporation for $12 million. The directors, who are also the members of the LLC, decided to sell the tower to the LLC despite the clear conflict of interest at issue here because the directors were on both sides of the transaction.

The fact that the tower was sold to the LLC for $12 million, within the range of market value indicated by the appraisals, does not remove the taint of the breach of the duty of loyalty. The value of the tower could have increased dramatically in the two year span since the appraisals or the directors may have inside knowledge as to why the tower is more valuable than what it's been valued at. Furthermore, the fact that the directors are interested in forming an LLC which shortly after its creation purchases the tower suggests that the tower has value beyond the market value predicted at the time of the considered sale. These possibilities demonstrate why a breach of the duty of loyalty cannot be considered mended merely because the transaction appears to be commercially reasonable.

Though the directors seemed to have breached their duty of loyalty, there are a number of safe harbors which may protect self-interested transactions: 1) approval by a majority vote of disinterested shareholders; 2) approval by a majority vote of disinterested directors; or 3) fairness.

Approval by a majority vote of disinterested shareholders requires that the shareholders be given all of the material information about the deal, including the interest of the interested directors. Material information is that which an ordinary person would consider to be important in making a decision.

Here, the transaction was not approved by the shareholders. The shareholders were not given any information about the deal and certainly were not told about the fact that the directors were authorizing the sale of the tower to an LLC that the directors collectively owned. Because the shareholders did not approve the transaction and could not have because of the lack of disclosure of material information, this safe harbor does not qualify.

The next safe harbor is the approval of the transaction by a majority of the disinterested directors. Here, all four directors of the board were interested in the transaction because they all were 25% owners in the LLC that bought the tower. Therefore, there were no disinterested directors to approve the transaction and thus this safe harbor does not apply.

The final safe harbor is fairness. Fairness essentially requires that the corporation receive something of approximately equal value for whatever was given up.

Here, the LLC paid $12 million for the tower. Two years ago, the appraisals of the tower ranged from $12 to $15 million. The corporation had earlier received offers from $8 to $13 million when they were actively seeking bids on the tower. However, the bids occurred two years ago. The time span and lack of investigation into current market value is likely to prevent the directors from taking advantage of the safe harbor of fairness. Furthermore, the fact that the board says that it authorized the transaction because the $12 million was near the top end of the prices bid before is not enough to make the transaction fair. Therefore, the directors did breach their duty of loyalty in authorizing the tower sale.

MEE Question 5 (Criminal Law)

On his way to work one morning, a man stopped his car at a designated street corner where drivers can pick up passengers in order to drive in the highway's HOV (high-occupancy vehicle) lanes. When the man, who was driving alone, opened his car door and announced his destination, a woman (a stranger) jumped into the front seat.

As soon as the man drove his car onto the busy highway, the woman took a knife from her backpack and held it against the man's throat. She said to him, "I am being followed by photographers from another planet where I am a celebrity. Pictures of me are worth a fortune, so I never give them away for free. Forget the speed limit and get me out of here fast, or else."

With the woman holding the knife at his neck, the man sped up to 85 miles per hour (30 mph over the posted speed limit of 55 mph), weaving in and out of traffic to avoid other cars, while the woman urged him to drive faster. While attempting to pass a motorcycle at a curve in the highway, the man lost control of the car, which struck and killed the motorcyclist before crashing into a railing.

A police car arrived at the scene a few minutes later. The man and the woman were treated for minor injuries at the scene and then arrested and taken to the police station.

While in custody, the woman was examined by two psychiatrists. Both psychiatrists submitted written reports stating that the woman suffers from schizophrenia and that, at the time of the accident, her delusions about alien photographers were caused by her schizophrenia.

The State A prosecutor has charged the woman with felony murder for the motorcyclist's death based on her kidnapping of the man, but is not sure whether to charge the man with any crime.

In State A, the rules governing crimes and affirmative defenses follow common law principles. However, in State A the Not Guilty by Reason of Insanity ("NGRI") defense is defined by statute as follows:

> To establish the defense of NGRI, the defendant must show that, at the time of the charged conduct, he or she suffered from a severe mental disease or defect and, as a result of that mental disease or defect, he or she did not know that his or her conduct was wrong. The defendant has the burden to prove all elements of the defense by a preponderance of the evidence.

Assume that the two psychiatric reports will be admitted into evidence.

1. Can the woman establish an NGRI defense? Explain.

2. With what crimes, if any, can the man be charged as a result of the motorcyclist's death? Explain.

3. What defenses, if any, will be available to the man if he is charged with a crime related to the motorcyclist's death? Explain.

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MEE 5

1. The issue is whether the woman can establish an NGRI defense.

The NGRI defense, under the State A statute, requires a defendant to show that he or she suffered from a severe mental disease or defect, and as a result, he or she did not know her conduct was wrong. It must be proved by a preponderance of the evidence. Here, the woman will likely not be able to prove the defense by a preponderance of the evidence. While the evidence and expert testimony certainly do prove that she suffers from the severe mental disease of schizophrenia, she will not be able to prove that she did not know her conduct was wrong. First, her act of holding a knife to a man's throat is such that it would take a fairly extraordinary showing to prove she did not know it was wrong; the very fact of holding it to his throat as opposed to doing something else with it indicates that she knew that the act would put him in fear and cause him to do what she said. Further, her words to the man evidence that, while she may have been delusional, she knew the nature of her act in regards to the man. Her statement "or else" indicates that she knew she was threatening the man. Further, her explanation for her conduct was not in service of some greater good, for which it could be plausibly inferred that she thought her conduct was right for instance, to protect earth from an alien invasion. Instead, she stated that she was acting so the alien photographers couldn't sell her photograph. This statement indicates that her actions were motivated by selfishness, rather than some justifiable motivation. Her actions and words to the man indicate that she knew her act of threatening him with the knife was wrong, and so she will not be able to prove her defense.

2a. The issue is whether the man can be charged with depraved heart murder as a result of the motorcyclist's death.

Though most forms of murder require that the defendant act with the intent to kill, a defendant can still be found liable for murder under the "depraved heart" doctrine in the absence of the intent to kill. Depraved heart murder is an unlawful killing of a human, with malice proven not through the intent to kill but through a defendant's actions which demonstrate a wanton disregard for the value of human life. If a defendant's actions demonstrate such extreme recklessness as to evidence a conscious disregard for the risk of death amounting to wanton disregard for human life, he may still be liable for murder.

Here, however, a charge of depraved heart murder would likely be pushing it. The facts demonstrate that he was driving dangerously, "weaving in and out of traffic," passing drivers on curves, and going 30 miles an hour over the speed limit. However, these actions, though dangerous, do not likely rise to so reckless that they evidence a wanton

disregard for life. It is not uncommon on highways to see people engaging in such behavior; even if dangerous, it is likely not extreme enough for the wanton disregard standard. Though he could technically be charged with depraved heart murder, the prosecutor should choose a lesser charge for a better chance of proving guilt.

2b. The issue is whether the man can be charged with involuntary manslaughter as a result of the motorcyclist's death.

Involuntary manslaughter can be proven in two ways: if a defendant causes death not intentionally, but as a result of his recklessness, he is liable for involuntary manslaughter. Recklessness requires a conscious disregard for the risk created by the actions. Additionally, if a defendant causes death due to the commission of a *malum in se* misdemeanor, the misdemeanor manslaughter rule will find him guilty of involuntary manslaughter.

Here, the man absent defenses could likely be found guilty of involuntary manslaughter due to his *mens rea* of recklessness or due to the misdemeanor manslaughter rule. Driving in the manner that he did, described above, could likely be described as reckless; he did not merely exceed the speed limit. It is likely that he knew the risks of driving in the manner that he did - that he could cause an accident, and that an accident at that speed would cause death. Similarly, he may also be guilty of a misdemeanor, either through his sheer speed or via a reckless driving offense.

The facts do not say whether such a crime exists in this jurisdiction, but if it does the misdemeanor manslaughter rule could apply.

2c. The issue is whether the man can be charged with criminally negligent homicide as a result of the motorcyclist's death.

Criminally negligent homicide occurs when a defendant causes death through his actions which, while not reckless, are criminally negligent. Criminal negligence requires more egregious negligence than the civil negligence standard.

Absent defenses, the man would likely be found guilty of criminally negligent homicide. As described above, his driving conduct of exceeding the speed limit by 30 mph, weaving in and out of traffic, and passing vulnerable motorcycles on curves would amount to criminal negligence. It goes beyond the mere breaking of traffic laws into actually dangerous driving, and should be enough to satisfy the heightened criminal negligence standard.

3a. The issue is whether the man can successfully plead the defense of duress.

The defense of duress is available when a defendant was subject to a threat, which was wrongful in nature, to which the defendant had no choice but to succumb. If a reasonable person would have succumbed to the threat, the defense may be proven. Like other affirmative defenses, it must be proven by a preponderance of the evidence. The defense of duress is not available in a murder prosecution.

Here, the man would likely have the defense of duress available. He was subject to a wrongful physical threat - the woman held a knife to his throat, which is a criminal assault. The fact that is was reasonable for him to believe that he would be killed if he did not follow the woman's driving instructions makes it such that the defense of duress would likely be successful.

The defense of duress is not available in a prosecution for murder; thus, he may only be successful if charged with involuntary manslaughter or criminally negligent homicide. However, the only murder theory the prosecution could make out would be depraved heart, which does not require an intentional killing. Thus, the reason for depriving the defendant of the duress defense - that one may not take one life to save another - should not apply.

3b. The issue is whether the man can successfully plead the defense of necessity. The defense of necessity is available to a defendant who breaks the law in order to prevent a greater harm. Like other affirmative defenses, it is proven by a preponderance of the evidence.

Here, the defendant would likely be able to successfully plead necessity. The facts state that the woman did not put her knife to his throat until he was driving on the busy highway. Under these facts, it would be reasonable for the man to believe that, if he did not drive as she ordered, that she would kill him, causing the car to spin out of control on the busy highway, likely leading to more car accidents and deaths than his choice to follow her instructions and drive dangerously. Since it was reasonable for the defendant to believe that his dangerous driving would actually save lives, the defense of necessity should be available.

MEE Question 6 (Trusts)

In 1995, a man and his friend created a corporation. The man owned 55% of the stock, and the friend owned 45% of the stock. When the man died in 2005, he left all of his stock in the corporation to his wife.

In 2009, the wife died. Under her duly probated will, the wife bequeathed the stock her husband had left her to a testamentary trust and named her husband's friend as trustee. Under the wife's will, the trustee was required to distribute all trust income to the wife's son "for so long as he shall live or until such time as he shall marry" and, upon the son's death or marriage, to distribute the trust principal to a designated charity. The stock, valued at $500,000 at the wife's death, comprised the only asset of this trust.

In 2013, after the stock's value had risen to $1.5 million, the trustee's lawyer properly advised the trustee to sell the stock in order to comply with the state's prudent investor act. Because of this advice, the trustee decided to sell the stock. However, instead of testing the market for potential buyers, the trustee purchased the stock himself for $1.2 million. Thereafter, on behalf of the trust, the trustee invested the $1.2 million sales proceeds in a balanced portfolio of five mutual funds (including both stocks and bonds) with strong growth and current income potential.

Recently, both the son and the charity discovered the trustee's sale of the stock to himself and his reinvestment of the proceeds from the stock's sale. They learned that, due to general economic conditions, the stock in the corporation that had been purchased by the trustee for $1.2 million had declined in value to $450,000 and the value of the trust's mutual-fund portfolio had declined from $1.2 million to $1 million. Both the son and the charity have threatened to sue the trustee.

The son has also decided that he wants to get married and has notified the trustee that he believes the trust provision terminating his income interest upon marriage is invalid.

1. Would the son's interest in the trust terminate upon the son's marriage? Explain.

2. Did the trustee breach any duties by buying the trust's stock and, if yes, what remedies are available to the trust beneficiaries if they sue the trustee? Explain.

3. Did the trustee breach any duties in acquiring and retaining the portfolio of mutual funds and, if yes, what remedies are available to the trust beneficiaries if they sue the trustee? Explain.

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1. Would the son's interest in the trust terminate upon the son's marriage?

No, the son's interest in the trust would not terminate upon the son's marriage. In general, a will or trust cannot place unreasonable restraints upon marriage unless the language of the devise or bequest indicates that its intended purpose is to take care of someone's daily needs until they are able to one day obtain such support through marriage. Here, the language of the bequest to son is "for so long as he shall live or until such time as he shall marry." This language does not appear intended to support the son until his time of marriage. Rather, it appears to be providing the son with an incentive not to marry. If the son never marries, he is continuously entitled to the funds in the trust. As soon as he marries, however, he is instantly cut off and the trust principal goes to a charity. This type of restraint on marriage is void on grounds of public policy and so the son should retain an interest in the trust even after he marries.

2. Did the trustee breach any duties by buying the trust's stock and, if yes, what remedies are available to the trust beneficiaries if they sue the trustee?

Yes, by buying the trust's stock for himself, the trustee breached his duty of loyalty that he owed to the trust. In general, a trustee must protect trust property, be fair and impartial to the beneficiaries of the trust, and account and inform the beneficiaries about transactions pertaining to the trust. Here, the trustee purchased trust assets for himself at a bargain rate. The stocks were valued at $1.5 million and he sold them to himself for $1.2 million, a bargain of $300,000. It does not matter that the stock later dropped in value because the trustee had no way of knowing that they would drop in value. All that matters is what the value of the stock was at the time that he made the transaction. The trustee's bargain sale of the trust's stock to himself is a failure to protect trust property and a clear breach of the trustee's duty of loyalty. The facts also indicate that the trustee never told either the son or the charity about the trustee's purchase of the stock for himself. This is a violation of the trustee's duty to account and inform beneficiaries about transactions pertaining to the trust.

Based on these above violations, the trust beneficiaries may sue the trustee and have the court replace him with a new trustee. Although this is a drastic action, it is appropriate when the trustee has violated sacred duties. One thing that the beneficiaries may not do is compel payments out of the trust. This is typically a very difficult thing to do. Thus, even though the trustee has behaved poorly, the court will not simply decide to terminate the trust or compel payments out of it. Rather, the court will simply replace the trustee with a court-appointed trustee and continue with the trust according to the wishes of the testator. One other remedy that the beneficiaries could seek is a constructive trust. A constructive trust is a judicial remedy that tracks down assets that

are unjustly gained and recovers them to help repay beneficiaries for their lost interest in a will or trust. Here, the court could impose a constructive trust on some of the shares owned by the trustee and used them to reimburse the trust for the $300,000 that the trustee took from it. The beneficiaries could exercise both of the above remedies in tandem.

3. Did the trustee breach any duties in acquiring and retaining the portfolio of mutual funds and, if yes, what remedies are available to the trust beneficiaries if they sue the trustee?

No, the trustee did not breach any duties by acquiring and retaining the portfolio of mutual funds. Generally, a trustee has four duties with regard to his financial management of trust assets. First, the trustee cannot commingle trust funds with his own. Second, the trustee must balance financial return with potential risk. Third, the trustee must diversify the trust's portfolio. Finally, the trustee must keep the trust productive. This means that he cannot simply sit on funds. Rather, he must do what he can to gain a return on the financial assets already existing within the trust.

Here, the equities weigh in favor of the trustee's actions. Although the trustee could have received more than $1.2 million in return for the stocks, the deposit of that $1.2 million in a balance portfolio of five mutual funds is an entirely separate transaction that ought be analyzed on its own merits. The facts state that the mutual-fund portfolio includes both stocks and bonds and has strong growth with current income potential. Thus, by making such an investment, the trustee is fulfilling his duties of balancing return with potential risk, diversifying the portfolio, and keeping the trust productive. The trustee is taking some risk to help the financial assets of the trust blossom, but he is off-setting that risk as much as possible through diversification. This is wise investing and, at least on this front, the trustee has adequately fulfilled his obligations.

If this scenario had constituted a breach of the trustee's duties he owed to the trust, then there is not much that the beneficiaries could do about it. In general, where a trustee has been given wide latitude to invest trust financial assets, a court will not second-guess his financial decisions. As stated above, it is very difficult to compel payments out of a trust. It is also very difficult, if not impossible, to require a trustee to invest funds in a certain way. As long as he is balancing return with potential risk, diversifying the portfolio, keeping the trust productive, and not commingling funds, the trustee will be able to invest as he sees fit. The best that beneficiaries could hope for is removal of the trustee and a court-appointed replacement. However, based on the trustee's investment activities alone, this is not a likely remedy.