



CONNECTICUT BAR EXAMINATION  
28 July 2015  
**PERFORMANCE TEST #1**  
From the Multistate Performance Test

**In re Bryan Carr**

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**Anders, Davis & Waters**  
**Attorneys at Law**  
6241 Lowell Street  
Franklin City, Franklin 33205

**To:** Examinee  
**From:** Miles Anders  
**Re:** Bryan Carr  
**Date:** July 28, 2015

My friend and former college roommate Bryan Carr has consulted me about a credit card problem he is facing. I offered to help him figure out a strategy for responding.

Bryan's mother died last year. Since then his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry asked Bryan if Bryan could pay the estimated \$1,500 it would take to repair Henry's van. Bryan gave his credit card to Henry and told him that he could charge all the repairs but could not use the card for anything else. Bryan also gave Henry a letter that said Bryan was giving Henry permission to use the card. In the end, the total repair cost was \$1,850, which was charged to Bryan's card.

Bryan forgot to get the credit card and letter back from his father, and Henry used the card to buy several things in addition to the auto repairs. Over several months, Henry charged gasoline, groceries, books, and, most recently, power tools to Bryan's account. Bryan always pays the entire balance on his credit cards each month, and he had already paid for the first three months of purchases without noticing Henry's charges. However, earlier this month, Bryan discovered the unauthorized purchases. He promptly contacted the bank that issued the card to dispute the charges. The bank has notified him that he is responsible for all charges.

Bryan would like our advice about his legal obligation to pay the bank for the charges Henry made in March, April, May, and June, as detailed in the statements for these months. Please draft an opinion letter for my signature to Bryan. This letter should advise Bryan of the extent of his liability for each of Henry's purchases. The letter should follow the attached firm guidelines for opinion letters.

**Anders, Davis & Waters**  
**Attorneys at Law**  
6241 Lowell Street  
Franklin City, Franklin 33205

**OFFICE MEMORANDUM**

**To:** Associates  
**From:** Managing partner  
**Re:** Opinion letters  
**Date:** September 5, 2013

The firm follows these guidelines in preparing opinion letters to clients:

- Identify each issue separately and present each issue in the form of a “yes or no” question. (E.g., Is the client’s landlord entitled to apply the security deposit to the back rent owed?)
- Following each issue, provide a concise one- or two-sentence statement which gives a “short answer” to the question.
- Following the short answer, write a more detailed explanation and legal analysis of each issue, incorporating all important facts and providing legal citations. Explain how the relevant legal authorities combined with the facts lead to your conclusions.
- Bear in mind that, in most cases, the client is not a lawyer; avoid using legal jargon. Remember to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

**Transcript of telephone conversation between Miles Anders and Bryan Carr**  
July 24, 2015

**Anders:** Bryan, I heard your voicemail message. I'm sorry you are having problems, and I'd like to help. Can you tell me what happened?

**Carr:** Well, you know that my mom died late last year. My dad has been devastated. They were married for 40 years. My mom had always organized and maintained their household and paid all the bills. Now my dad is pretty much at a loss for how to cope. Even though this is a busy season for my landscaping business, I've tried to step in to support him as much as I can, including paying some of his bills. It's been tough keeping up with all that's going on.

**Anders:** Can you tell me more about your dad's situation? I'm asking because I understand that this has contributed to your current problem.

**Carr:** About four months ago, my dad came to me after his van broke down. He had gotten a repair estimate for \$1,500, and he didn't have the money on hand to pay for the repairs. I decided to help him out and told him I would pay whatever it cost to have his van repaired. I also told my dad it was a loan, but honestly, I was never going to ask him to pay me back. I love my dad and wanted to help him in his time of need.

**Anders:** How did you give him the money?

**Carr:** I let him use one of my credit cards. It seemed the easiest thing to do at the time. I had a card that had a zero balance on it. It's with Acme State Bank. When I gave my dad the credit card, I told him that he could charge the van repairs, but I also specifically told him that that was the only purchase or charge he should make on the card.

**Anders:** Did you do anything else?

**Carr:** Yes, I wrote a letter that said that my dad was authorized to use my credit card and gave it to him. I think I also wrote the credit card account number and expiration date on the letter. I made a copy of the letter and have it in my desk. I will scan it and email it to you as soon as we get off the phone.

**Anders:** Did the letter say anything about restricting the purchase specifically to the van repairs?

**Carr:** No, it didn't.

**Anders:** Did your dad charge the repairs?

**Carr:** Yes, my dad used my Acme State Bank card to pay for the van repairs. The final bill was somewhat more than the original estimate. Apparently an additional part was needed, making the total repair cost \$1,850. That was \$350 more than the original estimate. My dad charged the total amount to my credit card.

**Anders:** Then what happened?

**Carr:** With all that was going on in my life, I forgot to get my credit card back from my dad until about six weeks ago. When I finally did, I also got back the letter I'd given him. Unfortunately, I subsequently learned that my dad had already used the card to make additional purchases without ever asking my permission or even telling me. In fact, he even used my account information after returning the card and letter.

**Anders:** How did you find out about the additional purchases?

**Carr:** When I was reviewing and preparing to pay my current credit card statement, I noticed a \$1,200 charge to Franklin Hardware Store for power tools. I knew I had not made this purchase. I called my dad to see if he knew anything about the power tools purchase.

**Anders:** What did your dad say?

**Carr:** He admitted he had used my account number to buy the power tools. He told me he wanted to prove to himself and the rest of the family that he could take care of the house, and he impulsively went to buy some tools to make some household repairs. He said he had written the account information on a piece of paper before returning the credit card and my letter to me.

Because my dad had already returned the credit card and my letter to me before he purchased the tools, he said he merely presented the credit card account name, number, and expiration date to the hardware store clerk. The clerk must have been out of his mind, but he accepted the information my dad presented and charged the tools to my account. My dad feels terrible and has apologized profusely. He is so ashamed of himself.

**Anders:** Are these the only other charges your dad made?

**Carr:** I wish. He also admitted that before he returned my card, he had used it to buy gas, groceries, and books over the past few months.

**Anders:** What did you do after you learned of all these transactions?

**Carr:** I pulled out my file with my Acme State Bank credit card statements and reviewed my statements for the past several months. Sure enough, upon review, I noticed that during the past four months, in addition to the van repairs, my dad had charged gasoline on two occasions at Friendly Gas, groceries on one occasion at the Corner Market, books at Rendell's Book Store, and most recently, the power tools at the Franklin Hardware Store. I always pay the entire balance on my credit cards on the due date each month. All the gas, grocery, and book charges made by my dad have already been paid in full. I noted this fact by writing "Paid—BC" on each of the past statements. I never noticed these charges before I paid my statements. The truth is, I usually don't review the bills very carefully, and I didn't notice the gas, grocery, and book charges because he and I both shop at the same places. I probably gave each statement a quick glance, if that. However, I have not yet paid the current credit card statement for June with the \$1,200 power tools charge.

**Anders:** Have you contacted the bank or done anything else?

**Carr:** I called the bank to discuss the problem. They directed me to fill out and send in their form disputing the charges. I did this right away.

**Anders:** What happened?

**Carr:** This morning I received a letter from the bank informing me that I was responsible for all the charges. That's when I called your office.

**Anders:** What would you like to see happen?

**Carr:** I know my dad did something he shouldn't have done; I told him to return the tools if he still could. But he's a senior citizen and in considerable distress. The various vendors should not have allowed him to use my credit card. I know he had the card in his possession for all but the power tools purchase, but it's still not right for the bank to say I'm responsible. I'd like to know whether the bank can hold me responsible for each of the charges my dad made.

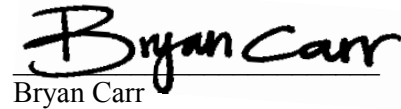
**Anders:** Bryan, we'll look into this quickly. Meanwhile, please don't pay your credit card statement until you get further advice from us. I'll be back in touch before the current payment due date.

March 12, 2015

To Whom It May Concern:

I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card: account number 474485AC66873641, expiration date 09/2017. If you have any questions, please feel free to call me at 555-654-8965.

Thank you,

  
Bryan Carr

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: March 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

**New Charges**

DATE	DESCRIPTION	AMOUNT
March 16, 2015	Schmidt Auto Repair	\$1,850.00

Total \$1,850.00

Payment Due Date April 30, 2015  
Minimum Due \$55.50

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

**THANK YOU FOR YOUR BUSINESS!**

PAID-BC April 29, 2015



ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: April 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

April 30, 2015      Payment Received      \$1,850.00

**New Charges**

DATE	DESCRIPTION	AMOUNT
April 10, 2015	Friendly Gas Station	\$75.00
April 16, 2015	Corner Store	\$55.00
April 21, 2015	Friendly Gas Station	\$76.50
	Total	\$206.50

Payment Due Date      Minimum Due  
May 31, 2015      \$15.00

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

**THANK YOU FOR YOUR BUSINESS!**

*PAID-BC May 30, 2015*

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: May 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

May 31, 2015      Payment Received      \$206.50

**New Charges**

DATE	DESCRIPTION	AMOUNT
May 16, 2015	Rendell's Book Store	\$45.70
	Total	\$45.70

Payment Due Date      Minimum Due  
June 30, 2015      \$15.00

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

**THANK YOU FOR YOUR BUSINESS!**

PAID-BC June 29, 2015

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: June 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

June 30, 2015      Payment Received      \$45.70

**New Charges**

DATE	DESCRIPTION	AMOUNT
June 21, 2015	Franklin Hardware Store—power tools	\$1,200.00
	Total	\$1,200.00

Payment Due Date      Minimum Due  
July 31, 2015      \$36.00

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

***THANK YOU FOR YOUR BUSINESS!***

**Excerpts from Federal Truth in Lending Act  
15 U.S.C. §§ 1602 and 1643**

**§ 1602 Definitions and rules of construction**

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

...

(k) The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

...

(o) The term “unauthorized use,” as used in section 1643 of this title, means 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.

\* \* \*

**§ 1643 Liability of holder of credit card**

**(a) Limits on liability**

(1) A cardholder shall be liable for the unauthorized use of a credit card only if—

(A) the card is an accepted credit card;

(B) the liability is not in excess of \$50;

...

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as a result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

...

(d) **Exclusiveness of liability.** Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

## **Excerpts from Restatement (Third) of Agency (2006)**

### **§ 1.01 Agency Defined**

Agency is the fiduciary relationship that arises when one person (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.

### **§ 2.01 Actual Authority**

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.

### **§ 2.03 Apparent Authority**

Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.

### **§ 3.01 Creation of Actual Authority**

Actual authority, as defined in § 2.01, 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.

### **§ 3.03 Creation of Apparent Authority**

Apparent authority, as defined in § 2.03, is created by a person’s manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

### **§ 3.11 Termination of Apparent Authority**

- (1) The termination of actual authority does not by itself end any apparent authority held by an agent.
- (2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.

**BAK Aviation Systems, Inc. v. World Airways, Inc.**

Franklin Court of Appeal (2007)

In 2005, BAK Aviation Systems, Inc. (BAK), issued a credit card to World Airlines, Inc. (World), to purchase fuel for a corporate jet leased by World from BAK. World designated Ken Swenson, an independent contractor hired by World, as chief pilot of the leased jet and gave him permission to make fuel purchases with the BAK credit card but only in connection with *non-charter* flights involving World executives. However, Swenson used the credit card to charge \$89,025 to World in connection with *charter* flights involving non-World customers prior to the cancellation of the credit card in 2006. When World refused to pay, BAK sought recovery in court.

The trial court entered judgment for BAK for the full amount in dispute. The court held that the federal Truth in Lending Act, which limits a cardholder's liability for "unauthorized" uses, did not apply to charges incurred by one to whom the cardholder had voluntarily allowed access for another purpose. World appeals.

The Truth in Lending Act, 15 U.S.C.

§ 1643(a), places a limit of \$50 on the liability of a credit cardholder for charges incurred by an "unauthorized" user. This appeal concerns the applicability of this provision to a card bearer who was given permission by the cardholder to make a limited range of purchases but who subsequently made additional charges on the card. We conclude that Swenson, who incurred the charges, was not an "unauthorized" user within the meaning of § 1643(a) and therefore affirm.

Congress enacted the 1970 Amendments to the Truth in Lending Act in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner. The amendments limit the liability of cardholders for all charges by third parties made without "actual, implied, or apparent authority" and "from which the cardholder receives no benefit." 15 U.S.C. §§ 1602(o), 1643. Where an unauthorized use has occurred, the cardholder can be held liable only up to a limit of \$50 for the amount charged on the card, if certain conditions are satisfied. 15 U.S.C. § 1643(a)(1)(B).

By defining “unauthorized use” as that lacking “actual, implied, or apparent authority,” Congress intended, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into “unauthorized use” properly focuses on whether the user acted as the cardholder’s agent in incurring the debt in dispute. A cardholder, as principal, can create actual authority only through manifestations to the user of consent to the particular transactions into which the user has entered. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01.

“Implied authority” has been held to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent’s express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestations in light of the principal’s objectives and other facts known to the agent. These meanings are not mutually exclusive. Both fall within the definition of

actual authority. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02, comment (b).

With respect to the transactions Swenson made in connection with the charter flights, we conclude that no actual or implied authority existed.

Unlike actual or implied authority, however, apparent authority exists entirely apart from the principal’s manifestations of consent to the agent. Rather, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder’s consent. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03.

Though a cardholder’s relinquishment of possession of a credit card may create in another the appearance of authority to use the card, the statute clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder’s consent, as in cases involving theft, loss, or fraud. However elastic the principle of apparent authority may be in theory, the language of the 1970

Amendments demonstrates Congress's intent that charges incurred as a result of *involuntary* card transfers are to be regarded as unauthorized under §§ 1602(o) and 1643.

Because the Truth in Lending Act provides no guidance as to uses arising from the *voluntary* transfer of credit cards, the general principles of agency law, incorporated by reference in § 1602(o), govern disputes over whether a resulting use was unauthorized. These disputes frequently involve, as in this case, a cardholder's claim that the card bearer was given permission to use a card for only a limited purpose and that subsequent charges exceeded the consent originally given by the cardholder. Acknowledging the absence of actual authority for the additional charges, 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. (Citations omitted.)

Nothing about the BAK credit card itself, or the circumstances surrounding the purchases, gave fuel sellers reason to distinguish the authorized fuel purchases

Swenson made for the *non-charter* flights from the disputed purchases for the *charter* flights. It was industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Swenson as the pilot and subsequently giving him the BAK card, World thereby imbued him with more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with World's blessing, Swenson had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between those uses expressly authorized and those now claimed to be unauthorized—the identity of the passengers—was insufficient to provide notice to those who sold the fuel that Swenson lacked authority for the charter flight purchases.

Here, the disputed charges were not "unauthorized" within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1). Accordingly, BAK was entitled to recover the full value of the charges from World under their credit agreement. The judgment of the trial court is affirmed.



## **Transmutual Insurance Co. v. Green Oil Co.**

Franklin Court of Appeal (2009)

This is an appeal from a holding of the trial court finding against defendant Green Oil Co. and in favor of plaintiff Transmutual Insurance Co. In March 2000, Transmutual obtained a Green Oil credit card for use in its business. Transmutual's office manager, Donna Smith, was responsible for requesting credit cards for Transmutual employees and paying bills. Smith did not have the authority to open new credit accounts for Transmutual; only its general manager had this authority.

On May 16, 2005, Smith made a written request to Green Oil for a GreenPlus credit card. A GreenPlus credit card may be used for purchases of goods and services other than those furnished at gasoline service stations. The GreenPlus application was signed by Smith as office manager. It also contained a signature purporting to be that of Alexander Foster as general manager and secretary-treasurer of Transmutual; however, the trial court determined that Foster's signature was forged by Smith.

During the period from May 2005 until July 2008, Smith wrongfully and fraudulently

used the GreenPlus card to obtain goods and services in the amount of \$26,376.53. Transmutual paid for these purchases with checks signed by Smith and an authorized officer. During this time, Transmutual employed accounting firms to perform audits, but they did not discover the fraud.

Under the federal Truth in Lending Act, 15 U.S.C. § 1643(a), a cardholder is liable only for a limited amount if certain conditions are met and if the use of the credit card was unauthorized. Accordingly, the initial determination is whether or not the use of the credit card in the case at hand was unauthorized. The federal definition of "unauthorized use" is "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." 15 U.S.C. § 1602(o). The test for determining unauthorized use is governed by agency law, and agency law must be used to resolve this issue.

Smith did not have actual or implied authority to request a GreenPlus credit card.

The trial court correctly determined that the principle of apparent authority controls in this case.

Apparent authority is created when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation of the principal. RESTATEMENT (THIRD) OF AGENCY § 3.03. Transmutual is bound by Smith's acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence. The trial court correctly determined that Green Oil acted negligently by issuing Smith a GreenPlus credit card without independently verifying her authority. Because of Green Oil's negligence, the trial court determined that Green Oil, as the card issuer, could not rely upon Smith's ostensible authority to establish the existence of agency between Smith and Transmutual.

However, the trial court erred in not looking beyond Green Oil's negligence in issuing Smith the card. After receiving the first statement from Green Oil containing the fraudulent charges, Transmutual was negligent in not finding and reporting Smith's fraud. If the person or entity to whom a credit card is issued is careless, that

person or entity may be held liable.

The federal Truth in Lending Act does not address whether cardholder negligence removes the statutory liability limit. However, we believe that Transmutual's negligence in not examining its monthly statements from Green Oil removes this case from the statutory limit on cardholder liability.

A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time.

The facts at hand are similar. Green Oil was not negligent in billing Transmutual. If someone at Transmutual other than Smith had examined its statements from Green Oil, he or she would have discovered Smith's fraud. Transmutual had the responsibility to institute internal procedures for the examination of the statements from Green Oil which would have disclosed Smith's

deception. Transmutual had sole power to do so. Transmutual's failure to institute such procedures is the cause of that portion of the embezzlement that occurred following the billing from Green Oil that contained the first evidence of Smith's fraud.

Transmutual's negligence leads us to reexamine whether Smith acquired apparent authority in her use of the GreenPlus card after Transmutual became negligent. In *Farmers Bank v. Wood* (Franklin Ct. App. 1998), we set forth the test to determine whether or not apparent authority exists. The authority must be based upon a principal's conduct which, reasonably interpreted, causes a third person to believe that the agent has authority to act for the principal.

Thus, 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.

*Farmers Bank, supra.*

Green Oil was negligent in issuing Smith the GreenPlus card. However, during Smith's fraudulent use of the card, Green Oil was not negligent. Rather, Transmutual (the cardholder) was negligent in not requiring that someone other than Smith examine its monthly statements. Smith embezzled money from Transmutual for three years through her fraudulent use of the GreenPlus credit card. During this lengthy period of embezzlement, Transmutual always paid its monthly bill to Green Oil.

Transmutual contends that it is not proper for the court to consider the fact that Transmutual paid all the Green Oil credit card charges. That contention is without merit. As a result of Transmutual's acts of paying the charges and its failure to examine its credit card statements so that it could notify Green Oil of the fraud, Transmutual allowed Green Oil to reasonably believe that Smith was authorized to use the credit card.

We conclude under the principles of apparent authority that Transmutual is liable for all of Smith's purchases from the time the credit card was issued.

Reversed.

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CONNECTICUT BAR EXAMINATION  
28 July 2015  
**PERFORMANCE TEST #2**  
From the Multistate Performance Test

**In re Franklin Aces**

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**Franklin Arts Law Services**  
*Pro Bono Legal Services for the Franklin Arts Community*  
224 Beckett Avenue  
Franklin City, Franklin 33221

**MEMORANDUM**

**TO:** Examinee  
**FROM:** Eileen Lee, Esq., Executive Director  
**RE:** Al Gurvin  
**DATE:** July 28, 2015

We have agreed to offer legal advice to Al Gurvin concerning a claim he may have against the Franklin Aces professional football team. The relevant materials are attached.

Our engagement by Mr. Gurvin recognizes that, as a pro bono service, we do not have the resources to represent him in litigation. Rather, we have been retained solely to provide legal advice about his potential claim. If he decides to pursue litigation, we will help him find counsel.

Mr. Gurvin has asked for 1) our evaluation of the likelihood of success should he litigate his claim against the team, 2) our assistance in seeking a settlement (we have done so and received an offer), and 3) our recommendation as to whether he should litigate or accept the settlement offer that the team has made.

Please draft a letter to Mr. Gurvin providing your recommendation as to whether he should accept the settlement offer. Your recommendation should factor in your assessment of the likely outcome of litigation, the recovery he might realize should he prevail, his goals in pressing his claim, and any other factors you think relevant. You should fully explain your reasoning as to why he should accept or reject the settlement offer.

Do not separately state the facts, but include the relevant facts in support of your legal analysis and recommendation as to the settlement offer. Remember that Mr. Gurvin is not an attorney. Your letter should explain the law and recommendation in language that, while encompassing a full legal analysis including citations to relevant legal authority, does so in terms a nonlawyer may easily understand.

## ***FRANKLIN SPORTS GAZETTE***

### **REJOICE, FRANKLIN FOOTBALL FANS, THE ACES ARE COMING!**

By Ben Jordan            January 27, 2014

FRANKLIN CITY, Franklin—Franklin’s long and unrequited longing for professional football is about to be satisfied. The Olympia Torches, after years of unsuccessful attempts to get support for a new stadium in Olympia, have announced that, starting in July of 2016, they will relocate to Franklin City.

ProBall Inc., the team owner, says that years of declining attendance in our neighboring state of Olympia—a result (in its view) of an aging, one could even say decrepit, stadium—have made a move imperative. Although many cities around the country sought to win the team, the owner chose Franklin City for several reasons, including the proximity of a good portion of the team’s fan base (without a team of their own, many Franklin residents followed the Torches) and—probably more importantly—the financial support of the Franklin State and Franklin City governments to underwrite the construction of a new, state-of-the-art stadium.

That new stadium will be built in the existing Franklin City Sports Complex, run by the Franklin Sports Authority. The Sports Complex currently includes the Omnidome, where Franklin’s pro basketball and hockey teams play, and Franklin Memorial Stadium, where the baseball Blue Sox play. The new stadium will be configured for soccer as well as football.

The team has also announced that it will change its name to the Franklin Aces. The new team logo and uniforms, yet to be created, will be announced in due course according to the team owner.

## Transcript of Interview between Eileen Lee and Al Gurvin (June 29, 2015)

**Lee:** Mr. Gurvin, nice to meet you. How may we help you?

**Gurvin:** They've stolen my design for the new football team's logo, and I need a lawyer.

**Lee:** Perhaps we'd better start at the beginning. I've read your intake application, and I know you qualify for our pro bono services given your income level, but tell me about yourself and how all this got started, from the beginning.

**Gurvin:** Okay, sorry, let's see. I work as a janitor at the Franklin Omnidome, the hockey rink and basketball facility used by our pro teams. I got real excited last year when they announced that the Olympia pro football team was moving to Franklin City.

**Lee:** Why were you so excited? Are you a big football fan?

**Gurvin:** I'll say—more than a big fan. I'm nuts about football, and I've been rooting for the Torches for years and years. I watch every game on TV, and I'd give my eyeteeth to be able to afford tickets to see games in person.

**Lee:** What happened after you saw the news reports of the move?

**Gurvin:** Well, I'm an amateur artist—no real training, but I like to doodle. When they announced that the team was moving, they also announced that it was changing its name to the Franklin Aces. They also said that they didn't yet have a logo or uniform designs. I didn't give it a second thought. But several months later, I started to think about a design and then one day it hit me. I realized that a real good design for a logo would be a hand holding the four aces from a deck of cards, fanned out like you hold cards. So I sketched that design, and it looked pretty good. I showed the sketch to my boss, and he liked it too.

**Lee:** Who's your boss? What's his position?

**Gurvin:** Dick Kessler—he's the work crew supervisor at the Omnidome. Anyway, he suggested that I send it to Daniel Luce, the CEO of the Franklin Sports Authority. So I took a drawing of the logo and faxed it to Mr. Luce with a note.

**Lee:** When did that happen, and what did the note say? Do you have a copy?

**Gurvin:** It was 10 months ago. Here's a copy of the note, and my original sketch [see attached note and description].

**Lee:** What happened then?

**Gurvin:** Nothing—I never heard back from anyone. Then, about a month ago, the team made a big announcement with a press conference and everything at which they announced



the new uniforms and logo, and it was mine, exactly! Here's a copy of their logo and the press release they issued with it, which was in the local newspapers [see attached press release and logo description]. I think they stole it from me, and I should be entitled to something for it—they should pay me something like \$20,000.

**Lee:** Have you registered the copyright in your design with the United States Copyright Office?

**Gurvin:** No—should I?

**Lee:** Well, a copyright exists from the moment a work is created, and you don't need any government action to grant it. But registration with the Copyright Office is a good idea for many reasons—for example, for our purposes, should you decide to litigate, you must have registered your claim before you can take the case to court. Even though the infringement you allege has already occurred, you can still register, but let's see what route you wish to pursue. Registration isn't expensive, and it won't hurt to wait to register for a few weeks in any event. Let me look into it. I happen to know José Alvarez, the General Counsel of ProBall Inc., the team owner—he's an old classmate and friend of mine. I'll contact him to see if we can work something out short of litigation, and get back to you.

**Gurvin:** Okay, great.

**Lee:** You should understand, Mr. Gurvin, that, while we'll be happy to evaluate your claim and help you seek a quick settlement, we're in no position to represent you if you decide to litigate it. As a pro bono service, we simply don't have the resources to undertake litigation on behalf of any client. So if litigation is ultimately the route you wish to follow, we'll try to help you find counsel, but our representation of you must end at that point.

**Gurvin:** Sure.

**Lee:** We'll draft an engagement letter for you to sign. I hope we can help you resolve this.

**Copy of Fax from Al Gurvin to Daniel Luce (September 25, 2014)**

Dear Mr. Luce: I'm a janitor in the Omnidome, and a big, big football fan. When I read that the Torches were moving to Franklin City, and that the team would become the Aces, I had a great idea for a logo for the team. I made a sketch, and it's attached to this note. I'd be honored if the team would consider and use my logo, and I wouldn't want anything from them if they did, except maybe some tickets to games in the new stadium. Thanks, Al Gurvin

[Actual sketch omitted]

\* \* \*

[DESCRIPTION OF GURVIN SKETCH: Mr. Gurvin's sketch consists of an outline of a hand from the wrist up, without any other features, holding four cards fanned out, in order from left to right, the ace of diamonds, ace of clubs, ace of hearts, and ace of spades.]

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**Press Release Announcing New Franklin Aces Logo**

[Franklin City, May 28, 2015] The Franklin Aces football team is delighted to announce its new logo and uniforms. After consideration of many designs, we believe this one will be most appealing to the fans and players. Later this year we will begin discussions with various merchandise manufacturers, and we expect that our fans will be able to purchase their Franklin Aces gear next year.

[Picture of Franklin Aces logo omitted.]

\* \* \*

**[DESCRIPTION OF NEW FRANKLIN ACES LOGO:**

Although the outline of the hand is somewhat different, the Franklin Aces logo presented in the press release is otherwise identical to Mr. Gurvin's sketch.]

**ProBall Inc.**

**José Alvarez, General Counsel**  
Franklin City Sports Complex, Suite 520  
Franklin City, FR 33221

July 24, 2015

Eileen Lee, Esq.  
Franklin Arts Law Services  
224 Beckett Avenue  
Franklin City, FR 33221

Dear Eileen:


Thanks for your phone call of July 7, 2015, explaining Mr. Gurvin's claim. I've looked into the matter, and our conclusion is that your client has no basis for any claim against the team.

First, the design he created, whatever its merits, is not copyrightable subject matter. The images of playing cards are familiar designs and common property containing no original authorship. That being the case, any claim he might have must fail.

Second, even if the design were copyrightable, there is no proof that those who designed the new team logo had any access to it. Thus, even if the designs were identical, there could be no copyright infringement, for without proof of access, any claim must fail. To that end, I have attached affidavits from those involved that summarize testimony that would be given in court.

Even though your client has no basis for any claim, the team's owner, in an effort to avoid unhappy publicity, makes this offer: In return for a release of any claims based on your client's design, ProBall Inc. would give Mr. Gurvin a season ticket for a single seat, in a prime location, to all home games for the team's first season. (The retail price of such a season ticket will be \$5,000.) Eileen, we go back a long way, you know I'm good for my word, and I want to be forthright with you—this is the team's final, and only, settlement offer.

With kindest personal regards,

  
José Alvarez

**AFFIDAVIT OF DANIEL LUCE**

STATE OF FRANKLIN     )  
COUNTY OF LINCOLN    )

I, Daniel Luce, being duly sworn, depose and say:

1. I am Chief Executive Officer of the Franklin Sports Authority. The Authority is entirely separate from ProBall Inc., the owner of the Franklin Aces football team. The Authority and ProBall Inc. are not under common ownership or affiliated in any way.

2. On September 25, 2014, I received a two-page fax from Al Gurvin, a janitor at the Omnidome facility of the Franklin City Sports Complex. I do not have a copy of the fax, but I know when I received it because I checked the fax log in our office. Although I do not recall the specifics, I remember that the fax had a sketch attached to it, and that Mr. Gurvin wanted the sketch submitted as a possible logo for the Franklin Aces pro football team.

3. I knew that the team had retained ForwardDesigns, a commercial design firm, to design a logo and uniforms for the team. Hence, I did not think any input from the Authority or otherwise was needed. Although I do not remember specifically what I did with the fax, I believe I discarded it in the trash.

4. ProBall was given a suite of offices in the five-story Administrative Building of the Franklin City Sports Complex. Those offices are on the fifth floor. All the Authority's offices, including mine, are on the second floor, as is the fax machine which serves all of the Authority's departments. (The ground floor contains a museum and ticket offices; the third and fourth floors are occupied by the firms holding the parking and food concessions at our facilities.)

5. Other than occasional greetings while passing in the lobby of our building or sharing rides in the elevator, I have had no contact with anyone working for ForwardDesigns.

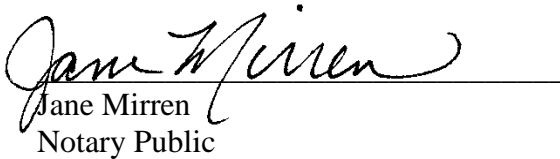
6. I and some of my staff meet occasionally with executives of ProBall Inc. to coordinate details concerning the construction and operation of the new football stadium. Other than that, no one from the Franklin Sports Authority has any dealings with representatives of ProBall Inc., the team owner.

Dated July 22, 2015

A handwritten signature in black ink that reads "Daniel Luce". The signature is written in a cursive style and is positioned above a horizontal line.

Daniel Luce

Signed before me on this 22<sup>nd</sup> day of July, 2015

A handwritten signature in black ink that reads "Jane Mirren". The signature is written in a cursive style and is positioned above a horizontal line.

Jane Mirren  
Notary Public

**AFFIDAVIT OF MONICA DEAN**

STATE OF FRANKLIN     )  
COUNTY OF LINCOLN    )

I, Monica Dean, being duly sworn, depose and say:


1. I am a commercial artist and designer for ForwardDesigns. Our firm was retained in August of 2014 by ProBall Inc. to design a logo and uniforms for the Franklin Aces pro football team. I was the sole designer working on the project. Our firm was paid \$10,000 for its services.

2. To facilitate my work on the project, the team gave me an office located in their suite of offices on the fifth floor of the Administrative Building of the Franklin City Sports Complex. I have had no contact with employees of the Franklin Sports Authority, other than with Julie Covington, a personal friend who works in the Authority’s transportation office and with whom I occasionally have lunch. I have never met Daniel Luce, the Authority’s Chief Executive Officer.

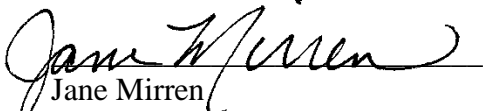
3. As I thought about a logo for the team, one obvious choice was a hand holding the four aces from a deck of cards. I had seen many versions of that image, including many on clip art collections on the Internet, none of which were protected by copyright, and which I used for inspiration. About five months ago, I drew that design, along with about a dozen others, and submitted it to ProBall Inc., who chose it as the new team logo. I alternated the suits of the cards in the design so that they appeared as first a red suit, then a black suit, and I made the last and most visible card the ace of spades, as it is the most striking and familiar card.

4. I do not recall ever seeing any sketch of any idea for the logo created by anyone else prior to creating my design.

Dated July 22, 2015

  
\_\_\_\_\_  
Monica Dean

Signed before me on this 22<sup>nd</sup> day of July, 2015

  
\_\_\_\_\_  
Jane Mirren  
Notary Public

**Oakland Arrows Soccer Club, Inc. v. Cordova**  
United States District Court for the District of Columbia (1998)

The question of the boundary between copyrightable and noncopyrightable subject matter—that is, what types of works are protected by the Copyright Act, and what types of works fall outside its sphere of protection—arises in the context of this petition for a writ of mandamus against Ricardo Cordova, the Register of Copyrights. All such actions against the Register of Copyrights must be brought here in Washington, D.C., as it is the location of the Copyright Office.

The facts are simple and not in dispute: The Oakland Arrows professional soccer club developed a new logo and wished to register it with the United States Copyright Office. While registration is entirely permissive, 17 U.S.C. § 408(a), and the existence of a copyright does not depend on it, registration confers significant benefits to the copyright owner, not the least of which is that it is a prerequisite to bringing a suit for copyright infringement. 17 U.S.C. § 411.

The Arrows' new logo consisted of an oblique triangle, colored red, white, and blue. The Arrows' explanation for the design was threefold: 1) the triangle conjured up an image of an arrowhead; 2)

the triangle could be seen to be a stylized letter "A"; 3) the colors evoked the United States flag.

The Arrows submitted an application for copyright registration to the Copyright Office. The Office's procedure is to examine each work for which registration is sought and determine if the work qualifies, in its opinion, for copyright protection. In this case, the Office's examiner concluded that the work did not qualify for protection. There is an internal appeals mechanism within the Office, which the Arrows pursued, but without success. Hence, they bring this mandamus action, seeking to compel the Register of Copyrights to register the work.

We review the question de novo. While we do give deference to the decision of an expert administrative agency, that deference is not necessarily dispositive.

The standard for copyrightability is easily stated: copyright protects original works of authorship. 17 U.S.C. § 102. That standard, however, is not so easily applied. What constitutes authorship? What constitutes originality? The courts have wrestled with

these questions over the years. Justice Holmes, in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), stated that “[It] is the personal reaction of an individual upon nature . . . . [A] very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright . . . .” More recently, Justice O’Connor, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991), stated (internal references and quotations omitted):

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works will make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it may be.

How do we apply these tests to the work at hand? We are assisted, to some degree, by the regulations of the Copyright Office as to the types of works the Office will register. We quote the regulation—which the Office states is based on decades of court decisions—in full, from 37 C.F.R.:

## **§ 202.1 Material not subject to copyright.**

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;

(b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;

(c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;

(d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources;

(e) Typeface as typeface.

The Copyright Office, in defending its action, argues that the logo is simply a “familiar symbol or design,” with a “mere variation in coloring,” as in subsection (a) of



the regulation. While the Arrows make many arguments as to the artistic value of the work, the effort that went into creating it, and the connections to the team which it conjures up, none of those arguments can carry the day. The copyright law does not reward effort—it rewards original expression of authorship. What we have here is a simple multicolored triangle. That is a “familiar symbol,” with “mere variation of coloring.” There is not enough originality of authorship in that design to merit copyright protection. In Justice O’Connor’s words, even the “extremely low” “minimal degree of creativity”—the “creative spark”—is lacking here.

The Arrows’ petition for a writ of mandamus is denied.

## **Savia v. Malcolm**

United States District Court for the District of Franklin (2003)

In this action for copyright infringement, plaintiff Joseph Savia, the composer and copyright owner of the song “Perhaps,” claims that defendant Lauren Malcolm copied the melody of his song and used it in her song “Love Tears” without authorization. After extensive discovery, the parties have filed cross-motions for summary judgment. We deny the plaintiff’s motion and grant the defendant’s motion.

### Facts

In 1981, Savia wrote “Perhaps” and was successful in having it placed over the closing credits of the motion picture *The Duchess of Broken Hearts*. The motion picture had only a limited theatrical release, playing in a single “art house” movie theater in Franklin City for a three-week run. A dispute among the producers of the motion picture, for reasons not relevant here, has resulted in no further exploitation of the motion picture, either in theatrical release, in home video format, or on television, cable, the Internet, or otherwise. The motion picture was rated NC-17 by the Motion Picture Association of America because of its sexual content. That rating means that no one under the age of 17 will be admitted to a

theater showing the motion picture. “Perhaps” was never commercially recorded, other than for the soundtrack of the motion picture, and no recording of it has ever been released. Savia registered the work with the United States Copyright Office, and there is no dispute about the validity of the copyright in “Perhaps” or that he is the copyright owner.

In 2002, Malcolm, a lifelong resident of Franklin City and a highly successful 25-year-old songwriter, wrote “Love Tears,” which was commercially recorded and released by Remnants of Emily, a well-known rock band. The recording achieved great success, ultimately making number one on the *Billboard* “Hot 100” chart for four weeks. The recording has sold over two million copies, and the song has been widely performed and has been used in commercial advertisements. Malcolm, as songwriter, has, through the end of 2002, earned approximately \$1.5 million in royalties attributable to the song from these various uses.

The parties each presented expert testimony from musicologists. These expert witnesses

agreed, and the court as finder of fact also finds, that the lyrics of the songs are entirely different, but that the melodies are, if not identical, virtually so.

### The Standard for Infringement

It is rare that direct evidence of copyright infringement exists. Therefore, the courts have turned to circumstantial evidence in determining whether one work infringes another. In doing so, the courts in this Circuit have uniformly applied a two-prong test for infringement: 1) Are the works “substantially similar”? 2) Did the alleged infringer have access to the copyrighted work? The reasons for these two standards should be obvious: If the works are not, at the very least, substantially similar, there can be no infringement. And if the alleged infringer had no access to the allegedly infringed work, there could be no possibility of copying. Certainly, the more similar the works, the less evidence of access need be adduced. But plausible evidence of access must always be found.

Two cases are instructive. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), the legendary songwriter Jerome Kern was accused of plagiarizing the bass line from a wildly popular earlier work.

Although Kern testified that he did not consciously use the earlier work, the court concluded that Kern, a working songwriter who kept up with current popular music, must have heard it and so had access to it. Kern also argued that the bass line could be found in earlier works which were not protected by copyright; if he had copied from those works, he would not be infringing. But, as Kern could not prove that he was even aware of those works before the lawsuit, his argument failed, and he was found liable for infringement.

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983), George Harrison (of the Beatles) was accused of plagiarizing the melody of an earlier popular rock and roll song. He testified that he did not consciously copy the earlier song, and the court believed him. Nevertheless, the court concluded that he had access to the earlier song and so had “unconsciously” copied it; he was found liable for infringement.

### Analysis

Here, there is no question that the works are virtually identical. Substantial similarity—

indeed, striking similarity—of the melodies is proven. The question is whether Malcolm had access to Savia’s song. Can access be plausibly inferred from the evidence? We conclude that it cannot.

As noted, Savia’s song was released to the public only in the form of the closing credits of a motion picture, one that had only a limited run in Franklin City. Further, the motion picture had been rated NC-17, meaning that no one under the age of 17 would be admitted to the theater. At the time the motion picture was released, Malcolm was four years old. While we can take judicial notice of the fact that the ratings code is sometimes more honored in the breach than in the observance, we think it implausible that a four-year-old child would be admitted to a theater showing an NC-17-rated movie.

Savia argues that, even so, Malcolm might have had access to “Perhaps” by hearing someone who had seen the motion picture play or sing the song. Without a scintilla of evidence to justify that conclusion, we cannot credit such mere speculation.

### Conclusion

We conclude that there is no plausible evidence that Malcolm had access to Savia’s work. For that reason, notwithstanding the virtual identity of the melodies of the two songs, we conclude that Malcolm’s song was original with her and was not copied from Savia’s. We deny Savia’s motion for summary judgment and grant Malcolm’s motion for summary judgment.

**Herman v. Nova, Inc.**

United States District Court for the District of Franklin (2009)

In our previous opinion, [citation omitted], Nova, Inc., a motion picture producer, was found liable to Herman for copyright infringement of Herman's unpublished screenplay. We now address the question of damages.

Herman, an amateur author, had, unsolicited, submitted the screenplay to Nova. Nova then used the screenplay as the basis for its own screenplay, from which, it announced, it was going to make a motion picture. It issued a press release announcing its intention to make a motion picture based on its own screenplay; the press release included a synopsis of the screenplay. Herman saw the press release and, before Nova took any further action, successfully sued Nova for copyright infringement.

Because Herman had not registered his copyright in his unpublished screenplay with the United States Copyright Office before the act of infringement occurred, his damages are limited to his actual damages and the infringer's profits. 17 U.S.C. §§ 412, 504(b). Had Herman registered before the infringement, he would have been entitled to statutory damages in lieu of actual damages and profits, and, in the court's discretion, costs, including attorney's fees. Here, as Nova, the infringer, took no action after appropriating Herman's work and realized no gain, direct or indirect, thereafter, there are no profits resulting from the infringement which can be awarded. (The result would be different if, for example, the motion picture had been made and released, but such is not the case here.) The question, then, is what are Herman's actual damages?

As Herman was an amateur author, he had no track record of payments for his work and hence can submit no evidence of his own as to his screenplay's worth. The evidence adduced in discovery, from Nova's records and from third-party witnesses, shows that the range of payment which a motion picture producer like Nova would make for a screenplay of this sort would be between \$15,000 and \$50,000.

Given the unquestioned infringement that took place, we are disposed to award damages at the upper end of that range. Hence, judgment will be entered in Herman's favor for \$50,000.

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## CONNECTICUT BAR EXAMINATION

28 July 2015

# QUESTION #1

## From the Multistate Essay Examination

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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## CONNECTICUT BAR EXAMINATION

28 July 2015

# QUESTION #2

## From the Multistate Essay Examination

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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## CONNECTICUT BAR EXAMINATION

28 July 2015

# QUESTION #3

## From the Multistate Essay Examination

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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## CONNECTICUT BAR EXAMINATION

28 July 2015

# QUESTION #4

## From the Multistate Essay Examination

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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## CONNECTICUT BAR EXAMINATION

28 July 2015

# QUESTION #5

## From the Multistate Essay Examination

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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## CONNECTICUT BAR EXAMINATION

28 July 2015

# QUESTION #6

## From the Multistate Essay Examination

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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