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 a 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. Futher, 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 of defendant's liability when too remote. A direct result of the negligence that is a within the natural occurences is a proximate cause. The touchstone is foreseeablility. 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. Futher, rescuers are also foreseeable. Thus, if someone puts another in peril in need of rescue, the subsequent rescue is foreseeable. Here, the neligence 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 employement, 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.

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

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 agaisnt State A for damages.

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

Here, bank would be considered domicield 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 it's 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 canot maintain a suit in federal court agaisnt State A for damages.

The issue is whether the bank can maintian a suit in federal court agaisnt the state Superindent 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 descretionary 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 implient the statute requring biometric identification. Because they are suing for an injunction to keep her from carrying out an official duty, this is an approriate suit.

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

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

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

The issue is whether the State A statute is unconstituiotnal

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 marekt 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.

Hhere, 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 impliment 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 wehtehr this is an undue burden. The risk of the theives circumventing security is small, as the facts state that sometimes theives circumvetn 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 doesnt 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

profits because of lost business from State A. Therefore, the bank is facing a substantial undue burden. There are likely other and cheaper ways to counteract theft that won't harm interestate commerce so much.

Therefore, it is likely that a court would find the State A statute is an unconsitutional violation of the dormant commerce clause.

======== End of Answer #2 ========

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 Â 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 transation betwenn the bank and manufacturer and finance company and manufacturer were secured transactions governed by Artcile 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 recievalbe (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 recievable, 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 it's 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 in convyed - it owned the accounts recievable. It is important to note that although the parties labled 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 recievable of the manufacturer, and thus was a secured transaction, and as discusses above, the requirements for attachment are present. However, as mentioned above, the financing company did not perfect it's security agreement because perfection in accounts recievable 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 vlaid security agreement are present. There was a signed writing labeled a laon agreement, and the collateral was reasonably identified. An account is a Article 9 term of art, and a collateral description using such a term is sufficient. Also, the bank gave value beacuas we are told the manufacturer "borrowed money" on March 15, and the debtor had rights in the accounts recievable (the fact that a security interest was in the ones he owned as of Feburary 1, held in favor of the financing company, does not negate his ownership). Furthermore, the agreement gave a security interest in future accounts. After aqcuired 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 unlikley 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 recieve 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, unecessary harm futher hindering its ability to honor its commitments. The sgined 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 foward their payments on the the bank or have the manufacturer

forward the payments to the bank. Only if these efforst fail, may the bank then directly contact the account debtors. The advantage of having a security interest is being able to avoid judicial process to seek repayment when a debtor defaults on an obligation. If the manufacturer is uncooperative in getting the payments on the accounts from the retail stores to the bank, the bank then only need contact the retail stores, providing them with a copy of the security agreement and financing statement indicating its right to payment. If this happens, and the retail stores continue to make payments only to the manufacturer, such payments will not discharge their obligations and they will be liable to the secured creditor/bank for their payments.

======== End of Answer #3 ========

MEE Question 4

In 2012, Testator wrote by hand a document labeled "My Will." The dispositive provisions in that document read:

> *A. I give $50,000 to my cousin, Bob;*
> *B. I give my household goods to those persons mentioned in a memorandum I will write addressed to my executor; and*
> *C. I leave the balance of my estate to Bank, as trustee, to hold in trust to pay the income to my child, Sam, for life and, when Sam dies, to distribute the trust principal in equal shares to his children who attain age 21.*

After Testator finished writing the will, he walked into his kitchen where his cousin (Bob) and his neighbor were sitting. After showing them the will and telling them what it was but not what it said, Testator signed it at the end in their presence. Testator then asked Bob and his neighbor to be witnesses. They agreed and then signed, as witnesses, immediately below Testator's signature. The will did not contain an attestation clause or a self-proving will affidavit.

When the will was signed, Sam and his only child, Amy, age 19, were living. Testator also had an adult daughter.

In 2015, Testator saw an attorney about a new will because he wanted to change the age at which Sam's children would take the trust principal from 21 to 25. The attorney told Testator that he could avoid the expense of a new will by executing a codicil that would republish the earlier will and provide that, when Sam died, the trust principal would pass to Sam's children who attain age 25. The attorney then prepared a codicil to that effect, which was properly executed and witnessed by two individuals unrelated to Testator.

Two months ago, Testator died. The documents prepared by Testator and his attorney were found among Testator's possessions, together with a memorandum addressed to his executor in which Testator stated that he wanted his furniture to go to his aunt. This memorandum was dated three days after Testator's codicil was duly executed. The memorandum was signed by Testator, but it was not witnessed.

Testator is survived by his aunt, his cousin Bob, and Sam's two children, Amy, age 24, and Dan, age 3. (Sam predeceased Testator.) Testator is also survived by his adult daughter, who was not mentioned in any of the documents found among Testator's possessions.

This jurisdiction does not recognize holographic wills. Under its laws, Testator's daughter is not a pretermitted heir. The jurisdiction has enacted the following statute:

> Any nonvested interest that is invalid under the common law Rule Against Perpetuities is nonetheless valid if it actually vests, or fails to vest, within 21 years after some life in being at the creation of the interest.

To whom should Testator's estate be distributed? Explain.

4) Please type your answer to MEE 4 below

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

(Essay)

======== Start of Answer #4 (1091 words) ========

MEE Question 4

First we need to establish that there is a valid will. A will is valid when the testator has the intent to create a will, has the capacity to create a will, and in fact creates a will that is properly executed. Here, nothing in the facts say that testator did not have capacity. Also, the testator had the intent to create a will because he labeled the document "my will." However, the jurisdiction does not recognize holographic wills. A holographic will is one where the material provisions are handwritten and it is onyl signed by the testator. This is not an issue here because while the will was handwritten, the testator followed the proper formalities to

execute a valid will.

The next issue is whether the gift to Bob is valid. This jurisdiction does not recognize holographic wills. Thus, for a will to be valid, it must be signed by the testator in the presence of at least two uninterested witnesses who must also sign in the presence of the testator. If there are only two witnesses and one of them is interested, the will is still found to be valid but the gift to the interested witness is invalid and it falls to the residuary estate. Here, the will included a gift for Bob. Bob was also a witness. Because Bob was one of two witnesses and he had an interest, his gift would pass to the residuary.

However, the will was republished three years later, in 2015. A will can be republished when the testator adds a codicil (a later testamentary instrument that modifies a will). Here, the will was republished, and thus made effective, when the testator added a codicil in 2015, and the codicil was properly executed and witnessed by two individuals unrelated to Testator. The effect of the republication through two uninterested witnesses means that Bob's gift will be valid and he will receive $50,000 from testator's estate.

The next issue is whether the memorandum was incorporated into the will. A document becomes part of a will through incorporation by reference when the document exists at the time the will is executed, the will sufficiently describes the document to the incorporated and the testator manifests the intent to incorporate

the document. However, the UPC allows a document to be incorporated even if it is executed after the will is created so long as the will sufficiently describes the document and where it can be found. Here, the will mentions that the testator's household goods will be given to those people mentioned in a memorandum addressed to the testator's executor. It can be argued that the will doesnt adequately describe the document to be incorporated (It is titled 'memorandum' which is not specific). However, looking at all the facts, it is likely that the memorandum will be considered incorporated. While the memorandum was executed three days after the will was republished, the will mentioned that the memorandum would be addressed to his executor and it would dispose of his household goods. In fact, the memorandum mentioned in the will was found together with the will, in the testator's possession, it was addressed to his executor, and it gave his furniture (household goods) to his aunt. Thus, a court would likely hold that the memorandum was incorporated by reference and the gift of furniture to the aunt will be valid.

the next issue is whether the gift to sam's children is valid. Here Sam predeceased testator. At common law, this would mean that the gift to Sam lapses, meaning it fails. However, most states have anti-lapse statutes, which say that if a beneficiary predeceases the testator, and they have a close family relationship, the gift will pass to the issue of the predeceased beneficiary. Here, Sam left behind to children:

Amy (age 24) and Dan (age 3). The will states that the trust principal should be delivered in equal shares to Sam's children who attain age 21. This would be a class gift because Sam could have multiple children during his lifetime. However, Sam is dead and Amy is of age to claim distribution. Thus, the class is closed and Amy is entitled to the trust principal. However, she must wait for Dan to reach the age of 21 before taking her interest because he was not of age 21 when Sam died. The will says that the children must attain 21, not be 21 when Sam dies. the jurisdiction has a statute that allows an interest that violates the rule against perpertuities to remain valid as long as it actually vests within 21 years after some life in being at the creation of the interest. This statute will not be applicable here because the clause giving the gift to Sam's children does not violate the Rule Against Perpetuities. We will know within 21 years of Sam's death whether or not his children will reach the age of 21. Thus, Amy must wait and see if Dan reaches the age of 21 before their interests can vest.

The next issue is whether testator's adult daughter is entitled to a share of the estate. Under the law of the jurisdiction, Testator's daughter is not a pretermitted heir. A pretermitted heir is one that arises after a will is validly executed and thus is not included in the will. If an heir is prettermitted the court will allow the heir to receive a share of the estate, whether it be from the residuary or from a gift left to a class of children. Usually, pretermitted heirs are children that are born after the

execution of the will. If the court finds that the testator would have included them, then they will be allowed to take. A child will not be considered pretermitted if the testator-parent left a large portion of the estate to the child's other parent. The court reasons that parent who receives the share of the estate will use it to raise the child. Here, the daughter was an adult when the will was executed the first time. She was also alive and an adult when the will was republished. This shows that testator had the intent to not include his dauther in the will. Parents are allowed to not include their issue in the will. Thus, the daughter will not receive anything.

To summarize: Bob will get $50,000, Aunt gets the furniture, Amy and Dan must wait and see if Dan will attain the age of 21, and Adult Daughter receives nothing.

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

MEE Question 5

A woman is on trial for the attempted murder of a man whom she shot with a handgun on March 1. According to a State A police report:

> The woman started dating the man in August. A few months later, after the woman broke up with him, the man began calling the woman's cell phone and hanging up without saying anything. In February, the man called and said, "I promise you'll be happy if you take me back, but very unhappy if you do not." The following week, to protect herself against the man, the woman lawfully bought a handgun.
>
> On March 1, the woman was working late in her office. At 10:00 p.m., the man entered the woman's office without knocking. The woman immediately grabbed the gun and shot the man once, hitting him in the shoulder.
>
> The police arrived at the scene at 10:10 p.m. By this time, a number of people had gathered outside the doorway of the woman's office. A police officer entered the office, and his partner blocked the doorway so that the woman could not leave and no one could enter. The officer immediately seized the gun from the woman and asked her, without providing Miranda warnings, "Do you have any other weapons?" She responded, "I have a can of pepper spray in my purse. Is that a weapon?"
>
> At 10:20 p.m., after the woman had been arrested and the man taken to the hospital, a custodian told the police officer, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."
>
> A few hours later, at the hospital, the man told the police officer that he had entered the woman's office just to speak with her and that the woman had shot him without provocation.

The woman will defend against the attempted murder charge on the ground that she acted in self-defense. In State A, self-defense is defined as "the use of force upon or toward another person when the defendant reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

State A has adopted evidence rules identical to the Federal Rules of Evidence. State A follows the doctrine of the Supreme Court of the United States when interpreting protections provided to criminal defendants under the U.S. Constitution.

The prosecution and the defense have fully complied with all pretrial notice requirements, the authenticity of all the evidence has been established, and the court has rejected defense objections based on the Confrontation Clause.

The woman, the man, and the police officer will testify at trial. The custodian is unavailable to testify at trial.

Under the Miranda doctrine and the rules of evidence, explain how the court should rule on the admissibility of the following evidence:

1. Testimony from the woman, offered by the defense, repeating the man's statement, "I promise you'll be happy if you take me back, but very unhappy if you do not."

2. Testimony from the police officer, offered by the prosecution, repeating the woman's statement, "I have a can of pepper spray in my purse. Is that a weapon?"

3. Testimony from the police officer, offered by the prosecution, repeating the custodian's statement, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

5) Please type your answer to MEE 5 below

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

(Essay)

======== Start of Answer #5 (1555 words) ========

1. Testimony from the woman, offered by the defense, repeating the man's statement, "I promise you'll be happy if you take me back, but very unhappy if you do not."

The first issue is whether the man's statement is relevant. Evidence is relevant when it tends to make a material fact more or less probable. Here, the woman has raised a defense of self-defense, and this statement may be indicative of how the woman perceived the man and how she felt when he showed up at her office. This may support (or negate) her claim that she felt she needed to act in self-defense. Therefore, it is likely relevant.

Relevant evidence is always admissible unless prohibited by another rule.

The next issue, therefore, is whether this statement is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter it asserts. Hearsay is not admissible unless it fits an exception.

Here, the man's statement was made in February, not as part of any judicial proceeding; therefore, it was made out-of-court. The issue then is whether the statement is being offered to prove the truth of the matter. For this, the court will have to determine the reason the defense is seeking to offer this testimony. Evidence is not offered for the truth of the matter asserted when it is offered for another purpose, such as to show the effect on the listener or a subsequent course of action by the declarant. When offered to show the effect on the listener, a statement is not offered to show that the statement is true, but rather to show that the person who heard it relied on it in some way.

This jurisdiction allows self-defense when a defendant "reasonably believed that such force was immediately necessary for the purpose of protecting herself against the use of unlawful force by such other person on the present occassion." If, as mentioned above, the man's statement is offered to show that the woman, based on the man's statement that she would be "very unhappy" if she did not take him back, then the testimony may be admissible to show the effect on the listener in inciting fear in the woman such that she felt that the man, by showing up at her work late at night, posed such an immediate threat as to warrant self-defense.

If the statement is offered for this purpose, then it is not offered to prove the truth of the matter asserted -- that is, it is not offered to show that the woman would actually be very unhappy if she did not take the man back, but rather that it instilled fear in the woman relevant to this case. As such, it is not hearsay under Rule 801, and the court should admit the testimony. If, however, the statement is offered to prove that the woman would, in fact, be very unhappy if she did not take the man back, then the statement is hearsay and should not be admitted.

2. Testimony from the police officer, offered by the prosecution, repeating the woman's statement, "I have a can of pepper spray in my purse. Is that a weapon?"

Again, the first issue is whether the evidence is relevant. Evidence is relevant when it tends to make a material fact more or less probable. Ultimately, the bar for relevance is low. Here, the prosecution may be offering the statement to show that the woman carried a gun in addition to pepper spray, negating to some extent her claim of self-defense. Or it may be offered to show that the woman was compliant with police. Either way, it is likely relevant.

As mentioned above, relevant evidence is always admissible unless prohibited by another rule. The next issue, therefore, is whether this statement is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the

matter it asserts. The statement was made out-of-court, at the scene of the alleged crime. However, rule 801(d) provides an exemption for hearsay as to statements made by the party opponent.

Here, the prosecution is seeking to admit this evidence, and the prosecution's party opponent is the defendant. The woman is the defendant, and she made this statement. Therefore, this statement is non-hearsay under 801(d). As such, it should be admitted unless it is prohibited by some other rule.

The next issue is whether this statement was obtained in violation of *Miranda*. Under the *Miranda* doctrine, when police are conducting a custodial interrogation, they must warn a suspect that: (1) s/he has the right to remain silent; (2) anything s/he says can and will be used against him/her in a court of law; (3) s/he has the right to an attorney; (4) if s/he cannot afford an attorney, one will be appointed to him/her at no cost.

The first issue is whether this was a custodial interrogation. A custodial interrogation, not surprisingly, requires that a person be (1) in custody and (2) interrogated. A person is considered to be in custody when a reasonable person would not feel free to leave. Here, the police report states that the officer's partner "blocked the doorway so that the woman could not leave and no one could enter." A reasonable person in this situation, blocked into a room by police officers, having just shot someone, would likely not feel free to leave. Therefore, the

woman was in custody. The next issue is whether the officer asking if she had any other weapons constituted an interrogation.

An interrogation occurs when officers ask questions or otherwise act to produce incriminating statements from a suspect. Generally, an officer may ask preliminary questions in order to ensure public safety without invoking *Miranda*. Here, the officer, seeking that the woman had a gun and then seizing it, asked if the woman had any other weapons. There is no indication that the officer intended to elicit any incriminating statement by this answer. Rather, having just come upon a scene with an active shooter and finding a woman with a gun, the officers seem to be securing the scene. The officer would need to seize any other weapons the woman may have had in order to protect himself and his partner, as well as anyone else in the vicinity.

For these reasons, though the woman was in custody, this was likely not an interrogation, and therefore likely did not invoke *Miranda*. As such,and given that this is a statement by a party opponent under 801(d), the statement should be admitted.

3. Testimony from the police officer, offered by the prosecution, repeating the custodian's statement, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

Again, the issue is whether the evidence is relevant. Relevant evidence tends to make a material fact more or less probable. Here, it is again unclear why the evidence is being admitted, but the bar for relevance is low. The testimony may be offered to establish a timeline, or to contradict the woman's statement about the events in question. As such, it is likely relevant.

As mentioned above, relevant evidence is always admissible unless prohibited by another rule. The next issue, therefore, is whether this statement is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter it asserts. The statement was made out-of-court, at the scene of the alleged crime. Again, depending on the purpose for which it is offered, it may well be used to prove the truth of the matter asserted.

Pursuant to Rule 803(1), a present sense impression is admissible as an exception against hearsay. Present sense impression requires that the statement be made as the witness was perceiving the event or scene. Here, however, the custodian's statement pertains to an event that happened at least 20 minutes earlier. In fact, the custodia was actually relaying what he *didn't* witness, not what he did. Therefore, this exception likely does not apply.

Pursuant to Rule 803(3), an excited utterance is admissible as an exception to hearsay. An excited utterance is a statement that was made under the excitement of the event while the witness was still under the distress or excitement of it. Here

again, the statement was made some 20 minutes later after the scene had calmed down. Therefore, this exception also likely does not apply.

Finally, under Rule 804, some otherwise inadmissible hearsay may be admitted where a declarant is unavailable to testify. A declarant is unavailable when he is outside the court's jurisdiction, deceased, refuses to testify despite being summoned, or cannot be located despite meaningful efforts. Here, we are told that the custodian is unavailable to testify.

However, Rule 804 has a secondary requirement for statements made by an unavailable declarant. The statement must meet on the exceptions enumerated in the second half of the rule. Among those are statements against penal, financial or reputation interest, and also statements made as dying declarations related to the manner of death. These facts do not indicate that this statement was against the custodian's interest, and there is no indication that this witness died as a result of the events in question in this case, so dying declaration does not apply.

As such, this statement is hearsay without an exception, and should not be admitted.

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

MEE Question 6

Taxes Inc. ("Taxes") is a tax preparation business incorporated in State A, where it has its corporate headquarters. Taxes operates five tax preparation offices in the "Two Towns" metropolitan area, which straddles the border between State A and State B. Three of the Taxes tax preparation offices are located in Salem, State A; the other two are in Plymouth, State B.

A woman, a recent college graduate, was hired by Taxes and trained to work as a tax preparer in one of its offices in Salem, State A. The woman and Taxes entered into a written employment contract in State A that included a noncompete covenant prohibiting her from working as a tax preparer in the Two Towns metropolitan area for a period of 24 months after leaving Taxes's employ. The employment contract also provided that it was "governed by State A law."

After working for Taxes for three years, the woman quit her job with Taxes, moved out of her parents' home in State A (where she had been living since her college graduation), and moved into an apartment she had rented in Plymouth, State B. Two weeks later, she opened a tax preparation business in Plymouth.

Taxes promptly filed suit against the woman in the federal district court for State A, properly invoking the court's diversity jurisdiction. The complaint alleged all the facts stated above, claimed that the woman was preparing taxes in violation of the noncompete covenant in her employment contract, and sought an injunction of 22 months' duration against her continued preparation of tax returns for any paying customers in the Two Towns metropolitan area.

Taxes delivered a copy of the summons and complaint to the home of the woman's parents in State A (the address that she had listed as her home address when she was employed by Taxes). The process server left the materials with the woman's father.

Each state has service-of-process rules identical to those in the Federal Rules of Civil Procedure.

Under State A law, covenants not to compete are valid so long as they are reasonable in terms of geographic scope and duration. The State A Supreme Court has previously upheld noncompete covenants identical to the covenant at issue in this case. When determining whether to give effect to a contractual choice-of-law clause, State A follows the Restatement (Second) of Conflict of Laws.

Under State B law, covenants not to compete are also valid if they are reasonable in scope and duration. However, the State B Supreme Court has held that noncompete covenants are unreasonable and unenforceable as a matter of law if they exceed 18 months in duration. While State B generally gives effect to choice-of-law clauses in contracts, it has a statute that provides that choice-of-law clauses in employment contracts are unenforceable. When there is no effective choice-of-law clause, State B follows the *lex loci contractus* approach to choice of law in contract matters.

Rather than file an answer to Taxes's complaint, the woman filed a motion pursuant to Rule 12(b)(6) to dismiss the action for failure to state a claim upon which relief can be granted. The

woman's motion argued that the noncompete covenant is invalid and unenforceable as a matter of law. Two days after filing the motion to dismiss, and before Taxes had responded to the motion, the woman filed an "amended motion to dismiss." The amended motion sought dismissal on the same basis as the original motion (failure to state a claim), but also asked the court to dismiss the action pursuant to Rule 12(b)(4) for insufficient service of process.

1. Should the court consider the woman's motion to dismiss for insufficient service of process? Explain.

2. If the court considers the woman's motion to dismiss for insufficient service of process, should it grant that motion? Explain.

3. In ruling on the woman's motion to dismiss for failure to state a claim, which state's choice-of-law approach should the court follow? Explain.

4. Which state law should the court apply to determine the enforceability of the noncompete covenant? Explain.

6) Please type your answer to MEE 6 below

(Essay)

======== Start of Answer #6 (1371 words) ========

Consideration of Motion to Dismiss for Insufficient Service of Process: The court should hear the motion to dismiss for insufficient service of process. The general rule on this matter is that a defendant waives her right to object to the sufficiency of service of process if she does not do so in her first response to a complaint, whether it be a Rule 12(b) motion or answer (this is also the case for motions to dismiss for insufficient process, lack of personal jurisdiction, and improper venue). The woman's first response was a Rule 12(b)(6) motion to dismiss and it did not include her motion to dismiss based on insufficient service of process, which means that ordinarily she would have wiaved her right to object to the sufficient of service of process. However, a defendant has a right to, once, amend her answer or 12(b) motion within 21 days of serving it so long as the plaintiff has not responsed to the answer or motion. That is the case here, and therefore, the woman's motion to dismiss based on insufificient service of process had been effectively included in her first Rule 12(b) response or answer meaning it

has not been waived. The court should consider the motion.

Merits of the Rule 12(b)(4) Motion: The court should probably grant the woman's motion. Service of proper is probably proper here. Service of process in federal district court is proper if served in compliance with the applicable service of process rules of the state in which the federal district court sits, the state where service of process was made, or in compliance with the rules for service of process under the Federal Rules of Civil Procedure. The state where service was made, State A, is also where the federal court sits, and it has adopted the federal rules so the analysis of this issue merges. Under the federal rules, service is proper if done by a nonparty, over the age of 18, and made upon a person of apparent competence who lives with the defendant at his or her usual abode.

The issue is whether the woman's parent's home can still be considered her usual abode. Ther is no issue with who served process. It was a process server, not a party, and nothing would suggest he or she was under 18. We are told that two weeks after quiting her job and moving to an apartment in State B, the woman opened her own tax preparation business and that following this event Taxes promptly filed suit and served the woman's father at his home in State A. The woman has not been in State B very long, and it's possible that even after a

diligent search her address would still appear as her parent's home in State A (the woman probably hasn't done things like get a new driver's license with an updated address if she has only been in her new apartment for weeks.). This would seem to suggest that the woman's parent's home is still her home for service of process purposes. Her father certainly was of sufficient competency for the process server. On the other hand, all the process server had to do to confirm that the parent's home was still the daughter's abode is ask the father if she lived there. He would have told the process server no, and that she nows lives in an apartment. Accordingly, it would appear that Taxes has an argument to support saying service was proper, but will probably fail because it was not made an the woman's usual abode, a fact the process server could have easily learned.

Selection of Choice-of-Law Approach: The federal district court in State A should apply State A's choice-of-law approach, the Restatement (Second), Most Significant Relationship Approach. We are told that Taxes properly invoked diversity jurisdiction. Under the Erie Doctrine, a federal district court sitting in diversity is to apply federal law for matters of procedures and matters for which a federal directive is on point (so long as that law is valid), and otherwise apply the substantive law of the state in which the district court is located. This would mean that the court in this case should apply the Restatement (Second) approach

because that is State A's approach and the court is located in State A.

Which State's Law Applies Under the Applicable Approach: Under the Second Restatement approach, State A law regarding the enforceablity of noncompete covenants should apply. The main issue is whether State A has a significant relationship to the transaction sufficient to justify the enforcement of the choice-of-law clause contained in the contract between the woman and Taxes.

Under the Second Restatement, a choice of law clause is always enforceable if the issue in debate is one on which the parties are free to contract about, such as manner and time of performance. On the other hand, a choice-of-law provision may not be enforceable if the issue in question is one over which the parties are not free to contract. The latter would be the situation here because the issue is the validity of a noncompete clause, and under State A law only certain noncompete clauses are valid, and different clauses are valid or invalid under State B law. Under the Second Restatement, when the validity of a choice-of-law clause is in question, and the matter being litigated is one over which the parties were not free to litigate, the choice-of-law clause will still be enforceable so long as the jurisdiction whose law was selected has a significant relationship to the transaction and parties, and resolution under that jurisdictions law's would not

violate the public policy of the forum.

Relevant contacts in determining whether determing whether State A has a significant relationship to the transaction and parties include where the contract was made, where it was to be performed, where it was negotiated, the residence of the parties (or their principal place of business or places where they do business), and where they relationship was centered. Here, the contract in question was made in State A, negotiated there, and to be performed there; Taxes is a citizen of State A, and domiciled there, for purposes of diversity because it is incorporated there and has it's principla place of business there; furthermore the parties' relationship centered out of that state. Even though Taxes has two business and in State B and the woman no lives there do not mean that State A does not have a significant relationship sufficient to justify the enforcement of the choice-of-law clause and the application of it's law under the Second Restatement. Furthermore, the federal courts have no common law, and thus the district court, as the forum, will have no "policy" against noncompete clauses like the one in this case. Accordingly, the State A law on this issue should be applied and the noncompete covenant enforced because we are told the State A supreme court has enforced a clause identical to the one in the Taxes/woman contract in this case.

It is clear that State A's choice of law rules would apply, however, in the alternative, if the federal district court applied the wrong's state's choice of law rules, and applied State B's approach, the outcome would be different. State B's laws hold that choice-of-law clauses in employment contracts are unenforceable. Thus under it's approach, lex loci contractus, a subset of the vested rights approach, it would apply the law of the place where the contract was made (if an issue of validity) and where it was to be performed (if an issue of sufficiency of performance). In this case, that is both State A. However, most states have a public policy exception which states they will not apply the law of a different state, even if it's choice of law provisions point to it, if the law would violate the fundemental public policy of the state. The covenant in this case is againast State B's public policy according to it's court which only pervents covenants preventing work for 18 months. The federal court would probably still apply STate A law under lex loci contractus, but might consider how that law also violated State B's public policy.

======== End of Answer #6 ========

END OF EXAM