

Applicant Number



04471

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THE MEE[®]

MULTISTATE ESSAY EXAMINATION

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MEE Question 1

Two years ago, a retailer of home electronic equipment borrowed \$5 million from a finance company. The loan agreement, signed by both parties, provided that the retailer granted the finance company a security interest in all of the retailer's present and future inventory to secure the retailer's obligation to repay the loan. On the same day that it made the loan, the finance company filed in the appropriate state filing office a properly completed financing statement reflecting this transaction.

Six months ago, a buyer purchased a home entertainment system from the retailer for a total price of \$7,000. The buyer paid \$1,000 as a down payment on the system and agreed to make 12 additional monthly payments of \$500 each. The buyer signed a "credit purchase agreement" memorializing the financial arrangement with the retailer and providing that the retailer would "retain title" to the entertainment system until the buyer's obligation to the retailer was paid in full. The buyer then returned home with her new home entertainment system. The buyer had no knowledge of the retailer's agreement with the finance company and acted in good faith in acquiring the home entertainment system. The retailer did not file a financing statement with respect to this transaction.

Two months ago, the buyer decided that she could no longer afford her monthly \$500 payments for the home entertainment system. She contacted her friend, who had often expressed interest in acquiring a home entertainment system. After a brief discussion, the friend agreed to buy the home entertainment system from the buyer for \$4,000 if the friend could pay the price 90 days later, when he anticipated receiving a bonus at work. The buyer accepted the friend's proposal, and the friend gave the buyer a check for \$4,000. The buyer promised to hold the \$4,000 check for 90 days before depositing it. The friend took the entertainment system and began using it at his own home. The friend had no knowledge of the buyer's agreement with the retailer or of the retailer's agreement with the finance company.

The retailer is in financial distress and has missed a payment owed to the finance company. Meanwhile, since the friend bought the home entertainment system from the buyer, the buyer has not made any of her monthly payments to the retailer.

1. Does the finance company have an interest in the home entertainment system? Explain.
2. Does the retailer have an interest in the home entertainment system? Explain.
3. Does the retailer have an interest in the \$4,000 check? Explain.

1) Please type your answer to MEE 1 below

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When finished with this question, click ⌂ to advance to the next question.
(Essay)

===== Start of Answer #1 (1136 words) =====

1. Does the finance company have an interest in the home entertainment system.

No, the retailer no longer has a security interest in the home entertainment system. The issue is with a creditor with a perfected security agreement covering future inventory applies to that inventory once it is sold by a retailer into a buyer in the ordinary course of business.

Article 9 of the Uniform Commercial Code ("UCC") applies to the sale of goods. Goods are defined as all things that are moveable at the time of the transaction. A creditor can obtain a security interest in collateral if he follows the procedures set forth in the UCC. First there must be a security agreement. A security agreement must be in writing and authorized or signed by debtor/person to be charged. The agreement must identify the goods for which the security interest will attach and describe the security interest. In order for a security interest to attach to the goods, there must be (1) an authorized security agreement from the debtor, (2) the creditor must give value to the debtor, and

(3) the debtor must receive an interest in the goods.

Security interests apply based on the type of goods. The classification of goods is based on the type of use of the goods made by the owner. Inventory is defined under the UCC as goods that a company uses or consumes in performing its business. Personal and consumer goods are goods purchased primarily for use by consumers in their home for personal uses.

In this case, the retailer borrowed \$5 million from the finance company. There is an authorized security agreement signed by both parties granting the finance company a security interest in all present and future inventory of the retailer. Since the retailer sells home electronic equipment, the home entertainment system would be inventory for the retailer. Second, we the creditor, here the finance company, gave value of \$5 million to the debtor. Finally, the retailer received an interest in the inventory that it was able to purchase with money loaned. Therefore, the finance company's security interest in the inventory of the retailer attached. Attachment means that the finance company can enforce its security interest against the retailer.

Perfection involves the finance company securing its rights as against other third parties that may also try to claim an interest in the goods for which it has a security interest. Perfection of a security interest can be accomplished by control of the goods or by filing a UCC-1 financing statement with the state. Here, the retailer filed a financing statement and perfected its security interest.

Finance company had a perfected security interest in the home entertainment system when it was inventory for the retailer. The creditor's security interest does not continue to a buyer in the ordinary course. (BIOC). A BIOC is a person who purchases goods from a seller of those kinds of goods and purchases without knowledge that the sale violates the security interest of another. In that case, the BIOC takes free of any perfected security interest on the goods.

Here, the buyer purchased the home entertainment system from retailer (who is a seller of that kind of goods), without any knowledge of retailer's agreement and acted in good faith. Therefore the buyer purchased as a BIOC and took free of the finance company's security interest.

2. Does the retailer have an interest in the home entertainment system.

No, the retailer does not have a security interest in the system. The issue is whether a consumer-to-consumer sale carries with it a retailer's perfected PMSI security interest.

When a seller sells goods to a purchaser on credit and retains a security interest, a purchase money security interest is created (PMSI). Here, the buyer signed a credit purchase agreement so we have an authorized security agreement creating retailer's security interest in the goods. The retailer gave value to buyer (the home entertainment system) and buyer received value by taking home his new home entertainment system.

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The buyer will be using the home entertainment system in his home so it is classified as personal or consumer goods once the buyer took possession.

Here, the retailer sold the consumer goods to the buyer on credit and retained a PMSI in the goods. That security interest attached at the sale and delivery of the goods. The retailer's PMSI on the goods was perfected automatically. A PMSI on consumer goods is automatically perfected at sale. However, the retailer can still file a financing statement which will provide it additional protection against third parties (as will be discussed below).

The retailer's perfected PMSI does not apply in a consumer-to-consumer transaction. For the consumer-to-consumer transaction to apply. A consumer must sell personal or consumer goods to another consumer, the buyer must take in good faith, the buyer must pay actual value for the goods, and the buyer must take unaware that the sale violates the security interest of another.

Here, the the buyer sold the home entertainment system to to her friend. Therefore we have a consumer to consumer transaction involving personal or consumer goods. The frieind purchased the home entertianment system from the buyer in good faith and without any knowledge of the retailer's PMSI security interest. As an aside, if the retailer had filed a UCC-1 financing statement, then the friend would be charged with notice of the retailer's security interest and the consumer to consumer exception would not apply. The final requirement for the exception to apply is the buying consumer must give

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value. Here, the friend gave the buyer a check but asked her to wait 90 days before depositing the check. This qualifies as giving value for the consumer to consumer exception to apply. The fact that the buyer had to wait 90 days to cash the check does not change the fact that the friend paid value for the goods. Therefore, the consumer to consumer exception applies and the friend took the home entertainment system clear of the retailer's PMSI.

3. Does the retailer have an interest in the home entertainments system.

The retailer does have a security interest in the proceeds of the sale of the home entertainment system. The issue is what rights a creditor has to the proceeds from the sale of collateral.

A secured creditor has a right to all proceeds from the sale of the secured goods for which it has a security interest. When the proceeds are cash or are traceable, then the security interest persists on the proceeds of the sale of the collateral. Here, the retailer's security interest applies to any proceeds from the sale of the collateral. Therefore, the retailer has a security interest in the \$4,000 check as proceeds of the sale of the collateral in which it had a PMSI security interest.

===== End of Answer #1 =====

MEE Question 2

A victim had just walked out of a jewelry store carrying a package containing a diamond bracelet when someone grabbed him from behind, put a gun to his back, and demanded the package. The victim handed the package over his shoulder to the robber. The robber said, "Close your eyes and count to 20. I'll be watching, and if you mess up, I'll shoot you." The victim did as he was told, and when he opened his eyes, the robber was gone. The victim immediately called 911 on his cell phone.

The victim did not see the robber. A witness on the other side of the street saw the entire encounter. While the victim was speaking to the 911 operator, the witness ran over to the victim and shouted, "Are you all right? I saw it all!"

A police officer arrived five minutes later and took a statement from the witness, who was wringing her hands and pacing. The police officer asked the witness, "What did you see?" The witness responded, "The robber is about six feet tall. He has brownish hair, almost buzzed to the scalp. He was wearing jeans and a blue jacket." The police officer called in the description to the police station.

The defendant, who is over six feet tall and has buzzed brown hair, was picked up 30 minutes later. When the police officer stopped him, he was six blocks from the scene of the robbery. The defendant was wearing jeans and a blue jacket but did not have a gun or the bracelet in his possession. He was brought to the police station for questioning and was placed in a lineup.

The police officer brought the witness to the police station to view the lineup. The witness viewed the lineup and identified the defendant as the robber. The defendant was arrested and charged with robbery.

One week after the robbery, the witness moved overseas. One year later, at the time of the defendant's trial, the witness could not be found.

The victim and the police officer both testified at trial for the prosecution. The police officer testified as follows:

Question: When you arrived at the scene of the robbery, did you obtain a description of the robber?

Answer: Yes. The witness said that the robber was about six feet tall, with very short, brownish hair, almost buzzed to the scalp, and that he was wearing jeans and a blue jacket.

Question: Did you gather any other evidence indicating that the defendant committed this robbery?

Answer: Yes. When I was walking into the police station with the victim, we overheard the defendant in an adjoining room. As soon as the victim heard the defendant's voice, the victim said, "That's the voice of the guy who robbed me."

Question: What do you know about the defendant?

Answer: He's a known drug dealer who had been hanging around in the area where the jewelry store is located for six months before the robbery, constantly causing trouble.

The trial was held in a jurisdiction that has rules identical to the Federal Rules of Evidence. Defense counsel made timely objections to the admission of the following evidence:

- (a) The police officer's testimony recounting the witness's statement at the scene.
- (b) The police officer's testimony recounting the victim's statement while walking into the police station.
- (c) The police officer's testimony that the defendant is a "known drug dealer who had been hanging around in the area where the jewelry store is located for six months before the robbery, constantly causing trouble."

The trial judge overruled all of defense counsel's objections.

Was this evidence properly admitted? Explain.

2) Please type your answer to MEE 2 below

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When finished with this question, click Â to advance to the next question.
(Essay)

===== Start of Answer #2 (1093 words) =====

1. Is the police officer's testimony recounting the witness's statement at the scene admissible?

Ordinarily, hearsay is inadmissible. Hearsay is: (1) an out of court statement; (2) sought to be introduced for the truth of the matter asserted. Although this an expansive bar, there are numerous exceptions to the bar on admissibility.

Defendant will argue that the statement was made out of court during the police interview, and that the prosecution sought to introduce it to prove the truth of the matter asserted, in that the robber was six feet tall, with shor tbrown hair, etc.

The Prosecution could argue one of the applicable exceptions, such as the present sense impression or an excited utterance.

A. Present Sense Impression

A present sense impression is a statement made describing an event as it happens or within a reasonable time thereafter. The Prosecution could argue that the police officer arrived a mere 5 minutes later and that short window of time qualifies as a reasonable time for these purposes. This exception depends on the idea that the person will not lie while describing it. 5 minutes expired.

The court could go either way, but they would likely find that the 5 minute lapse was simply too long.

B. Excited Utterance

An excited utterance is a statement made by a person describing a startling event while being "excited" by the startling event. The Prosecution could argue that the witness was startled by witness a violent robbery and that a short 5 minutes was not a sufficient window of time to permit that excitement to pass. In addition, the witness described the individual who attacked the victim, thus the witness was describing the startling event.

The court could go either way, but they would likely find that the excited utterance exception applied.

The public record exception will not work because it does not extend to police reports

created for use in a subsequent prosecution.

C. Confrontation Clause

The Confrontation Clause requires that criminal defendants be afforded an opportunity to confront witnesses against them. This arises where a witness is unavailable, has not been subject to cross-examination, and where the statement is testimonial in nature. One is unavailable where they refuse to testify, are outside of the jurisdiction, have died, cannot be found, have forgotten, or enjoy some privilege. A statement is testimonial where it was collected in preparation for a future prosecution rather than to assist in ending an ongoing emergency.

Here, the witness is unavailable as a record indicates that she moved outside of the jurisdiction.

The Prosecution could argue that the statement was non-testimonial in nature as an armed robber was freely running about the town, and thus the statement was made to stop an ongoing emergency. The Defense will argue that the information was collected for the purposes of locating, arresting, and prosecuting the robber. Given the situation, and that robberies like this don't seem to happen in quick succession, it was probably testimonial.

The court will likely find that the statement was testimonial. As a result, Defendant must

be afforded the opportunity to confront the witness.

Also, never had the opportunity to cross-examine.

As a result, the lower court likely erred in admitting the evidence.

2. Is the police officer's testimony recounting the victim's statement while walking into the police station admissible?

Ordinarily, hearsay is inadmissible. Hearsay is: (1) an out of court statement; (2) sought to be introduced for the truth of the matter asserted. Although this an expansive bar, there are numerous exceptions to the bar on admissibility.

Defendant will argue that the statement was made out of court during an interaction with police, and that the prosecution sought to introduce it to prove the truth of the matter asserted, in that the Defendant was the robber..

The Prosecution could argue one of the applicable exceptions, such as the present sense impression or prior identification.

A. Present Sense Impression

A present sense impression is a statement made describing an event as it happens or

within a reasonable time thereafter. The Prosecution could argue that the witness was describing the voice of the individual as witness heard it. This exception depends on the idea that the person will not lie while describing it.

The court could go either way, but they would likely find that present sense impression exception applies.

B. Prior Identification

Certain out of court statements are considered non-hearsay. Prior identifications are one such exception. Here, the witness identified the Defendant as the robber. As a result, the prior identification likely applies.

The court would likely find this exception to apply.

C. Confrontation Clause

The Confrontation Clause requires that criminal defendants be afforded an opportunity to confront witnesses against them. This arises where a witness is unavailable, has not been subject to cross-examination, and where the statement is testimonial in nature. One is unavailable where they refuse to testify, are outside of the jurisdiction, have died, cannot be found, have forgotten, or enjoy some privilege. A statement is testimonial where it was collected in preparation for a future prosecution rather than to assist in

ending an ongoing emergency.

Here, the witness is unavailable as a record indicates that she moved outside of the jurisdiction.

The Defense will argue that the information was collected for the purposes of locating, arresting, and prosecuting the robber. Here, there is no indication of an ongoing emergency.

The court will likely find that the statement was testimonial. As a result, Defendant must be afforded the opportunity to confront the witness.

Also, never had the opportunity to cross-examine.

As a result, the lower court likely erred in admitting the evidence.

3. Is the police officer's testimony regarding defendant's status as a known drug dealer admissible?

Character Evidence is usually inadmissible to demonstrate that a defendant has acted in accordance with his/her propensity on a specific occasion. A Defendant may open the door to such evidence by first discussing Defendant's character. Such evidence may be admissible if it is an essential element of the crime.

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Here, there is no indication that Defendant had opened the door for the Prosecution to introduce character evidence. The Prosecution could argue that they were using it for some other purpose than propensities evidence, but the Defense could point that it has no probative value outside of that purpose. The Prosecution could argue that it was serving to establish the Defendant's identity, but even then, the risk of unfair prejudice would outweigh its probative value in this particular situation.

This is not habit evidence.

The court likely erred in admitting the evidence.

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===== End of Answer #2 =====
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MEE Question 3

Four years ago, a man and a woman properly formed a partnership to own and manage a multi-million-dollar apartment complex. They qualified the partnership as a limited liability partnership (LLP). The complex required a good deal of maintenance, and they anticipated regular borrowings of up to \$25,000 to cover maintenance expenses as is customary in this industry.

While the partnership agreement contained no limitations on the authority of the partners to act for LLP, two months after LLP was formed the man and the woman agreed that neither partner would have authority to incur indebtedness on behalf of LLP in excess of \$10,000 without the consent of the other partner. They then signed a statement of partnership authority describing this limitation, but this statement was never filed.

Over the next two years, the man regularly borrowed amounts from LLP's bank to cover the complex's ordinary maintenance expenses. The amounts borrowed ranged from \$5,000 to \$9,000, and the man did not ask for the woman's consent when he entered into these loans on behalf of LLP.

Earlier this year, the man, without the woman's knowledge, asked the bank to loan \$25,000 to LLP. The man told the bank's loan officer that the funds would be used for ordinary maintenance of the apartment complex. This amount, though greater than LLP's previous borrowings from the bank for maintenance, was in line with loans made by the bank for maintenance to other similar apartment complexes.

When the loan officer asked the man if he had authority to borrow the money on behalf of LLP, the man handed the loan officer a copy of the partnership agreement. The man, however, did not give the officer a copy of the statement of partnership authority, nor did he tell the loan officer that it existed. The bank had no actual knowledge of the limitation on the man's authority to obtain the loan on behalf of LLP.

Without contacting the woman, the bank loaned \$25,000 to LLP. The loan agreement was signed only by the man and the bank's loan officer. The woman, though she had knowledge of the earlier borrowings from the bank, had no knowledge of this loan.

The man then used the \$25,000 to pay his personal gambling debts. LLP has not made any payments to the bank on the loan.

1. Is LLP liable to the bank on the loan? Explain.
2. Is the woman personally liable to the bank on the loan? Explain.
3. Is the man liable for breaching his fiduciary duties and, if so, to whom is he liable? Explain.

Applicant No. _____

MEE QUESTION 3

Please be sure your applicant No. is legible.

1. Is LLP liable to bank on the loan?

The general rule is that every partner is an agent of the partnership and the partnership will be held liable for any contract entered into by a partner where he was authorized to do so. Authorization can be actual, express or implied, and it can also be apparent.

Here, the apparent authority of the man as partner to enter into contracts on behalf of the partnership was established by his past course of dealings with the bank. The facts show that over the previous two years he had regularly borrowed money from this bank on behalf of the LLP. Additionally, the general rule is that every ~~of~~ principle is authorized to enter into contracts on behalf of partnerships. Because the partnership agreement had no such limitation on the man's power to enter into loan agreements, and because the applicable statement of partnership authority was never filed with the state, the bank had no way to be put on notice as to the lack of authority. Thus, while the man lacked actual authority to enter into the loan, the apparent authority of the man will result in the LLP being held liable to the bank for the loan.

2. Is the woman personally liable to the bank on the loan?

A partner in a validly formed LLP is not personally liable for the debts and obligations of the LLP. This is contrary to a general partnership where a ~~partner~~ partner is personally liable. Thus, ^{assuming} ~~because~~ the LLP was properly filed with the state, the woman will only be liable to the bank to

the extent of her financial contributions to the LLP. She will have no personal liability. If it is ultimately determined the LLP is insolvent then she would under those circumstances be personally liable.

3. Is man liable for breach of fiduciary duties?

A partner owes fiduciary duties of loyalty and care to a partnership and other partners. These fiduciary duties cannot be altered in the partnership agreement. The duty of loyalty includes not stealing partnership's opportunities, engaging in self-dealing transactions, or advancing conflicting interests. The duty of care requires the partner to act as a reasonable person and avoid gross negligence, recklessness or intentional misconduct. ←

Here, the taking out of a loan in express violation of his actual authority by not seeking the consent of the woman, and then stealing those funds for his own use likely constituted a breach of his fiduciary duty of care, as it constituted intentional misconduct, and it clearly entailed a breach of the duty of loyalty, as he stole funds belonging to the company and appropriated them to his own uses. Thus, the man will almost certainly be liable to the LLP and the woman for breach of his fiduciary duties.

When a partner breaches his fiduciary duties, he can be held personally liable, even if he would not otherwise be personally liable as a partner in an LLP.

MEE Question 4

State A, a leader in wind energy, recently enacted the “Green Energy Act” (“the Act”).

Section 1 of the Act requires that 50% of the electricity sold by utilities in the state come from “environmentally friendly energy sources.” Wind energy, which is produced in State A, is classified by the Act as an “environmentally friendly energy source.” Natural gas, which is not produced in State A, is not classified by the Act as environmentally friendly. The preamble of the Act contains express findings that the burning of natural gas releases significant quantities of greenhouse gases into the atmosphere and requires the diversion of scarce water resources for use in gas-burning thermoelectric plants.

Section 2 of the Act prohibits the Public Service Commission of State A from approving any new coal-burning power plants in the state, unless it finds that “the construction of the plant is necessary to meet urgent energy needs of this state.” A public utility in neighboring State B has applied for a permit to build a coal-burning power plant on property it owns across the border in State A. The Commission has denied the utility’s application based on its finding that there is no evidence of any urgent energy needs in State A. The State B utility presented undisputed evidence of severe energy shortages in State B, but the Commission rejected this evidence as irrelevant to the statutory exception.

Section 3 of the Act requires State A, whenever possible, to buy goods and services only from “environmentally friendly vendors located within the state.” To qualify as an “environmentally friendly vendor,” a firm must meet specified standards concerning energy efficiency, chemical use, and use of recycled materials. A vendor located outside of State A meets all the standards to qualify as an environmentally friendly vendor. The vendor has sought to sell goods and services to State A. The relevant State A agencies have refused to purchase from this vendor, pointing out that the Act requires them to purchase, if possible, only from “environmentally friendly vendors located within the state,” of which there are several.

There is no federal statute or regulation relevant to this problem.

Which provisions, if any, of the Green Energy Act unconstitutionally burden or discriminate against interstate commerce? Explain.

4) Please type your answer to MEE 4 below

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When finished with this question, click Â to advance to the next question.
(Essay)

===== Start of Answer #4 (923 words) =====

The Commerce Clause and dormant commerce Clause

The Commerce Clause in the Constitution gives Congress the power to regulate interstate commerce as well as the instrumentalities of interstate commerce. Electrical systems cross state lines and electricity freely passes across state lines. Therefore Congress can regulate electrical systems and utilities.

When a state seeks to regulate interstate commerce, its regulation will be held to be invalid if it is preempted by a federal law or act of Congress. Here there is no federal statute or regulation relevant so preemption is not an issue.

If a state regulation places a burden on interstate commerce it can be invalidated under certain circumstances discussed below.

Under the dormant commerce clause (also called the negative implications of the

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Commerce Clause) If the state regulation on its face discriminates against out of state business to promote in state businesses, then it will be held to be invalid unless it is necessary to achieve an important government purpose and no non-discriminatory regulation will suffice (see the state bait fish exclusion case).

If a state regulation does not discriminate against out of state commerce on its face, then we look at the burden that it places on interstate commerce. If a state regulation unduly burdens interstate commerce, even though it is not discriminatory against out of state business, then it will be held to be invalid if its burdens on interstate commerce outweigh the benefit to the state through the regulation.

Section 1

Section 1 is probably valid under the dormant commerce clause. The issue is whether a regulation that does not discriminate against out of state business on its face will be valid under the dormant commerce clause. Section 1 requires that 50% of electricity sold in the state come from environmentally friendly energy sources. The wind energy produced in State A qualifies as environmentally friendly energy sources under the Act. However, electricity from natural gas is not included and is only produced outside State A. Section 1 does not discriminate against out of state business on its face. This is true despite the fact that wind energy (which qualifies) is generated in State A and natural gas generated electricity (which does not qualify) is not generated in the state. Therefore, because there is no express discrimination against out of state business, the

Section 1 will be valid under the dormant commerce clause unless the burden placed on interstate commerce outweighs the benefits to State A. Here, the burden on out state business and state businesses is the same, 50% the electricity sold in State A by a utility must come from environmental friendly sources. The benefit to the state is a cleaner environment. Based on these facts, a court would probably find that the benefits to State A outweigh any burden on interstate commerce and Section 1 would be valid under the dormant commerce clause.

Section 2

Section 2 will be found to be invalid under the dormant commerce clause because its benefits to State A are outweighed by the burden the regulation places on interstate commerce. Section 2 does not discriminate against out of state businesses on its face. It requires that all new coal-burning power plants in the state, constructed by in state or out of state businesses, to be approved by the state Public Service Commission only if the commission finds it meets the urgent energy needs of State A. Because Section 2 does not discriminate against out of state business on its face it will be held to be valid if State A can show that the benefits outweigh the burdens on interstate commerce. Here State A would arguably benefit by having fewer coal-burning power plants and their emissions in the state unless State A needs more electricity. However, electricity flows through wires across state lines in interstate commerce. And Section 2 limiting new construction of power plants based only on State A's determination of need in State A, creates an enormous burden on interstate commerce by preventing utilities from

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constructing new power plants in State A when, as the State B utility demonstrated, the electricity is severely needed due to an energy shortage in State B. Therefore, it is unlikely that State A can show the benefit of Section 2 outweighs the great burden placed on interstate commerce by limiting construction of new power plants only to when State A needs more power in the state. As a result Section 2 will probably be found to be invalid under the dormant commerce clause.

Section 3

Section 3 does not violate the dormant commerce clause because of the market participant exception. The issue is to what extent a state can discriminate against out of state business when it is acting as a market participant. Section 3 of the act requires that whenever possible State A buy goods and services only from environmentally friendly vendors in the state. The act on its face discriminates against out of state businesses. However, there is an exception to the dormant commerce clause for discrimination against out of state businesses by a state when it is acting as a participant in the market. In that case, a state is free to favor in state business over out of state business because it is acting as a participant in the market and not purely as a regulator. Here, the act only applies to purchases by State A. Because of that the market participant exception will prevent this express discrimination against out of state business from being invalidated by the dormant commerce clause.

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===== End of Answer #4 =====

MEE Question 5

Last year, a patient, age 80, was diagnosed with cancer. Shortly after receiving the cancer diagnosis, the patient signed a durable health-care power of attorney (POA) designating her son as her “agent to make all health-care decisions on my behalf when I lack capacity to make them myself.” The POA contained no other provisions relevant to the commencement or duration of the agent’s authority. The patient thereafter underwent several cancer therapies which were so successful that, two months ago, the patient’s doctor said that, in his opinion, the patient’s cancer was in “complete remission.”

Last week, the patient was struck by an automobile, suffered serious injuries to her head and neck, and underwent emergency surgery for those injuries. Following surgery, the patient’s doctor explained to her son that there was a more than 50% risk that the patient would not regain consciousness and would need to be maintained on life-support systems to provide her with food, hydration, and respiration. The doctor also noted that, during the next few days, there was a large risk of a stroke or cardiac arrest, which would substantially increase the risk that the patient would never regain consciousness, and which could be fatal.

The patient’s son was confident that his mother would not want to be kept on life support if she were permanently unconscious but believed that she would want to be maintained on life support until her status was clear. He thus instructed the doctor to put the patient on life support but not to resuscitate her if she were to experience a stroke or cardiac arrest. The son issued these instructions after conferring with the doctor and with his two sisters. The sisters disagreed with their brother’s decision and told the doctor to ignore the instructions “because we have as much right to say what happens to Mom as he does, and we want her resuscitated in all events.” Nonetheless, the doctor thereafter placed a “do not resuscitate” (DNR) order in the patient’s chart.

Four days ago, the patient, who had not regained consciousness, suffered a cardiac arrest. Following the DNR order, the nursing staff did not attempt to resuscitate the patient, and she died.

The patient’s valid will devised her estate to her three children in equal shares. All three children survived the patient.

This jurisdiction has a typical statute authorizing durable health-care powers of attorney. This jurisdiction also has a statute providing that “[n]o person shall share in the estate of a decedent when he or she intentionally caused the decedent’s death.”

The patient’s two daughters have consulted an attorney, who has advised them that (1) the patient’s son had no authority to instruct the doctor to write the DNR order; (2) in a wrongful death action, the son would be liable for the patient’s death; and (3) the son is barred from taking under the patient’s will because his actions intentionally caused her death.

Is the attorney correct? Explain.

5) Please type your answer to MEE 5 below

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When finished with this question, click Ⓐ to advance to the next question.
(Essay)

===== Start of Answer #5 (758 words) =====

1. The issue is whether the patient's son acted properly under a durable health-care power of attorney when he instructed the doctor to write a do not resuscitate (DNR) order.

A durable health-care power of attorney gives the designee the power to make all health-care decision for the designor. A designee acting on the designor's behalf under the POA is not liable for his actions if those actions are taken in good faith.

Here, patient signed a durable health-care power of attorney designating her son as her agent. the POA gave her son the power to make all health-care decision on patient's behalf when she became incapable of making them herself due to lack of capacity. Although patient made the POA after receiving her cancer diagnosis, patient did not revoke the POA when she was declared to be in complete remission after her cancer treatments.

Patient was struck by an automobile and suffered serious head injuries. Patient was unconscious and the doctor explained to the son that she might not regain consciousness. The doctor also explained that during this state, if patient had a stroke or cardiact arrest, it would be unlikely that patient would ever regain consciousness again.

Based on this information and what son believed that patient would want, son instructed doctor to put patient on life support, but not to resuscitate her if she were to experience a stroke or cardiac arrest. Although the sisters disagreed with son, the doctor placed a DNR order in the patient's chart. Son had a valid durable health-care POA of patient at the time he instructed the doctor to place a DNR order. Son had express actual authority under the durable health-care POA to make decisions if patient lacked capacity to make decisions for herself. Patient was unconscious. Patient was unlikely to regain consciousness. Patient lacked capacity due to her unconsciousness. Son had authority to make decisions on patient's behalf.

Therefore, son acted properly under the durable health-care power of attorney when he instructed the doctor to write a DNR order for patient.

2. The issue is whether son would be liable for patient's death in a wrongful death action.

A durable health-care power of attorney gives the designee the power to make all health-care decision for the designor. A designee acting on the designor's behalf under the POA is not liable for his actions if those actions are taken in good faith.

As previously established, son had authority to act on patient's behalf regarding medical decisions under the valid health-care POA. Son did not make the decision to instruct the doctor to order the DNR lightly. Son considered all the information given to him by doctor about patient's status. Son acted in the way he thought his mother would

had she been conscious and able to make the decision for herself. Son did not deny patient life support. Son requested that patient be put of life support to see if she would regain consciousness. Relying on doctor's opinion that if patient suffered a stroke or cardiac arrest while she was unconscious that she would never again regain consciousness, son requested the doctor enter a DNR on patient's chart in the case that patient did have a stroke or cardiac arrest. Son believed that patient would not want to be kept alive without the possibility of regaining consciousness.

Therefore, son acted in good faith by instructing the doctor to enter a DNR in patient's chart and is not liable for patient's death.

3. The issue is whether son will be barred from taking under patient's will under the Slayer Statutes.

Many states have enacted Slayer Statutes that prohibit a person from taking under the decedent's will if the person that is to inherit intentionally caused the death of the decedent.

In this case, son did not intentionally cause the death of patient. As previously discussed, son acted in good faith under a valid durable health-care POA that designated son as patient's agent to make all patient's health-care decision when patient lacked capacity to make them on her own. Son acted in accordance with the durable POA. Son acted in good faith by doing what he believed patient would do if she were able to make the decision on her own. Son did not intentionally cause patient's death. Patient's death

MEE Question 6

Eight years ago, a woman and a man began living together. The woman worked as an investment banker, and the man worked part-time as a bartender while he struggled to write his first novel. The couple lived in a condominium that the woman had purchased shortly before the man moved in. The woman had purchased the condominium for \$300,000 using her own money and had taken title in her own name.

Four years ago, the woman and the man were married at City Hall. One week before the wedding, the woman presented the man with a proposed premarital agreement and an asset list. The asset list correctly stated that the woman owned the condominium, then worth \$350,000, and a brokerage account, then worth \$500,000. The agreement specified that, in the event of divorce, each spouse would be entitled to retain "all assets which he or she then owns, whether or not those assets are acquired during the marriage." The man was surprised when the woman gave him the agreement to sign, and he contacted a lawyer friend for advice. The lawyer urged the man not to sign the agreement. Nonetheless, the man signed the agreement, telling the woman, "I'm a little hurt, but I guess I understand that you want to keep what you earn." The woman signed the agreement as well.

After their wedding, the woman and the man continued to live in the woman's condominium and to work at the jobs each held before the marriage. The man also continued to work on his novel.

Six months ago, the man's novel was accepted by a publisher. The novel will be released next spring. The publisher has estimated that the royalties may total as much as \$200,000 over the next five years.

Two months ago, the woman and the man separated. The woman remained in the condominium, now worth \$400,000 as a result of market appreciation. The woman's brokerage account, worth \$500,000 when she and the man married, is now worth \$1,000,000 as a result of market appreciation and additional investments that the woman made with employment bonuses she received during the marriage. The woman has made no withdrawals from this account.

One month ago, the woman won, but has not yet received, a \$5 million lottery jackpot.

One week ago, the man filed for divorce. In the man's divorce petition, he asks the court to invalidate the premarital agreement and seeks half of all assets owned by the woman, i.e., the woman's brokerage account, her condominium, and her right to the lottery payment. The man owns no assets except for personal effects and the book contract under which he will receive future royalties based on sales of his novel.

This jurisdiction has adopted the Uniform Premarital Agreement Act, which in relevant part provides that "the party against whom enforcement [of the premarital agreement] is sought must prove (1) involuntariness or (2) *both* that 'the agreement was unconscionable when it was executed' *and* that he or she did not receive or waive a 'fair and reasonable' disclosure and 'did not have or reasonably could not have had . . . an adequate knowledge' of the other's assets and obligations."

The jurisdiction's divorce law requires "equitable distribution" of all marital (community) assets and prohibits the division of separate assets.

1. Is the premarital agreement enforceable? Explain.
2. Assuming that the agreement is unenforceable, what assets are subject to division in the divorce action, and what factors should a court consider in distributing those assets? Explain.

6) Please type your answer to MEE 6 below
(Essay)

===== Start of Answer #6 (952 words) =====

1. Is the premarital agreement valid?

The issue is to what extent a premarital agreement that appears grossly unfair at divorce can be invalidated based on unconscionability or lack of disclosure at the time of signing the premarital agreement.

Under the UPA as adopted in the state a premarital agreement will be invalidated if the party challenging the agreement proves (1) involuntariness, or (2) *both* that the agreement was unconscionable when it was executed and that he or she did not receive fair and reasonable disclosure and did not have or reasonably could not have had adequate knowledge of the other's assets and obligations.

Here, prior to signing the prenuptial agreement (the Agreement), the woman disclosed to the a man: (1) her condo correctly valued at \$350k, and (2) her brokerage account worth (\$500k). The Agreement stated that in the event of divorce each spouse would be entitled to retain "all the assets which he or she then owns, whether or not those assets are acquired during the marriage." The man reviewed the agreement and then sought independent legal advice from his attorney who advised him not to sign it. Then over the advice of his attorney he signed the agreement.

Here, the man could attempt to argue the agreement was not voluntary because he was only presented with one week before the wedding. However, that argument is not likely to be successful. Therefore the man likely cannot prove that signing the Agreement was involuntary. That removes the first prong for invalidating the Agreement.

Here, the man appears to have received full and reasonable disclosure of the woman's assets at the time of signing the Agreement. This seems to satisfy the requirements of the statute. There are no facts indicating the woman failed to disclose any material assets. In light of that fact a court may never even reach the question of if the terms were unconscionable when the Agreement was executed. However, if the court were to reach that issue it could find the terms are not unconscionable, especially when considering the fact that the man consulted with an attorney and received independent legal advice before signing. In such a case a court would be unlikely to find the terms unconscionable when executed.

2. Assuming that the agreement is unenforceable, what assets are subject to division in the divorce action, and what factors should a court consider in distributing those assets.

The man will not receive half of the assets he seeks but will receive an equitable

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distribution of the marital property as discussed below. The issue is how the assets of the man and wife would be distributed in a jurisdiction that applies an equitable distribution to marital property in divorces. Here the jurisdiction will divide all marital property (property acquired during marriage by the spouses) based on an equitable division. The separate assets of the spouses that they both had before the marriage will not be subject to division according to the laws of the jurisdiction.

In making an equitable distribution of marital property, a court will often split the marital assets 50/50 but that is not required. Equitable does not necessarily mean half. In determining an equitable split of assets, the court will consider all of the following: the assets that each spouse brought into the marriage, the duration of the marriage, the education level and employment of each spouse, each spouse's contributions to the marital property earned during the marriage including wages, bonuses and labor contributed, the employment prospects and earning capacity of each spouse, the standard of living established during the marriage, and the mental and physical health of each spouse. The court will not usually consider marital fault when making an equitable distribution of marital property.

Each of the assets will be analyzed in turn below:

a. Woman's brokerage account

The woman's brokerage account was her separate property that she had when they entered into the marriage. The brokerage account as appreciated in value from \$500k

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to \$1 million as a result of both market appreciation and from contributions made by the woman during the marriage from employment bonuses. To increase in value of the brokerage account due to market appreciation is not subject to division at divorce and remains separate property. However, the increase in value of the brokerage agreement due to the woman investing employment bonuses during the marriage will be treated as marital property and is subject to an equitable division by the court upon divorce.

b. Woman's condominium

The condo appreciated in value from \$350k to \$400k during the marriage. It was the woman's separate property before marriage. The facts do not indicate that there was any significant increase in value of the condo due to improvements either made with marital property or through the labor of the husband. In that case the woman is entitled to the condo and its increase in value due to market appreciation during the marriage. The condo will not be subject to equitable distribution.

c. Woman's right to lottery payment

The lottery ticket was purchased during marriage and even though the woman has not yet received the \$5 million payment she is entitled to the payment. Therefore, the lottery payment will be considered marital property and subject to an equitable distribution by the court based on the factors listed above.

d. Man's book contract.

The man spent labor and effort during the marriage working on his book. The book

(Question 6 continued)

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contract that he earned will be marital property because he wrote the book and earned the proceeds during his marriage to the woman. Therefore, the book contract and its payments over the next five years will be subject to an equitable distribution by the court at divorce.

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End of Answer #6
END OF EXAM

MULTISTATE ESSAY EXAMINATION DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Answer all questions according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

NOTE: Examinees testing in UBE jurisdictions must answer according to generally accepted fundamental legal principles rather than local case or statutory law.