

MEE Question 1

Two siblings, a brother and a sister, decided to start a bike shop with their cousin. They filed a certificate of organization to form a limited liability company. The brother and the sister paid for their LLC member interests by each contributing \$100,000 in cash to the LLC. Their cousin paid for his LLC member interest by conveying to the LLC five acres of farmland valued at \$100,000; the LLC then recorded the deed.

Neither the certificate of organization nor the members' operating agreement specifies whether the LLC is member-managed or manager-managed. However, the operating agreement provides that the LLC's farmland may not be sold without the approval of all three members.

Following formation of the LLC, the company rented a storefront commercial space for the bike shop and opened for business.

Three months ago, purporting to act on behalf of the LLC, the brother entered into a written and signed contract to purchase 100 bike tires for \$6,000 from a tire manufacturer. When the tires were delivered, the sister said that they were too expensive and told her brother to return the tires. The brother was surprised by his sister's objection because twice before he had purchased tires for the LLC at the same price from this manufacturer, and neither his sister nor their cousin had objected. The brother refused to return the tires, pointing out that the tires "are perfect for the bikes we sell." The sister responded, "Well, pay the bill with your own money; you bought them without my permission." The brother responded, "No way. I bought these for the store, I didn't need your permission, and the company will pay for them." To date, however, the \$6,000 has not been paid.

One month ago, purporting to act on behalf of the LLC, the cousin sold the LLC's farmland to a third-party buyer. The buyer paid \$120,000, which was well above the land's fair market value. Only after the cousin deposited the sale proceeds into the LLC bank account did the brother and sister learn of the sale. Both of them objected.

One week ago, the brother wrote in an email to his sister, "I want out of our business. I don't want to have anything to do with the bike shop anymore. Please send me a check for my share."

1. What type of LLC was created—member-managed or manager-managed? Explain.
2. Is the LLC bound under the tire contract? Explain.
3. Is the LLC bound by the sale of the farmland? Explain.
4. What is the legal effect of the brother's email? 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 (1319 words) =====

1. A member-managed LLC was created in this case.

The issue is whether a LLC is member-managed or manager-managed if there is no express agreement indicating who is to manage the LLC. A Limited Liability Company is a sort of hybrid between a corporation and a partnership because members of a LLC have limited liability similar to shareholders in a corporation, but the LLC is taxed like a partnership. Generally, an LLC is formed by filing a certificate of organization with the secretary of state and may adopt an operating agreement. Members have the ability to manage the LLC. This is referred to as a member-managed LLC. In a member-managed LLC, the members act much like a board of directors for a corporation, owing the same duties as a board of directors does and managing with a majority vote, unless there is an agreement otherwise. Members may also delegate their management powers to managers. This type of LLC is referred to as a manager-managed LLC.

In this case, a LLC was formed by a brother, sister, and their cousin. The brother and sister each contributed \$100,000 in cash as capital and their cousin contributed farm land that is valued at \$100,000 as capital to the LLC. Therefore, they are all three equal members of the LLC. They filed a certificate of organization with the state and adopted an operating agreement. However, neither the certificate of organization nor the

operating agreement specified whether the LLC is member-managed or manager-managed. However, the operating agreement does indicate that the farmland may not be sold without approval of all three members. Because members generally have the authority to manage the LLC, and there is no indication that any of the members delegated their managing power to a manager, this is conclusive that this is a member-managed LLC.

2. The LLC is bound under the tire contract because the brother acted with both actual implied authority and apparant authority as an agent of the LLC.

The issue is whether the brother had the authority to enter into a contract as an agent for the LLC. Generally, a member of an LLC has the authority to act as an agent of the LLC in order to carry out business that falls within the normal business of the LLC. Generally, an agency is created by an agreement between the principal and agent, but normally does not have to be in writing. A principal may grant authority to an agent either by express authority, which can either be express or implied, or by apparent authority, which is when the principal holds the person out as an agent, either directly or indirectly. Actual express authority is granted within the four corners of the agreement with the agent. Actual implied authority is granted by a principal when the principal's acts lead the agent to reasonably conclude that he/she has the authority to act for the principal; this could be by custom or previous dealings.

Here, the brother acted as an agent for the LLC with both actual implied authority and apparent authority. Brother is a member of the member-managed LLC. Therefore,

brother is an agent of the LLC with the ability to carry out business for the LLC, as long as that business falls within the normal business of the LLC. Here, brother entered into a contract for bike tires. The LLC's principle business is a bike shop, and therefore buying tires is within the scope of normal business operations. Also, brother had entered into two separate agreements previously with the exact same manufacturer for the same type of tires and for the same price, purporting to act on behalf of the LLC. Neither the sister or the cousin had previously objected, and the contract duties had been fulfilled by the LLC. Therefore, brother reasonably believed, based on prior contracts, that he had the authority to enter in the contract on behalf of the LLC; thus, he acted with implied authority. Also, because the LLC had fulfilled the contractual duties on the two previous contracts with this manufacturer, the manufacturer reasonably believed that brother had the apparent authority to act as an agent for the LLC. Because the brother acted with appropriate authority when entering into the contract on behalf of the LLC, the LLC is bound under the tire contract.

3. The LLC is not bound by cousin's sale of the farmland because the operating agreement specified that all three members must agree before the farmland could be sold.

The issue here is whether the LLC is bound by the cousin's contract for the sale of the land. Generally, a member of an LLC has the actual authority to act as an agent of the LLC in order to carry out business that falls within the normal business of the LLC. Generally, an agency is created by an agreement between the principal and agent, but normally does not have to be in writing. A principal may grant authority to an agent

either by express authority, which can either be express or implied, or by apparent authority, which is when the principal holds the person out as an agent, either directly or indirectly. Actual express authority is granted within the four corners of the agreement with the agent. Actual implied authority is granted by a principal when the principal's acts lead the agent to reasonably conclude that he/she has the authority to act for the principal; this could be by custom or previous dealings.

Here, the operating agreement of the LLC specifically states that the farmland may not be sold without the approval of all three members. Although the cousin would normally have actual authority to act on behalf of the LLC as its agent, selling all of the farmland was not within the scope of normal business for the LLC. The cousin sold the farmland without the approval of the other two members and therefore exceeded the scope of his authority. The LLC had not provided apparent authority to the buyer of the land that cousin had contractual ability to bind the LLC because the sale was outside of the scope of normal business dealings and had never dealt with the buyer before. Because the cousin breached the terms of the operating agreement and exceeded the scope of his ability, the LLC is not bound for his contract for the sale of the farmland.

4. The brother's email has the effect of disassociation, but has no other legal effect on the LLC.

The issue what legal effects the brother's email stating that he wants out of the business has on the LLC. Life of an LLC is generally limited, either by the certification of organization or an agreement by the partners. Members of an LLC are typically treated

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as a sharehold is treated by a corporation. Unlike a partnership where disassociation automatically triggers dissolution, disassociation by a member of an LLC does not automatically trigger dissolution of the LLC. However, a member's share in the LLC has limited liquidity-meaning that only the right to profits is treated like transferable personal property. A member may only transfer his share if all members unanimously agree. Here, the brother sent an email to his sister expressing that he no longer wanted anything to do with the bike shop and he wanted out of the business. He also asked for a check for his share. Because the LLC can only be terminated upon all of the members agreement, dissolution is not automatically triggered. The brother's right to profits is the only right that he has in the LLC that is a liquid asset. Therefore, the brother is entitled to a check for the profits of the LLC so far, but he is not entitled to his capital contribution of \$100,000 until the other two partners agree to terminate the LLC, or the LLC reaches the date of termination indicated on the certificate of organization.

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

MEE Question 2

A defendant was tried before a jury for a robbery that had occurred at Jo-Jo's Bar on November 30. At trial, the prosecutor called the police officer who had investigated the crime. Over defense counsel's objection, the officer testified as follows:

Officer: I arrived at the defendant's home on the morning of December 1, the day after the robbery. He invited me inside, and I asked him, "Did you rob Jo-Jo's Bar last night?" The defendant immediately started crying. I decided to take him to the station. Before we left for the station, I read him Miranda warnings, and he said, "Get me a lawyer," so I stopped talking to him.

Prosecutor: Did the defendant say anything to you at the station?

Officer: I think he did, but I don't remember exactly what he said.

Immediately after this testimony, the prosecutor showed the officer a handwritten document. The officer identified the document as notes she had made on December 2 concerning her interaction with the defendant on December 1. The prosecutor provided a copy of the document to defense counsel. The document, which was dated December 2, stated in its entirety:

The defendant burst into tears when asked if he had committed the robbery. He then received and invoked Miranda rights. I stopped the interrogation and didn't ask him any more questions, but as soon as we arrived at the station the defendant said, "I want to make a deal; I think I can help you." I reread Miranda warnings, and this time the defendant waived his rights and said, "I have some information that can really help you with this case." When I asked him how he could help, the defendant said, "Forget it—I want my lawyer." When the defendant's lawyer arrived 30 minutes later, the defendant was released.

The officer then testified as follows:

Prosecutor: After reviewing your notes, do you remember the events of December 1?

Officer: No, but I do remember making these notes the day after I spoke with the defendant. At that time, I remembered the conversation clearly, and I was careful to write it down accurately.

Over defense counsel's objection, the officer was permitted to read the document to the jury. The prosecutor also asked that the notes be received as an exhibit, and the court granted that request, again over defense counsel's objection. The testimony then continued:

Prosecutor: Did you speak to the defendant any time after December 1?

Officer: Following my discovery of additional evidence implicating the defendant in the robbery, I arrested him on December 20. Again, I read the defendant his Miranda rights.

The defendant said that he would waive his Miranda rights. I then asked him if he was involved in the robbery of Jo-Jo's Bar, and he said, "I was there on November 30 and saw the robbery, but I had nothing to do with it."

Defense counsel objected to the admission of this testimony as well. The court overruled the objection.

The defendant's trial for robbery was held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

Were the following decisions by the trial court proper?

1. Admitting the officer's testimony that the defendant started crying. Explain.
2. Permitting the officer to read her handwritten notes to the jury. Explain.
3. Admitting the officer's handwritten notes into evidence as an exhibit. Explain.
4. Admitting the officer's testimony recounting the defendant's statement, "I have some information that can really help you with this case." Explain.
5. Admitting the officer's testimony recounting the defendant's statement, "I was there on November 30 and saw the robbery, but I had nothing to do with it." Explain.

2) Please type your answer to MEE 2 below

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

===== Start of Answer #2 (1424 words) =====

1) The Court did not error in admitting the officer's testimony that the defendant started crying. The defendant crying is an act, and not necessarily words, but will still be included as testimony. Any out of court statement brought in for the truth of the matter asserted is excluded unless it falls under any one of the hearsay exceptions. There are several exceptions, exclusions, and non-hearsy statements. Here, the act of crying by the defendant will be admissible. This falls under one of the non-hearsay categories; the effect on the listener. If something is said to the listener, and the listener does an act or says something that can lead towards the effect on that listener, it can be admitted under the non-hearsay category. Here, the officer asked the defendant "Did you rob Jo-Jo's Bar last night?" The defendant responded by crying. This shows the effect on the listener. He heard the question, and began to cry. This shows that something is effecting him, therefore is in one of the non-hearsay categories. In the alternative, if the Court finds this does not fall under the non-hearsay category of the effect on the listener, it will atleast fall under the statement by a party opponent exclusion to the hearsay rule. This exclusion states that when a party to the suit or case makes a statement, that statement automatically falls under the exclusions of the hearsay rule. Either way, the Court did not err in admitting the officer's testimony that the defendant started crying. Also, there is no Miranda violation of this

statement/conduct by the defendant. To invoke the Miranda rules, there must be custodial interrogation. Custody is where a reasonable person would not feel free to leave. Interrogation is questioning that is likely to lead to incriminating evidence. Here, although the officer is asking interrogation questions, there is no custody for Miranda to be invoked until the defendant was asked to come to the station. At that point, the Miranda rules applied, and the officer did read him his Miranda warnings, which he then asked for a lawyer.

2) The Court did not err in permitting the officer to read her handwritten notes to the jury. Of course, the handwritten notes are an out of court statement brought in for the truth of the matter asserted. This means that it traditionally would be excluded because of the hearsay rules. However, there are several exceptions and exclusions as noted above. First, the prosecutor asked if the defendant said anything to the officer at the station. The officer couldn't remember and stated that he thought he did. To refresh the witness' memory, under the refreshing recollection exception for the hearsay rule, the prosecutor is allowed to show any document or notes to the witness to try to refresh that memory. Of course there are some procedural safe guards, such as allowing the other side, or defense counsel to review the notes before. Defense counsel can also use those notes on cross-exam. Once the witness has reviewed those notes, without them being read or entered into evidence, the witness can proceed with the examination. Here, the officer's memory was not refreshed. In fact he stated that he couldn't remember the events, but did remember making the notes the day after he spoke with the defendant. At that time he remembered the conversation clearly, and he was careful to write it down accurately. When a witness' memory is not refreshed, the

attorney can seek to use the past recollection recorded exception of the hearsay rules to read the notes or document into evidence. To be able to use the past recollection recorded, there must be a showing of no memory at the current examination, a better memory of the events at the time the document was written, either written or adopted by the witness, and the witness can vouch for the validity of the documents. Here, the officer stated all of the elements required for a past recollection recorded exception, therefore the notes can be read to the jury. Of course the procedural safe guards can also come into play, the other side can examine the document, or use it on cross-examination, but the other side may also admit this into evidence if they so choose.

3) The Court did err in granting the request by the prosecutor to have the notes be received as an exhibit. As stated in the previous question, the past recollection recorded exception will not allow the attorney who is direct examining the witness to enter the past recollection recorded into evidence. Only the other side can do this with the procedural safe guards allowed under the past recollection recorded exception to the hearsay rule. The prosecutor can only have the witness read the document to the jury, but not admit the notes as evidence.

4) The Court did not err in admitting the officer's testimony recounting the defendant's statement "I have some information that can really help you with this case." Here, Defendant was still in the custody of the police, and there was no break in custody. He did unambiguously invoke his right to counsel by stating "Get me a lawyer." Once the defendant unambiguously invokes his right to counsel, the interrogation must stop until the defendant is either provided an attorney, or the defendant reinitiates the

interrogation voluntarily. Here, the officer stopped talking to him as soon as he made the statement to get him a lawyer. This was no Miranda violation. In the note that was read to the jury pursuant to the past recollection recorded exception, the officer noted that he stopped interrogation and didn't ask him any more questions, but as soon as they arrived at the station the defendant said "I want to make a deal; I think I can help you." This is the defendant reinitiating conversation and did not come from custodial interrogation and did not violate his Miranda rights. The officer reread him his Miranda rights, which wasn't necessary since the defendant reinitiated the interrogation, and the defendant stated "I have some information that can really help you with this case." This statement is not in violation of Miranda. The next issue is whether this statement falls under one of the hearsay exceptions or exclusions. Hearsay as stated above is an out of court statement brought for the truth of the matter asserted, which is what this statement is being introduced for. Therefore, this statement must fall under one of the exclusions or exceptions to be admissible. This statement would most likely come under the statement by a party opponent exception to the hearsay rules. This allows a statement made by a party to the suit or case to be brought in, regardless if it violates the hearsay rules. This statement was properly admitted under the hearsay exception of statement by a party opponent.

5) The Court did not err in admitting the officer's testimony recounting the defendant's statement "I was there on November 30 and saw the robbery, but I had nothing to do with it." Miranda warnings must be reread to a defendant if there has been a break in custody of more than 14 days. Here, the Defendant was presumably let free of custody on December 1st, and then the officer arrested him again on December 20th. This is

more than the 14 days for the break in custody, therefore the officer was required to reread him his miranda warnings, which the officer did in this case. This time the defendant waived his Miranda rights. This is allowed because there was a break in custody. Although, the defendant unambiguously invoked his right to counsel during the first custodial interrogation, that ended when he was no longer in their custody. Once there was that break in the custody, he was then free to either invoke or waive his Miranda rights. Here, the Defendant did waive his Miranda rights presumably voluntarily and knowingly. He then told the officer that "I was there on November 30 and saw the robbery, but I had nothing to do with it." This statement is an out of court statement that is being brought into court for the truth of the matter asserted. This statement will be excluded unless it falls under one of the hearsay exceptions or exclusions. Of course, as the last statement was admitted under the statement by a party opponent exception, this one will be too. This is a statement made by the defendant, therefore it falls under this category, and will be admitted.

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

Six months ago, a man visited his family physician, a general practitioner, for a routine examination. Based on blood tests, the physician told the man that his cholesterol level was somewhat elevated. The physician offered to prescribe a drug that lowers cholesterol, but the man stated that he did not want to start taking drugs because he preferred to try dietary change and “natural remedies” first. The physician told the man that natural remedies are not as reliable as prescription drugs and urged the man to come back in three months for another blood test. The physician also told the man about a recent research report showing that an herbal tea made from a particular herb can reduce cholesterol levels.

The man purchased the herbal tea at a health-food store and began to drink it. The man also began a cholesterol-lowering diet.

Three months ago, the man returned to his physician and underwent another blood test; the test showed that the man’s cholesterol level had declined considerably. However, the test also showed that the man had an elevated white blood cell count. The man’s test results were consistent with several different infections and some types of cancer. Over the next two weeks, the physician had the man undergo more tests. These tests showed that the man’s liver was inflamed but did not reveal the reason. The physician then referred the man to a medical specialist who had expertise in liver diseases. In the meantime, the man continued to drink the herbal tea.

Two weeks ago, just before the man’s scheduled consultation with the specialist, the man heard a news bulletin announcing that government investigators had found that the type of herbal tea that the man had been drinking was contaminated with a highly toxic pesticide. The investigation took place after liver specialists at a major medical center realized that several patients with inflamed livers and elevated white blood cell counts, like the man, were all drinking the same type of herbal tea and the specialists reported this fact to the local health department.

All commercially grown herbs used for this tea come from Country X, and are tested for pesticide residues at harvest by exporters that sell the herb in bulk to the five U.S. companies that process, package, and sell the herbal tea to retailers. U.S. investigators believe that the pesticide contamination occurred in one or more export warehouses in Country X where bulk herbs are briefly stored before sale by exporters, but they cannot determine how the contamination occurred or what bulk shipments were sent to the five U.S. companies. The companies that purchase the bulk herbs do not have any control over these warehouses, and there have been no prior incidents of pesticide contamination. The investigators have concluded that the U.S. companies that process, package, and sell the herbal tea were not negligent in failing to discover the contamination.

Packages of tea sold by different companies varied substantially in pesticide concentration and toxicity, and some packages had no contaminants. Further investigation has established that the levels of contamination and toxicity in the herbal tea marketed by the five different U.S. companies were not consistent.

The man purchased all his herbal tea from the same health-food store. The man is sure that he purchased several different brands of the herbal tea at the store, but he cannot establish which brands. The store sells all five brands of the herbal tea currently marketed in the United States.

The man has suffered permanent liver damage and has sued to recover damages for his injuries. It is undisputed that the man's liver damage was caused by his herbal tea consumption. The man's action is not preempted by any federal statute or regulation.

1. Is the physician liable to the man under tort law? Explain.
2. Are any or all of the five U.S. companies that processed, packaged, and sold the herbal tea to the health-food store liable to the man under tort law? Explain.
3. Is the health-food store liable to the man under tort law? Explain.

3) Please type your answer to MEE 3 below

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

(Essay)

===== Start of Answer #3 (1418 words) =====

1. At issue is whether the doctor breached his duty to his patient in his treatment regarding cholesterol. It is most likely that he did not breach his duty.

A cause of action for negligence requires the proof of four elements--An existing duty, a breach of that duty, causation (both actual and proximate), and damages. A duty exists to all foreseeable plaintiffs and is a responsibility to act in a particular manner (or refrain from acting in a particular manner) so that others around you are not harmed. A breach of that duty exists when a person does not live up to the standard of acting that is required by his duty. Both of these are at issue here, while causation and damages are not at issue because there is no breach of the doctor's duty.

Here, the doctor had a duty to act like an average member of his profession in good

standing in his community. Historically, this was a local standard, but is slowly moving towards a more national standard due to the issues presented at trial with presenting expert witness proof. What this duty means is that the doctor must possess the reasonable amount of care, intelligence, and skill of the average member of his community. Included in this duty is the duty to reasonably inform a patient about information that may be deemed material or important to the average patient (referred to as informed consent).

The doctor here was described as a general practitioner, and thus must possess the skill and knowledge of the average doctor in the community. This is the duty that the doctor must have lived up to.

As to breach, He seems to have told his patient that he could prescribe a drug that would help his cholesterol and was knowledgeable that the drug would be better than natural remedies and dietary change. He informed his patient that the drug would work better and that there might be some risks with the natural remedies. As a further precaution of care, he told the patient to come back in three months for another check up. At this check up, he continued to monitor blood levels and noticed that there were issues that were beyond his level of generalized expertise. Thus, he referred the man to a specialist.

The one area that might be concerning is that he failed to tell the patient to stop drinking the tea or abort his new diet, even though the doctor knew he was on the new diet. But, taken as a whole, it is fairly apparent that the doctor did not breach his duty

because he informed the patient of risks and the patient willingly continued. Had the original advice of the doctor been followed, the man would likely have not had any issues.

2. At issue is whether the five US companies are liable to the man under tort law. While liability exists under strict products liability principles, causation is going to be difficult to prove.

Under stricts products liability law, a merchant is strictly liable for the products it provides to customers that end up causing harm or damage. Strict products liability requires a showing that a merchant provided goods and left the hands of the store with a defect that is unreasonably dangerous and that that defect caused harm to the plaintiff. As to food stuffs and consumables, the generic descriptions of manufacturing defects, design defects, and warning defects do not apply. A provider of foods is just strictly liable for harms caused by the foods.

It is clear that the five manufacturers are merchants--they process, package, and sell this herbal tea to retailers. For all intents and purposes, they are the "makers" of this particular type of tea. Each of these merchants provided these goods to retailers...this meets the part of the test where they must ship out a product and place it into commerce in some manner. It went to retailers for customers to purchase. Further, it must have left the hands of the manufacturer with the defect. The government agency determined that it is likely that the goods passed through the manufacturers' hands while defective--it must be assumed that the pesticides were placed on the tea while it

was grown instead of being picked up otherwise. Even if it was assumed that it was picked up after the fact, this would have occurred in the temporary storage warehouses in Country X. Thus, the test is met for the product to have left the hands of the defendant with the defect.

This defect was certainly unreasonably dangerous because it had the temperament to cause extreme harm to plaintiffs. Damage to liver and blood cell counts was rampant from drinking this tea. Therefore, damages are also easy to prove from this plaintiff.

The only remaining issue is causation--strict products liability does not have the proximate causation limitations that a normal negligence action has, but the defective condition must have caused the injury in fact. Here, the injury in fact was caused by the tea, but it is difficult to pinpoint a particular defendant with whom to charge. Under the but-for test, no particular defendant can be responsible here because the plaintiff bought multiple brands of tea from the five manufacturers and the government does not know which manufacturer is mostly or wholly responsible. It appears to claim that at least all five manufactureres are at least partially responsible.

Thus, this is a perfect scenario in which to use the *Summers v. Tice* shifting of the burden to defendants. When it can be pinpointed that a group of persons was responsible for causing a harm, the burden can be shifted for the defendants to apportion the harm between them. Assuming the Plaintiff can meet the burden and the court allows this, he will recover from any defendant which cannot exculpate itself.

It should be noted here that *res ipsa loquitur* cannot be used to establish duty or breach because this is a strict products liability action---no negligence is at issue.

3. At issue is whether a middle man provider of goods can be held responsible under strict products liability rules. The answer is that yes, here, the retailer can be held liable.

Under stricts products liability law, a merchant is strictly liable for the products it provides to customers that end up causing harm or damage. It does not matter that a merchant was a maker or merely a provider of goods from up the chain. Further, it does not matter under strict products liability that middle man may have inspected goods in a reasonable fashion to check for defects.

Strict products liability requires a showing that a merchant provided goods and left the hands of the store with a defect that is unreasonably dangerous and that that defect caused harm to the plaintiff. As to food stuffs and consumables, the generic descriptions of manufacturing defects, design defects, and warning defects do not apply. A provider of foods is just strictly liable for harms caused by the foods.

Here, it is clear that the retailer is a merchant--they sell the goods to consumers and sell many other types of goods. They sell all types of the herbal tea as evidenced by the man's purchase of many types of tea. The defect existed when the product left the hands of the retailer because it has been determined by the government that the pesticides came from Country X (most likely). This pesticide contamination caused the

MEE Question 4

Two years ago, PT Treatment Inc. (PTT), incorporated in State A, decided to build a new \$90 million proton-therapy cancer treatment center in State A. The total cost to PTT for purchasing the land and constructing the building to house the treatment facility was \$30 million. PTT financed the purchase and construction with \$10 million of its own money and \$20 million that it borrowed from Bank. To secure its obligation to Bank, PTT granted Bank a mortgage on the land and all structures erected on the land. The mortgage was properly recorded in the county real estate records office, but it was not identified as a construction mortgage.

Two months after the mortgage was recorded, PTT finalized an agreement for the purchase of proton-therapy equipment from Ion Medical Systems (Ion) for \$60 million. PTT made a down payment of \$14 million and signed a purchase agreement promising to pay the remaining \$46 million in semi-annual payments over a 10-year period. The purchase agreement provided that Ion has a security interest in the proton-therapy equipment to secure PTT's obligation to pay the remaining purchase price. On the same day, Ion filed a properly completed financing statement with the office of the Secretary of State of State A (the central statewide filing office designated by statute), listing "PT Treatment Inc." as debtor and indicating the proton-therapy equipment as collateral.

Shortly thereafter, Ion delivered the equipment to PTT and PTT's employees installed it. The equipment was attached to the building in such a manner that, under State A law, it is considered a fixture and an interest in the equipment exists in favor of anyone with an interest in the building.

The new PTT Cancer Treatment Center opened for business last year. Unfortunately, it has not been an economic success. For a short period, PTT contracted with State A Oncology Associates (Oncology) for the latter's use of the proton-therapy equipment pursuant to a lease agreement, but Oncology failed to pay the agreed fee for the use of the equipment, so PTT terminated that arrangement. To date, PTT has been unsuccessful in its efforts to collect the amounts that Oncology still owes it. PTT's own doctors and technicians have not attracted enough business to fully utilize the cancer treatment center or generate sufficient billings to meet PTT's financial obligations. PTT currently owes Ion more than \$30 million and is in default under the security agreement. Ion is concerned that PTT will soon declare bankruptcy.

In a few days, Ion will be sending a technician to the PTT facility to perform regular maintenance on the equipment. Ion is considering instructing the technician to complete the maintenance and then disable the equipment so that it cannot be used by PTT until PTT pays what it owes.

1. In view of PTT's default, if Ion disables the proton-therapy equipment, will it incur any liability to PTT? Explain.
2. If PTT does not pay its debts to either Bank or Ion, which of them has a superior claim to the proton-therapy equipment? Explain.
3. Does Ion have an enforceable and perfected security interest in any of PTT's assets other than the proton-therapy equipment? Explain.

4) Please type your answer to MEE 4 below

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

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===== Start of Answer #4 (828 words) =====

Ion's liability for disabling equipment:

Ion will not have liability for disabling the equipment. The facts state that Ion has a security interest and that a financing statement was properly filed. Article 9 of the UCC applies to the finance of transactions for goods. Goods are anything that is moveable at the time of the transaction. Proton equipment are goods because they are moveable at the time of the transaction, even if they are later affixed to real property as a fixture. Article 9 looks to the substance of the transaction, not the form. So even if a transaction is not called a loan, if it has the substance of a loan, then it falls under Article 9. The transaction between PTT & Ion fully amortizes the debt over a 10 year period. If fully amortized, there is no amount owed at the end of the term. When there is no amount or a nominal amount owed at the end of a term, the transaction is a loan. The transaction between PTT & Ion is a loan.

A security interest attaches to collateral when the secured party (ION) gives value (here, a loan), the debtor (PTT) gains an interest in the collateral (proton-therapy equipment), and either the debtor authenticates a record or the secured party is in possession (tangibles) or has control (intangibles). A purchase money security interest (PMSI) exists when the seller of the goods carries the financing for the collateral. A secured interest is perfected upon proper filing of a financing statement. A PMSI is

automatically perfected for 20 days to give the secured party time to file a financing statement. Here, Ion has a PMSI in the proton therapy equipment because Ion carried the financing (as stated above). Ion properly filed a financing statement in the central statewide office. The security agreement implies the debtor's authentication of a record (the financing statement). Ion's security interest is perfected.

Upon default, a secured party may disable large equipment without liability in some cases. In order to escape liability, the secured party may not breach the peace in order to disable the equipment. Here, the technician was allowed on the property, even if under somewhat false pretenses, so it is not a breach of the peace. However, if PTT files for bankruptcy protection, then any attempt to recover or disable the equipment must immediately stop due to the automatic stay provided by bankruptcy.

Superior claim to proton-therapy equipment:

A security interest attaches to collateral when the secured party (ION) gives value (here, a loan), the debtor (PTT) gains an interest in the collateral (proton-therapy equipment), and either the debtor authenticates a record or the secured party is in possession (tangibles) or has control (intangibles). A purchase money security interest (PMSI) exists when the seller of the goods carries the financing for the collateral. A secured interest is perfected upon proper filing of a financing statement. A PMSI is automatically perfected for 20 days to give the secured party time to file a financing statement. Here, Ion has a PMSI in the proton therapy equipment because Ion carried the financing (as stated above). Ion properly filed a financing statement in the central statewide office. The security agreement implies the debtor's authentication of a record

(the financing statement). Ion's security interest is perfected.

The Bank has a properly recorded mortgage on the land, the improvements, and fixtures attached thereon. A construction loan has a superpriority over any fixtures attached to the land or the improvements. However, the Bank did not note on its mortgage that it was a construction mortgage. Here, the battle of priority is between a perfected PMSI secured party (Ion) and a mortgagee (Bank). Ion has priority over the fixtures.

If PTT files bankruptcy, then Ion's priority status will be affected. The bank will maintain its 1st position on the land, improvements, and fixtures. Ion will then be placed into the pool of general secured creditors and will have to share in the collective distribution from the bankruptcy trustee.

Ion's security interest:

Ion has an enforceable and perfected security interest in the proton therapy equipment, as well as any accounts or proceeds that flow from that equipment. There are no facts to suggest that Ion's financing statement covered any other equipment, inventory, or after-acquired equipment (although many states imply after-acquired equipment). PTT leased with Oncology to sue the proton therapy equipment. Ion would be able to collect on the proceeds from that transaction. However, Oncology has not paid PTT. At this point, PTT is the owner of a receivable against Oncology. Article 9 allows a secured party with a perfected PMSI in equipment to collect from a subsequent debtor of the original debtor. Ion may be able to collect from Oncology for

MEE Question 5

A homeowner and his neighbor live in houses that were built at the same time. The two houses have identical exteriors and are next to each other. The homeowner and his neighbor have not painted their houses in a long time, and the exterior paint on both houses is cracked and peeling. A retiree, who lives across the street from the homeowner and the neighbor, has complained to both of them that the peeling paint on their houses reduces property values in the neighborhood.

Last week, the homeowner contacted a professional housepainter. After some discussion, the painter and the homeowner entered into a written contract, signed by both of them, pursuant to which the painter agreed to paint the homeowner's house within 14 days and the homeowner agreed to pay the painter \$6,000 no later than three days after completion of painting. The price was advantageous for the homeowner because, to paint a house of that size, most professional housepainters would have charged at least \$8,000.

The day after the homeowner entered into the contract with the painter, he told his neighbor about the great deal he had made. The neighbor then stated that her parents wanted to come to town for a short visit the following month, but that she was reluctant to invite them. "This would be the first time my parents would see my house, but I can't invite them to my house with its peeling paint; I'd be too embarrassed. I'd paint the house now, but I can't afford the going rate for a good paint job."

The homeowner, who was facing cash-flow problems of his own, decided to offer the neighbor a deal that would help them both. The homeowner said that, for \$500, the homeowner would allow the neighbor to take over the homeowner's rights under the contract. The homeowner said, "You'll pay me \$500 and take the contract from me; the painter will paint your house instead of mine, and when he's done, you'll pay him the \$6,000." The neighbor happily agreed to this idea.

The following day, the neighbor paid the homeowner \$500 and the homeowner said to her, "The paint deal is now yours." The neighbor then invited her parents for the visit that had been discussed. The neighbor also remembered how annoyed the retiree had been about the condition of her house. Accordingly, she called the retiree and told him about the plans to have her house painted. The retiree responded that it was "about time."

Later that day, the homeowner and the neighbor told the painter about the deal pursuant to which the neighbor had taken over the contract from the homeowner. The painter was unhappy with the news and stated, "You can't change my deal without my consent. I will honor my commitment to paint the house I promised to paint, but I won't paint someone else's house."

There is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house.

1. If the painter refuses to paint the neighbor's house, would the neighbor succeed in a breach of contract action against the painter? Explain.

2. Assuming that the neighbor would succeed in the breach of contract action against the painter, would the retiree succeed in a breach of contract action? Explain.
3. If the painter paints the neighbor's house and the neighbor does not pay the \$6,000 contract price, would the painter succeed in a contract claim against the neighbor? Against the homeowner? Explain.

5) Please type your answer to MEE 5 below

⌂

⌂

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

(Essay)

===== Start of Answer #5 (541 words) =====

Question 5

1. If Painter refuses to paint Neighbor's house, would Neighbor succeed in a breach of contract action?

Neighbor likely would succeed in a breach of contract action against Painter. The issue is whether the attempted assignment is enforceable. Since this is a contract for services, we apply common law. The general rule is that parties to a contract are permitted to assign the performance they would receive under the contract to a third-party. This is true even when the contract prohibits assignments (although the assignor may be liable for breach). There are three main exceptions to this rule: if the performance is personal to the obligor, if the assignment would materially alter the obligee's burden under the contract, or if the assignment is against public policy. Once

assigned, the assignee steps into the obligor's shoes, and is entitled to the performance, and can sue for breach if the obligee fails to perform.

Here, Painter, the obligee, cannot lawfully object to the assignment. For one, there is no indication that the contract between Painter and Homeowner prohibits assignments. Even if it did, none of the exceptions apply--it isn't against public policy, the task does not appear to be of a personal nature, and the facts specify that the difficulty in painting Neighbor's house as compared to Homeowner's house is negligible. The assignment here appears to be valid - consideration was given and both parties assented. Thus, Neighbor steps into Homeowner's shoes, and would likely succeed in a breach of contract action

2. Assuming Neighbor would succeed in a breach of contract action against Painter, would Retiree?

Retiree likely would not succeed against Painter. Although third-party beneficiaries are sometimes permitted to recover under contracts to which they are not a party, this type of action depends on whether the contracting parties intended to benefit the third party. If they intended to benefit the third party, then the third party can sue under the contract. If the third party is merely an incidental beneficiary, however, the third party cannot recover.

Here, it does not appear that Retiree is an intended beneficiary of the contract between Painter and Neighbor (or Homeowner, for that matter). Neighbor's intent is to have his

house painted before his parents come to visit, and Painter's intent is to get paid. Neighbor's knowledge that Retiree will appreciate the benefit is irrelevant.

3. If Painter paints Neighbor's house, and Neighbor does not pay the contract price, would Painter succeed in a contract claim against Neighbor? Against Homeowner?

Painter could likely recover against Neighbor if Neighbor fails to pay. The facts do not give rise to any plausible defenses, and both the contract and the assignment appear to be validly entered and supported by consideration. Because there has not been a novation (a three-way agreement in which the contracting parties agree with a third party that the third party will take the place of one of the contracting parties and become liable on the contract in place of the contracting party), Painter is also entitled to pursue a cause of action against Homeowner as well, because the two remain in privity of contract. Given the possibility of double-recovery, however, some jurisdictions may limit Painter to only suing one or the other.

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===== End of Answer #5 =====

MEE Question 6

A woman and a man have both lived their entire lives in State A. The man once went to a gun show in State B where he bought a gun. Otherwise, neither the woman nor the man had ever left State A until the following events occurred.

The woman and the man went hunting for wild turkey at a State A game preserve. The man was carrying the gun he had purchased in State B. The man had permanently disabled the gun's safety features to be able to react more quickly to a turkey sighting. The man dropped the gun and it accidentally fired, inflicting a serious chest wound on the woman. The woman was immediately flown to a hospital in neighboring State C, where she underwent surgery.

One week after the shooting accident, the man traveled to State C for business and took the opportunity to visit the woman in the hospital. During the visit, the woman's attorney handed the man the summons and complaint in a suit the woman had initiated against the man in the United States District Court for the District of State C. Two days later, the woman was released from the hospital and returned home to State A where she spent weeks recovering.

The woman's complaint alleges separate claims against the man: 1) a state-law negligence claim and 2) a federal claim under the Federal Gun Safety Act (Safety Act). The Safety Act provides a cause of action for individuals harmed by gun owners who alter the safety features of a gun that has traveled in interstate commerce. The Safety Act caps damages at \$100,000 per incident, but does not preempt state causes of action. The woman's complaint seeks damages of \$100,000 on the Safety Act claim and \$120,000 on the state-law negligence claim. Both sets of damages are sought as compensation for the physical suffering the woman experienced and the medical costs the woman incurred as a result of the shooting.

The man has moved to dismiss the complaint, asserting (a) lack of personal jurisdiction, (b) lack of subject-matter jurisdiction, and (c) improper venue. State C's jurisdictional statutes provide that state courts may exercise personal jurisdiction "to the limits allowed by the United States Constitution."

With respect to each asserted basis for dismissal, should the man's motion to dismiss be granted? Explain.

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

===== Start of Answer #6 (998 words) =====

MEE 6

The man's motion to dismiss for lack of personal jurisdiction.

The United States District Court for the District of State C has personal jurisdiction over the man. The issue is whether the United States District Court for the District of State C has personal jurisdiction over the man in state C. First, we are talking about jurisdiction over the defendant, as there is always jurisdiction over a plaintiff since they have voluntarily filed a lawsuit there. The United States District Court for the District of State C can exercise jurisdiction over the man if the courts of state C could exercise jurisdiction. There are two types of jurisdiction: general jurisdiction and specific jurisdiction. General Jurisdiction is found where a person is domiciled, that is where they have physical presence and an intent to remain. When a court finds that there is general jurisdiction, a person is open to any claim for any reason. Specific jurisdiction exists where there was a particular event or instance where there would be narrow jurisdiction to hear a claim based on that particular incident. There is also the issue of tagging. A person is considered tagged when they briefly come into a jurisdiction, such as the man did here, and was tagged with service of process. To successfully raise the defense of improper personal jurisdiction a defendant must do so in their first responsive pleading or first 12(b) motion made to the court. Failure to do so waives the

defense of improper jurisdiction.

Here, the man is a domiciliary of state A. the facts indicate that he lived there, had always lived there, and has intent to remain there. However the man was tagged with service of process he was in state C. Because he was tagged there is personal jurisdiction over the man in State C.

The man's motion to dismiss for lack of subject matter jurisdiction.

There is federal subject matter jurisdiction for the woman's federal claim, and while there is no diversity of citizenship subject matter jurisdiction for the state tort claim, the woman will likely be able to save the claim with supplemental jurisdiction. The issue here is whether the woman has laid out a claim with proper subject matter jurisdiction to continue the action in United States District Court for the District of State C. There are two types of subject matter jurisdiction: diversity of citizenship and federal question.

Woman's claim for state law negligence. For diversity of citizenship jurisdiction, there must be complete diversity as required by federal statute, even though the United States Constitution only requires minimum diversity. This means that all of the parties on one side of the case must be "from" different states than the parties on the other side of the case. To be "from" a place means to be domiciled there. To be domiciled in a place a person must have (1) physical presence and (2) intent to remain. Additionally, to maintain an action under diversity of citizenship jurisdiction, the amount in controversy must exceed \$75,000. Here, the woman's state law claim is for \$120,000,

which is in excess of the required \$75,000 threshold. However the claim fails for diversity, because both the man and the woman are domiciled in state A. Thus there is no subject matter jurisdiction under a theory of diversity of citizenship.

Saving the woman's claim for state law negligence under supplemental jurisdiction. However, there may be supplemental jurisdiction for this claim.

Supplemental jurisdiction arises when there is a common nucleus of operative fact in two cases. While supplemental jurisdiction cannot be used by a plaintiff to join a claim to a diversity of citizenship claim, it CAN be used by a plaintiff to join a claim to federal question action. Provided that there is federal jurisdiction for the other claim (as described below) and provided that this claim arises out of the same common nucleus of fact as the federal claim (which it does because this all stems from the same gun incident) then there is supplemental jurisdiction for the state law claim.

Woman's claim for violation of the Federal Gun Safety Act. There is federal question jurisdiction where a case arises under federal law. There is no need for diversity. There is no minimum amount in controversy. What must be true is that there is an element of federal law when looking at the face of the complaint. This is the well pleaded complaint rule. Because the woman has raised a claim under the federal law, there appears to be federal subject matter jurisdiction over this claim.

As a procedural matter on subject matter jurisdiction, unlike described above for personal jurisdiction, the defense of lack of subject matter jurisdiction cannot be waived,
