

MEE Question 1

On the evening of July 4, a woman went to the end of her dock to watch a fireworks display on the lake where her house was located. The woman's husband remained inside the house. The fireworks display was sponsored by the lake homeowners association, which had contracted with a fireworks company to plan and manage all aspects of the fireworks display.

The fireworks display was set off from a barge in the middle of the lake. During the finale, a mortar flew out horizontally instead of ascending into the sky. The mortar struck the woman's dock. She was hit by flaming debris and severely injured. When the woman's husband saw what had happened from inside the house, he rushed to help her. In his hurry, he tripped on a rug and fell down a flight of stairs, sustaining a serious fracture.

All the fireworks company employees are state-certified fireworks technicians, and the company followed all governmental fireworks regulations. It is not known why the mortar misfired.

The woman and her husband sued the homeowners association and the fireworks company to recover damages for their injuries under theories of strict liability and negligence. At trial, they established all of the above facts. They also established the following:

- 1) Nationally, accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. About 15% of these accidents are caused by mortars misfiring in the course of professional fireworks displays, and some of these accidents occur despite compliance with governmental fireworks regulations.
- 2) Even with careful use by experts, fireworks mortars can still misfire.
- 3) Although a state statute requires a "safety zone" of 500 feet from the launching site of fireworks when those fireworks are launched on land, the statute does not refer to fireworks launched on water. Neither the homeowners association nor the fireworks company established such a zone.
- 4) The average fireworks-to-shore distance for this display was 1,000 feet. The woman's dock is 450 feet from the location of the fireworks barge; at only three other points on the lake is there land or a dock within 500 feet of the fireworks barge location.

After the conclusion of the plaintiffs' case, both the homeowners association and the fireworks company moved for a directed verdict on the basis that the facts established by the evidence did not support a verdict for the plaintiffs.

The trial judge granted the motion, based on these findings:

1. Fireworks displays are not an abnormally dangerous activity and thus are not subject to strict liability.
2. Based on the evidence submitted, a reasonable jury could not conclude that the conduct of the fireworks company was negligent.
3. The misfiring mortar was not the proximate cause of the husband's injuries.
4. The homeowners association cannot be held liable for the fireworks company's acts or omissions.

As to each of the judge's four findings, was the judge correct? Explain.

1) Please type your answer to MEE 1 below

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

(Essay)

===== Start of Answer #1 (1050 words) =====

As a preliminary issue, to grant a directed verdict, the evidence presented must be so that no reasonable juror could differ and the evidence is clearly in favor of the moving party. The evidence is viewed in light most favorable to the nonmoving party.

1) The judge was incorrect regarding the strict liability of firework displays. The issue is whether firework displays are an abnormally dangerous activity.

Specifically, can the risk associated with the activity be eliminated with reasonable care. Strict liability can be imposed for abnormally dangerous activities that cause

injuries. To be abnormally dangerous, the risks associated with the activities cannot be eliminated with reasonable care and must not be normal in the area where conducted. Other facts consider the degree of the potential harm and the usefulness of the activity in the community. Further, the harm caused has to be from the abnormally dangerous propensity of the activity for strict liability to apply. Here, nationally, accidents involving fireworks cause about 9,000 injuries and 5 deaths each year. About 15% of these accidents are caused by mortars misfiring in the course of professional firework displays, and some of these accidents occur despite compliance with governmental fireworks regulations. Further, even with careful use by experts, fireworks mortars can still misfire. Eventhough, all the fireworks company employees were state-certified fireworks technicians, and the company followed all governmental fireworks regulations, the potential risk associated with mortars cannot be eliminated. In this case, it is not known why the mortar misfired. Further, the mortar's misfire is what caused the woman's injuries; thus, it was a result of the dangerous propensities of the mortars misfiring. Furthermore, while firework displays may be common in the area during certain holidays, it is not a normal activity in the area. Therefore, in light of this evidence, the judge was incorrect, because there is plenty of evidence that could cause reasonable jurors to differ.

2) The judge was incorrect regarding whether a reasonable jury could not conclude that the conduct of the fireworks company was negligent. The issue is whether the location that the fireworks company decided to shoot the mortars from was a breach of a duty owed, either by negligence per se or by breaching the duty. To establish negligence, the plaintiffs must prove that the defendant owed the plaintiffs a duty of care, that the defendant breach that duty of care owed to plaintiffs, actual and proximate cause, and damages. The duty of care owed is that of a reasonable prudent person under the same or similiar circumstances and is only owed to foreseeable plaintiffs. Here, the fireworks company owed the plaintiffs a duty of care to not injure them with fireworks because this was a July 4th fireworks display, so it is foreseeable that people around the lake would watch. Breach of a duty is a fact question for the jury to decide. Only when plaintiffs have offered no evidence of a breach is the Court able to grant a directed verdict. Further, negligence per se if applicable establishes duty and breach. Negligence per se applies when there is a statute that sets a standard of care to protect those class of persons plaintiff is within. Here, there is a state statute requiring a "safety zone" of 500 feet from the launching site of fireworks when those fireworks are launched on land, the statuted does not refer to fireworks launched on water. Neither the homeowners association nor the fireworks display company established such a zone. Here, clearly the statute was designed to protect the class

of persons plaintiff is within, viewers of fireworks within 500 feet. However, it is not a clear as whether the statute is on point because it applies to land.

Nonetheless, there is no practical difference between distance on land and distance on water, both are distances and negligence per se should apply. However, if it does not apply, the fact that the fireworks company were close to the plaintiffs may be enough evidence of a breach. The woman's dock is 450 feet from the location of the fireworks barge; at only three other points on the lake is there land or a dock within 500 feet of the fireworks barge location. Therefore, a reasonable juror could find that the close proximity to the woman's dock was breach of the duty. Therefore, the court was incorrect.

3) The misfiring of the mortar was the proximate cause. The issue is whether a rescuer harmed in attempting to rescue is a foreseeable event. Proximate cause acts to cut off defendant's liability when too remote. A direct result of the negligence that is a within the natural occurrences is a proximate cause. The touchstone is foreseeability. Even in indirect cases, where there is another event after the defendant's negligence that acts in producing the harm, if a harmful result is foreseeable, it doesn't matter that the way it happen was unforeseeable. Further, rescuers are also foreseeable. Thus, if someone puts another in peril in need of rescue, the subsequent rescue is foreseeable. Here, the negligence of the mortar

hitting the woman produces a foreseeable result that someone who try to rescue/help her, including her husband. It doesn't matter that the manner of the injury, tripping on a rug, was foreseeable, just the that someone could be injured helping the woman. Therefore, the misfiring mortar was the proximate cause.

4) The issue is whether the Homeowner's associaton can be vicariously liable for the fireworks company's acts or omission. Specically, if the fireworks company is an employee or independent contract. A employer is only liable for the torts of its employees committed within the scope of their employment, this is known as respondeat superior. However, employer is not liable for torts of independent contractors, unless that activity was authorized or if the activity is an abnormally dangerous activity. Whether someone is an employee or independent contract is determined by whether the employer has the right to control the method and manner of completeing the job. Here, the Homeowner's association does not control the fireworks company, they just contracted with them and the company planned and managed all aspects of the fireworks display. However, as discussed above, this activity consituted a abnormally dangerous activity and the exception applies. Therefore, the homeowners association can be held liable.

MEE Question 2

Businesses in the United States make billions of dollars in payments each day by electronic funds transfers (also known as “wire transfers”). Banks allow their business customers to initiate payment orders for wire transfers by electronic means. To ensure that these electronic payment orders actually originate from their customers, and not from thieves, banks use a variety of security devices including passwords and data encryption. Despite these efforts, thieves sometimes circumvent banks’ security methods and cause banks to make unauthorized transfers from business customers’ bank accounts to the thieves’ accounts.

To combat this type of fraud, State A recently passed a law requiring all banks that offer funds transfer services to State A businesses to use biometric identification (e.g., fingerprints or retinal scans) to verify payment orders above \$10,000. Although experts dispute whether biometric identification is significantly better than other security techniques, the State A legislature decided to require it after heavy lobbying from a State A–based manufacturer of biometric identification equipment.

A large bank, incorporated and headquartered in State B, provides banking services to businesses in every U.S. state, including State A. Implementation of biometric identification for this bank’s business customers in State A would require the bank to reprogram its entire U.S. electronic banking system at a cost of \$50 million. The bank’s own security experts do not believe that biometric identification is a particularly reliable security system. Thus, instead of complying with State A’s new law, the bank informed its business customers in State A that it would no longer allow them to make electronically initiated funds transfers. Many of the bank’s business customers responded by shifting their business to other banks. The bank estimates that, as a result, it has lost profits in State A of \$2 million.

There is no federal statute that governs the terms on which a bank may offer funds transfer services to its business customers or the security measures that banks must implement in connection with such services. The matter is governed entirely by state law.

The bank’s lawyers have drafted a complaint against State A and against State A’s Superintendent of Banking in her official capacity. The complaint alleges all the facts stated above and asserts that the State A statute requiring biometric identification as applied to the bank violates the U.S. Constitution. The complaint seeks \$2 million in damages from State A as compensation for the bank’s lost profits. The complaint also seeks an injunction against the Superintendent of Banking to prevent her from taking any action to enforce the allegedly unconstitutional State A statute.

1. Can the bank maintain a suit in federal court against State A for damages? Explain.
2. Can the bank maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the State A statute? Explain.
3. Is the State A statute unconstitutional? 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 (811 words) =====

The issue is whether the bank can maintain a suit in federal court against State A for damages.

The 11th Amendment to the US constitution provides that states are immune from lawsuits against them by citizens of other states for damages. This is called Sovereign Immunity. Generally, a State must waive its sovereign immunity and consent to being sued in order to be brought to court. A corporation is considered a person. A corporation is considered to be a citizen of the place where it is domiciled. A corporation's domicile is in its state of incorporation or where it is headquartered. Its headquarters are where its nerve center is located.

Here, bank would be considered domiciled in State B because there is where the facts say it is incorporated and where its headquarters are. Additionally, there are no facts here stating that the state has waived its sovereign immunity. There is nothing indicating there is a state statute that State A has passed that will allow itself to be sued, or that it has specifically consented to being sued by the bank in State B. Therefore, because the state is immune from suit, the bank cannot maintain a suit in federal court against State A for damages.

The issue is whether the bank can maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the State A statute.

Individuals may sue state officials in their official capacities to enjoin them from taking certain actions. They may not sue them in their official capacities for damages resulting from discretionary decision making inherent in the job.

Here, the bank is suing State A's Superintendent of banking in her official capacity so that she cannot implement the statute requiring biometric identification. Because they are suing for an injunction to keep her from carrying out an official duty, this is an appropriate suit.

The issue is whether the court has subject matter jurisdiction to hear the case. Subject matter jurisdiction can be provided by federal question jurisdiction. Federal question jurisdiction arises whenever there is an issue of law arising under the federal laws of the United States. The issue must be pleaded in the plaintiff's complaint for federal question to apply.

Here, the Bank alleged in its complaint that the statute violates the U.S. Constitution. Thus, the issue is a federal question because it is based on the US Constitution and it was properly pleaded in the complaint. Therefore, a federal court would have subject matter jurisdiction over the complaint.

Therefore, the bank could properly maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the statute.

The issue is whether the State A statute is unconstitutional

The dormant commerce clause provides that where there is no federal regulation of governing a matter, the state may regulate. However, a state is not permitted to discriminate or place an undue burden on interstate commerce. The exceptions to

discrimination include: 1) it is an important governmental interest that cannot be achieved by alternative, nondiscriminatory means; 2) the state is a market participant; 3) the activity is one traditionally carried out by the government; or 4) there is congressional consent. Where there is an undue burden, the court will balance the concerns of the state with the impact that it has on interstate commerce to determine whether the legislation is appropriate.

Here, The law does not appear to be discriminatory, as it applies to all banks that offer funds transfer services in the state. However, the fact that it is costing an out of state bank \$2 million in lost profits shows or would cost them \$50 million to implement the system shows that there is a substantial burden on interstate commerce. Those are significant sums of money that the bank must pay. The question then is whether this is an undue burden. The risk of the thieves circumventing security is small, as the facts state that sometimes thieves circumvent the banks security measures. Thus, it does not appear that the problem of theft is incredibly pervasive. Additionally, it would appear that there would be relatively few payment orders that would qualify for the biometrics, as it is only used on sums greater than \$10,000, which likely doesn't make up most of the bank transactions. On the other hand, bank in State B stands to have to pay \$50 million if it wants to continue doing business in State A, or face the loss of \$2 million in

MEE Question 3

A garment manufacturer sells clothing to retail stores on credit terms pursuant to which the retail stores have 180 days after delivery of the clothing to pay the purchase price. Not surprisingly, the manufacturer often has cash-flow problems.

On February 1, the manufacturer entered into a transaction with a finance company pursuant to which the manufacturer sold to the finance company all of the manufacturer's outstanding rights to be paid by retail stores for clothing. The transaction was memorialized in a signed writing that described in detail the payment rights that were being sold. The finance company paid the manufacturer the agreed price for these rights that day but did not file a financing statement.

On March 15, the manufacturer borrowed money from a bank. Pursuant to the terms of the loan agreement, which was signed by both parties, the manufacturer granted the bank a security interest in all of the manufacturer's "present and future accounts" to secure the manufacturer's obligation to repay the loan. On the same day, the bank filed a properly completed financing statement in the appropriate filing office. The financing statement listed the manufacturer as debtor and the bank as secured party. The collateral was indicated as "all of [the manufacturer's] present and future accounts."

There are no other filed financing statements that list the manufacturer as debtor.

On May 25, the manufacturer defaulted on its repayment obligation to the bank. Shortly thereafter, the bank sent signed letters to each of the retail stores to which the manufacturer sold clothing on credit. The letters instructed each retail store to pay to the bank any amounts that the store owed to the manufacturer for clothing purchased on credit. The letter explained that the manufacturer had defaulted on its obligation to the bank and that the bank was exercising its rights as a secured party.

The finance company recently learned about the bank's actions. The finance company informed the bank that the finance company had purchased some of the rights to payment being claimed by the bank. The finance company demanded that the bank cease its efforts to collect on those rights to payment.

Meanwhile, some of the retail stores responded to the bank's letters by refusing to pay the bank. These stores contend that they have no obligations to the bank and that payment to the manufacturer will discharge their payment obligations.

1. As between the bank and the finance company, which (if either) has a superior right to the claims against the retail stores for the money the retail stores owe the manufacturer for clothing they bought on credit before February 1? Explain.
2. Are the retail stores correct that they have no obligations to the bank and that paying the manufacturer will discharge their payment obligations? Explain.

3) Please type your answer to MEE 3 below

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

(Essay)

===== Start of Answer #3 (1159 words) =====

Superior right to Claims Against Retail Stores: It is likely that a court would determine that both the transaction between the bank and manufacturer and finance company and manufacturer were secured transactions governed by Article 9 of the UCC and thus that the bank will prevail as to all of the claims. The primary issue is whether both parties perfected a security interest in the collateral (claims against the retail stores).

Under Article 9, generally a perfected secured creditor's claim in collateral will prevail over the claim of a unsecured creditor. The type of collateral in question here is an account receivable (a right to payment for services or goods). The

claims against the retail stores are for the right to direct payment for goods the manufacturer sold on credit. To perfect in an account receivable, a creditor must attach a security interest in the collateral and perfect by filing a financing statement. To attach, there must be a security agreement between the debtor and creditor with the intent of creating a security interest in the creditor (whether written, or by control or possession), the creditor must give value, and the debtor must have rights in the collateral.

Both parties attached however the financing company did not perfect. The manufacturer "sold" to the financing company its outstanding rights to be paid by retail stores for clothing it sold on credit. There was a signed writing describing the details of the payment. A valid security agreement is one written, signed by the debtor, and that reasonably identifies the collateral. We are told that there was a writing memorializing the transaction, that it was signed, and that it described "in detail" the payment rights. The requirements for a valid security agreement are present. The finance company gave value by paying the agreed purchase price, and the debtor had rights in the collateral conveyed - it owned the accounts receivable. It is important to note that although the parties labeled their transaction a sale, the label a party places on a transaction, under Article 9, is not dispositive. A transaction that is disguised as a sale, but in reality is a security agreement, will

be subject to the requirements of Article 9 and be a transaction that creates a security interest. It appears as if this transaction was really a loan to be repaid via the accounts receivable of the manufacturer, and thus was a secured transaction, and as discussed above, the requirements for attachment are present. However, as mentioned above, the financing company did not perfect its security agreement because perfection in accounts receivable requires filing a financing statement and we are told that never happened.

On the other hand, the bank attached and also perfected. The bank attached because one, all of the elements of a valid security agreement are present. There was a signed writing labeled a loan agreement, and the collateral was reasonably identified. An account is an Article 9 term of art, and a collateral description using such a term is sufficient. Also, the bank gave value because we are told the manufacturer "borrowed money" on March 15, and the debtor had rights in the accounts receivable (the fact that a security interest was in the ones he owned as of February 1, held in favor of the financing company, does not negate his ownership). Furthermore, the agreement gave a security interest in future accounts. After acquired property clauses are typically valid. Finally, the bank perfected by filing a financing statement. A valid financing statement includes the name and mailing address of the debtor, the name and mailing address of the secured party,

and it indicates the collateral. The facts say that the manufacture and bank were listed as debtor and creditor, and the description of collateral was sufficient because a financing statement it only need put a searcher on notice of a security interest in the collateral and the description used was even more detailed and would have been sufficient on a security agreement. Accordingly, the bank attached and perfected.

As indicated above, a perfected security interest prevails over an unperfected security interest in the event of default. Financing company did not perfect even though it attached earlier, on February 1, and therefore bank's March 15 perfection gave it superior right in the claims.

However, there is one unlikely, alternative conclusion. If a court were to lable the transaction between the financing company and manufacturer as a sale and not an Article 9 secured transaction, which is unlikely because as mentioned courts will apply the Article 9 rules to a secured transaction disguised as a sale, then the financing company's claim to the accounts owed to the manufacturer as of February 1 would prevail. If the transaction was deemed a sale, then on March 15, when the manufacturer granted a security interest in his current and future accounts, no security interest would attach to the accounts owned on February one

because the manufacturer would have no ownership rights in them. Those rights would be in the financing company. Again though, this is an unlikely conclusion, the more likely one being that the bank has a superior right in all claims against the retail stores.

Retail Store's Obligation to Pay Bank or Manufacturer: The retail stores are correct that as the facts currently exist, they have no obligation to pay the bank and paying the manufacturer will discharge their payment obligations. The main issue here is what process is required on the part of a creditor with a security interest in an account before he or she is entitled to receive payment directly from an account debtor.

Policy reasons suggest that it is improper for the bank to, immediately upon default, seek repayment directly from the account debtors/retail stores without going through the manufacturer. If the bank goes to the account debtor's immediately it might harm the debtor/manufacturer's reputation in the business and cause future, unnecessary harm further hindering its ability to honor its commitments. The signed letter from the bank, alone is not sufficient. Instead, the bank must first proceed with the manufacturer, and have it inform the account debtors to forward their payments on to the bank or have the manufacturer
