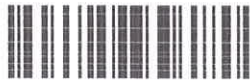


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03920

MPT-1

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THE MPT[®]

MULTISTATE PERFORMANCE TEST

In re Harrison

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In re Harrison

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FILE

Barbour, Lopez & Whirley
Attorneys at Law
788 Washington Blvd.
Abbeville, Franklin 33017

MEMORANDUM

To: Examinee
From: Esther Barbour
Date: February 24, 2015
Re: Daniel Harrison matter

Last year, our client Daniel Harrison bought a 10-acre tract (the Tract) of land in the City of Abbeville from the federal government, which had used the property as an armory and vehicle storage facility. The Tract is currently zoned for single-family residential development. Harrison applied for a rezoning of the property for use as a truck-driving training facility, but the City has denied the application.

Harrison wants to know whether he can pursue an inverse condemnation case seeking compensation from the City based on the denial of his rezoning application. Inverse condemnation is a legal proceeding in which a private property owner seeks compensation from a governmental entity based on the governmental entity's use or regulation of the owner's property.

Please draft a memorandum to me identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. Note that there has been no physical taking, so do not address that issue. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Barbour, Lopez & Whirley

MEMORANDUM TO FILE

From: Esther Barbour
Date: February 23, 2015
Re: Summary of interview of Daniel Harrison

Today I met with Daniel Harrison regarding a 10-acre Tract he bought from the federal government. He provided the following background information about the Tract's zoning, its prior use, and his plans for development.

- From 1978 to 2014, the Franklin National Guard operated an armory and vehicle storage building on the Tract. The buildings and parking lot are located on approximately three acres, and the remaining seven acres are undeveloped, heavily sloped, and wooded.
- In 1994, the City of Abbeville enacted an R-1 (single-family residential) zoning ordinance, restricting development to single-family housing and prohibiting all commercial and industrial uses on the Tract.
- The Guard operated the armory and storage building without objection from the City until March 2014, when the property was decommissioned and the Guard began looking for buyers. The buildings were (and still are) in good shape, but they contain levels of asbestos and lead paint that may pose environmental hazards if the buildings are renovated or demolished.
- The Tract borders a City park and baseball field and is near the municipal airport. The area surrounding the Tract has had very little residential growth since the 1960s.
- In June 2014, Harrison purchased the Tract from the Guard through a bid process for \$100,000 (about \$10,000 per acre), intending to use the existing Guard buildings for commercial purposes. He believed that the Tract was "grandfathered in" and not subject to the 1994 residential zoning ordinance.

- There were several other bids on the Tract, ranging from \$20,000 to \$88,800. Harrison anticipates that the City will point to his winning bid and the other bids submitted as proof of the Tract's value. However, the other bids were made before the City rejected Harrison's proposed non-residential use of the Tract, and Harrison believes that the other bidders bid on the Tract believing (as he did) that the zoning ordinance would not be enforced.
- Harrison also believes that it is not feasible to develop the Tract for residential use (see attached emails).
- In August 2014, Harrison negotiated a lease of the Tract to a truck-driving school. After negotiating the lease, Harrison contacted the City and was informed that the City intended to enforce the residential zoning ordinance.
- He then submitted an application to the City's Planning and Zoning Board requesting that the zoning of the Tract be changed from R-1 (single-family residential) to C-1 (general commercial/industrial) to allow the Tract to be used as a truck-driving school.
- The Board recommended approval of the rezoning application, but the Abbeville City Council voted unanimously to deny it.
- At the Council meeting, some Council members were concerned about the proximity of the Tract to a park; one suggested that with a special-use permit, the property could be used for a church, medical or dental clinic, business office, or day-care center. Harrison believes that these other uses are not feasible because the Tract is in a remote area of the City with little traffic and no growth, and because of the prohibitive cost of renovating the existing structures for such non-industrial uses.
- Harrison wants to keep the Tract, but he's very concerned about losing money on it. The Tract would be worth \$200,000 if used for industrial purposes (see attached appraisal). But because the City denied his rezoning application, the Tract is not producing and will not produce any income. Harrison estimates that if the Tract is not rezoned, he will lose between \$10,000 and \$15,000 per year due to maintenance, taxes, insurance, and deterioration.

MASTER APPRAISALS LLP

3200 Barker Road
Abbeville, Franklin 33020

Mr. Daniel Harrison
1829 Timber Forest Drive
Abbeville, Franklin 33027

January 9, 2015

SUBJECT: Market Value Appraisal for Harrison Tract

Dear Mr. Harrison:

Master Appraisals LLP submits the accompanying appraisal of the referenced property. The purpose of the appraisal is to develop an opinion of the market value of the fee simple interest in the property based on the highest and best use value of the property, if zoned for general commercial/industrial use. The appraisal is intended to conform to the Uniform Standards of Professional Appraisal Practice and applicable state appraisal regulations.

The subject is a parcel of improved land containing two buildings and a parking lot and consisting of an area of 10.0 acres or 435,600 square feet. The property is zoned R-1 (single-family residential) but has been used as a military armory and vehicle storage facility. The existing structures appear to be perfect for conversion to an industrial or training facility of some kind. That appears to be the highest and best use of the property, in its "as-improved" state. Thus, the appraisal assumes that the property will be used for industrial or training purposes.

VALUE CONCLUSION

Appraisal Premise: Market Value

Date of Value: January 6, 2015

Interest Appraised: Fee Simple

Value Conclusion: \$200,000 total (\$20,000/acre)

If you have any questions or comments regarding the information contained in this letter or the attached report, please contact the undersigned. Thank you for the opportunity to be of service.

Respectfully submitted,

MASTER APPRAISALS LLP



Margaret Jane Charleston
Certified General Real Estate Appraiser
Franklin Certificate # FR-053010

[Balance of APPRAISAL REPORT omitted]

January 19, 2015, Email Correspondence Between Harrison and Real Estate Agent

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>
Subject: Development options for my land

Hi, Amy. Remember the 10-acre tract of land that I bought last year? I've been trying to get the tract rezoned as C-1 commercial so that I can lease it to a truck-driving school that wants to open a new training facility in Abbeville. The City Council denied my rezoning application and told me that the only development it will allow is single-family residential. Frankly, I just don't think anyone would want to live way down there. You've been a real estate agent for 15 years. What do you think?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

I agree. I don't think the land is suitable for residential development. Assume that you could build three houses per acre—that would be 30 homes on the 10-acre tract. Typically, it costs between \$15,000 and \$20,000 per lot to develop land for single-family housing, including grading the land and installing utilities and drainage systems. That's a reasonable investment if the land is near a business district because people will pay a premium to live close to work.

But your land is almost 45 minutes southeast of the business district. There are several single-family lots a few miles from your tract, priced at \$4,500 each, and they aren't selling. I think you'd be lucky to get \$5,000 per lot if you developed the land, assuming you could sell the lots.

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>

That's what I thought. I wasn't sure about the numbers, but I didn't think it was doable.... You've seen the tract — do you have any idea what it would cost to tear down the existing buildings and parking lot and clear the wooded areas of the tract?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

In other deals I've worked on, I've seen it cost \$25,000 or more to demolish a building or parking lot. Here, the property has two buildings with likely environmental issues, and a parking lot and shrubs and trees to remove. You're probably looking at a minimum expense of \$75,000.

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>

I just don't have that kind of money.... If I can't lease the land to the truck-driving school and I can't develop it for residential housing, what do you think it's worth in its current condition?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

Not much. Maybe a few hundred dollars an acre. But that's about it.

LIBRARY

Franklin Constitution, Article I, Section 13

No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person

United States Constitution, Fifth Amendment ("Takings Clause")

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Newpark Ltd. v. City of Plymouth
Franklin Court of Appeal (2007)

This appeal involves an inverse condemnation claim in which a developer (Newpark Ltd.) contends that the City of Plymouth's denial of its rezoning application effected an unconstitutional regulatory taking of property. We affirm the trial court's judgment against the developer.

The property at the center of this dispute consists of 93 acres of land acquired by Newpark for \$930,000 (\$10,000 per acre). The tract is located in an area zoned "SF-E" (single-family residential development). The area has been zoned for one-acre-minimum lots since 1967. The tract was used primarily for pastureland at the time of purchase. While Newpark was unaware that the tract was zoned for one-acre-minimum lots when it signed the purchase contract, it was aware of the zoning by the time of closing.

In August 2000, after closing on the tract, Newpark applied for a zoning change to allow the development of 325 single-family lots on the 93 acres with a density of approximately 3.5 units per acre. The City Council considered and denied the application. Newpark then sued the City,

seeking damages for inverse condemnation.¹ The trial court found in favor of the City, and this appeal followed.

At the outset, we note that the fact that the zoning restriction had already been enacted when Newpark bought the tract does not bar it from bringing a takings action against the City, regardless of whether Newpark had notice of the restriction. Unreasonable zoning regulations do not become less so through the passage of time or title. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (rejecting argument that post-zoning purchasers cannot challenge a regulation under the Takings Clause).

The Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use

¹ Inverse condemnation occurs when the government takes private property for public use without paying the property owner, and the property owner sues the government to recover compensation for the taking. Because the property owner in such situations is the plaintiff, the action is called *inverse* condemnation because the order of the parties is reversed as compared to a direct condemnation action where the government is the plaintiff who sues a defendant landowner to take the owner's property.

without just compensation. *Id.* A taking can be physical (e.g., land seizure, continued possession of land after a lease to the government has expired, or deprivation of access to the property owner), or it can be a regulatory taking (where the regulation is so onerous that it makes the regulated property unusable by its owner). *See Soundpool Inv. v. Town of Avon* (Franklin Sup. Ct. 2003). The constitutionality of a regulatory taking involves the consideration of a number of factual issues, but whether a zoning ordinance is a compensable taking is a question of law.

The state of Franklin’s prohibition against taking without just compensation is set forth in Article I, Section 13, of the Franklin Constitution and is comparable to the Takings Clause of the United States Constitution, despite minor differences in wording. *See Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006). Therefore, Franklin courts look to federal cases for guidance in these situations.

The United States Supreme Court recently clarified the types of regulatory taking: (1) a total regulatory taking, where the regulation deprives the property of all economic value; (2) a partial regulatory taking, where the

challenged regulation goes “too far”; and (3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the improvements are not necessary to accommodate the additional traffic from the proposed development). *Lingle v. Chevron*, 544 U.S. 528 (2005).²

Here, Newpark does not argue that the City has physically taken its property, nor does it assert a partial regulatory taking or a land-use exaction. Thus, we need only consider the first type of regulatory taking: whether the City ordinance restricting development of Newpark’s land to one-acre-minimum lots constitutes a total regulatory taking.

A total regulatory taking occurs when a property owner is called upon to sacrifice *all* economically beneficial uses in the name of

²The Franklin Supreme Court recognizes a fourth type of regulatory taking in situations where a regulation does not “substantially advance” a legitimate governmental interest. In *Lingle*, the United States Supreme Court rejected the “substantially advances” formula under federal constitutional law. Its continuing validity is still an issue under Franklin law, but the parties have not raised it. Thus, we need not determine whether the “substantially advances” test remains valid in a regulatory takings case under the Franklin state constitution.

the common good. This type of regulatory taking was first articulated by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A *Lucas*-type total regulatory taking is limited to the extraordinary circumstance when no productive or economically beneficial use of the land is permitted and the owner is left with only a token interest.

Newpark contends that the only way to achieve an economically productive use of the property is for the City to allow single-family development of some type. This argument not only mischaracterizes the zoning ordinance but also misapplies the *Lucas* test upon which the argument is premised. The SF-E zoning *does* permit the development of a single-family residential subdivision, albeit in one-acre-minimum lots. The appraisal experts for both parties testified that, due to market conditions and the current zoning, the cost to develop one-acre lots would exceed the potential for revenue. The City's appraiser testified that the highest and best use of the property is to hold the property for the future.

Although the testimony established that the development would not be profitable under current conditions, the absence of profit

potential does not equate with impossibility of development. To the contrary, the takings clause does not require the government to guarantee the profitability of every piece of land subject to its authority, although lost profits are a relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner.

The City's expert testified that the property's value is approximately \$5,000 per acre. Newpark's expert testified that the property is worth \$2,000 per acre. Both experts testified that Newpark paid more for the property (\$10,000 per acre) than it is worth. The court reasonably concluded that Newpark had assumed certain risks attendant to real estate investment. But such risks have no place in a total takings analysis because the government has no duty to underwrite the risk of developing and purchasing real estate. Although investment-backed expectations are relevant to a *partial* regulatory taking analysis rather than a total taking analysis, we note that when such expectations are measured, the historical uses of the property are critically important. Here, the zoning always required one-acre-minimum lots, and the historical use of the property was farmland.

Newpark’s expert testified that the value of the property, if capable of being developed, is \$25,000 per acre. Expert testimony on both sides provides a range of value for the property in an undeveloped state from \$2,000 to \$5,000 per acre. Newpark claims that the \$2,000 constitutes no value at all.

We do not read *Lucas* to hold that the value of land is a function of whether it can be profitably developed. To the contrary, the economic viability test “entails a relatively simple analysis of whether value remains in the property after governmental action.” *Sheffield*. The appropriate *Lucas* inquiry is whether the value of the property has been completely eliminated. The deprivation of value must be such that it is tantamount to depriving the owner of the land itself. *Id.*

Newpark also argues that the property is valueless because if it cannot be developed as a residential subdivision, it will remain vacant, with a value equivalent to that of parkland. The fallacy of this approach is that it equates the lack of availability of a property for its most economically valuable use with the condition of being “valueless.” Although the regulation in *Lucas* precluded the development of oceanfront property, the property still had value. The owner could

enjoy other attributes of the property: he could picnic, camp, or live on the land in a mobile trailer. The owner also retained other valuable property rights—the right to exclude others and to alienate the land. *Id.* (Blackmun, J., dissenting); see also *Wynn v. Drake* (Fr. Sup. Ct. 2003) (no taking when zoning left owner with only recreational and horticultural uses). Here, the court could reasonably conclude that the property retains residual uses and therefore some value.

Newpark’s insistence that it is virtually impossible to find a tract of land without value is instructive. The fact that a piece of land will rarely be deemed utterly lacking in economic viability is consistent with the *Lucas* limitation of such claims to extraordinary circumstances. Here, because the property has a value of at least \$2,000 per acre, we conclude that those extraordinary circumstances are not present. Because the ordinance does not completely eliminate the property’s value, there has been no unconstitutional taking.³

Affirmed.

³ We note that a necessary result of a taking under these circumstances—had Newpark prevailed—would be that upon payment of adequate compensation, the City would own the property. Thus, had Newpark prevailed in its claim for inverse condemnation, Newpark would have been required to transfer title of the property to the City.

Venture Homes Ltd. v. City of Red Bluff
Franklin Court of Appeal (2010)

Appellant Venture Homes Ltd. owns two apartment buildings in the City of Red Bluff. After the City rezoned adjacent land, Venture sued the City, alleging that the rezoning had reduced the value of its property. The trial court granted the City's summary judgment motion. We affirm.

Background

In 1999, upon application of developer Austin Inc., the City created Planned Unit Development No. 12 (PUD 12). (A PUD is an alternative to traditional zoning containing a mix of residential, commercial, and public uses.) PUD 12 is a 195-acre mixed-use development, consisting of multi-family housing, shopping centers, and office buildings. The original development plan allowed a maximum of 900 apartment units to be built on the site. Austin built two apartment buildings, containing 800 units, which Venture subsequently purchased in 2002. Austin retained ownership of the remaining land in PUD 12.

When Venture bought the 800-unit apartment complex, it assumed that only

100 additional apartment units could be built in PUD 12. Because Venture thought that a 100-unit apartment building would be too small to be commercially viable, and because Venture believed that the City needed Venture's consent to allow additional apartment units in PUD 12, Venture assumed that it effectively had 100 additional units in reserve for future expansion of the two apartment buildings that it had purchased.

However, in April 2006, at Austin's request, the City carved out an area from PUD 12 and rezoned it. Austin then filed an application for creation of a new PUD within the boundaries of PUD 12. After public hearings, the City passed an ordinance creating PUD 30, an eight-acre tract zoned for 350 additional multi-family units.

Discussion

Venture alleges that creation of PUD 30 gives rise to a claim for inverse condemnation under the Franklin Constitution. Venture does not claim that its

property was physically invaded or that the City's zoning regulations eliminated all economically beneficial uses of its property. Rather, Venture argues that the City's creation of PUD 30 amounted to a partial regulatory taking for which Venture should be compensated.

A. Partial Regulatory Takings Test

A partial regulatory taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far," causing an unreasonable interference with the landowner's right to use and enjoy the property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Because the Franklin Constitution's takings clause is similar to the Takings Clause of the Fifth Amendment to the United States Constitution, we look to federal law to analyze Venture's takings claims. *See Newport Ltd. v. City of Plymouth* (Franklin Ct. App. 2007).

For a partial regulatory taking to occur, the governmental regulation must, at a minimum, diminish the value of an owner's property. Not every regulation that diminishes the value of property, however, is a taking.

There is no bright-line test for determining whether a partial, *Penn Central*-type regulatory taking has occurred. Whether a regulation goes "too far" requires a factual inquiry using the following guiding factors: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006) (citing *Penn Central*).

Our goal is to determine, after analyzing and balancing all relevant evidence, whether a regulatory action is the functional equivalent of a classic taking in which the government directly appropriates private property, such that fairness and justice demand that the burden of the regulation be borne by the public rather than by the private landowner.

Our analysis must not be merely mathematical. Rather, while applying the balancing test, we must remember that purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite those risks.

(1) Economic Impact of the Regulation

The first *Penn Central* factor, the regulation's economic impact on the property owner, is undisputed for the purpose of this appeal. Venture presented expert testimony that the value of its apartment properties was reduced from \$65.6 million to \$62.9 million. The City stipulated to Venture's figure for purposes of this appeal. While significant in absolute terms, this diminution in value of \$2.7 million reflects a loss of only about 4%.

The City cites several cases that suggest that such a small diminution in value is rarely if ever held to be a taking. The City claims that because Venture's loss was a small part of its property's value, Venture failed to show that creation of the new PUD unreasonably interfered with its use of the property. Although this one factor is not dispositive, the City is correct when it asserts that the small relative amount of Venture's loss weighs heavily against Venture's claims.

(2) Interference with Reasonable Investment-Backed Expectations

The second *Penn Central* factor requires us to consider the extent to which the regulation has interfered with Venture's reasonable investment-backed expectations.

The record shows that the ordinance at issue caused minimal interference with Venture's *reasonable* investment-backed expectations.

Venture concedes that the only harm it has suffered is increased competition and a resulting diminution in the value of its property. The City has not rezoned Venture's property to prohibit a current or proposed use, nor has the City substantially altered the character of the surrounding land use. The City simply increased the number of multi-family units permitted within the original boundaries of PUD 12, which already included a significant number of multi-family units.

In *Sheffield*, the Franklin Supreme Court held that the existing and permitted uses of the property constitute the "primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable investment-backed expectations.

In creating PUD 30, the City has not altered the existing or permitted uses of Venture's property and therefore has not interfered with Venture's "primary expectation." Venture can continue to operate its 800-unit complex and can build an additional 100

units on its property, should it decide to do so.

(3) Character of the Governmental Action

The third *Penn Central* factor is the character of the governmental action. This factor is the least concrete and carries the least weight. This factor's purpose, when viewed in light of the goal of the takings test (to determine if the Constitution requires the burden of the regulation to be borne by the public or by the landowner) is to elicit consideration of whether a regulation disproportionately harms a particular property. If the rezoning was general in character, that weighs against the property owner, whereas if the rezoning impacted the owner's property disproportionately harshly, that weighs in the owner's favor that a taking did occur.

Venture asserts that the governmental action in this case targeted a small subsection of an otherwise cohesive PUD, thereby increasing competition for its apartment complex. Venture claims that the City created PUD 30 solely to satisfy Austin. The City disputes this and responds by citing language from the ordinance creating PUD 30 and public meeting minutes that suggest that the new

PUD was crafted to "create a more modern pedestrian-friendly and urban environment."

The issue is whether the City created PUD 30 for the public welfare or did so to benefit the private interests of Austin. Venture presented evidence that could lead a reasonable fact finder to conclude that one of the City's purposes, or perhaps even its primary purpose, for enacting the ordinance was to benefit Austin. That evidence does not preclude summary judgment for the City, however, because the other two *Penn Central* factors—particularly the first (the economic impact of the regulation)—weigh so heavily against Venture that, as a matter of law, there is no taking here.

B. The "Substantial Advancement" Takings Test

Venture also argues that the City's ordinance creating PUD 30 effects a taking of its property because the ordinance does not "substantially advance legitimate state interests." The United States Supreme Court rejected this test in *Lingle v. Chevron*, 544 U.S. 528 (2005). Prior to *Lingle*, the Franklin Supreme Court applied the "substantial advancement" test to state regulatory-takings claims, but it has not yet

addressed whether the test still applies in light of *Lingle*. Assuming that the test is still valid in Franklin, there was no taking under the “substantial advancement” test.

The “substantial advancement” test examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. This requirement is not, however, equivalent to the “rational basis” standard applied to due process and equal protection claims. The standard requires that the ordinance “substantially advance” the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective.

The City asserts that the new PUD promotes a mixed-use, pedestrian-friendly, urban development that will enhance the quality of life of its citizens. Venture contends that the City’s stated goal is a pretext—that its real goal was only to benefit Austin by making Austin’s land more valuable. Even if that were true, however, we are not required to consider the City’s *actual* purpose. Instead, we look for a nexus between the effect of the ordinance and the legitimate state interest it is *supposed* to advance. The City

could reasonably have concluded that increasing housing density in a PUD already zoned for multi-family housing, shopping centers, and office space would advance the legitimate state interest of enhancing the quality of life of citizens by decreasing traffic, lowering commuting times, and encouraging citizens to walk. Accordingly, the creation of PUD 30 is not a taking under the “substantial advancement” test.

Affirmed.

1) MPT1 - Please type your answer to MPT 1 below

⌂

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

(Essay)

===== Start of Answer #1 (2042 words) =====

Memorandum

To: Board of Law Examiners

From: Applicant

Date: 2/24/15

Re: In re Harrison

Introduction

Franklin has a constitutional taking clause in Article 1 section 13 which Franklin courts have held is "similar" to the Takings Clause of the 5th Amendment of the U.S.

Constitution and Franklin courts look to federal law when analyzing takings claims. As

compared to a condemnation, an inverse condemnation is different in that the plaintiff is the landowner and is seeking the court to tell the government entity that the entity took the plaintiff's property without just compensation. Mr. Harrison's main objective is to have the land rezoned so that he can lease it to the truck-driving school and derive a profit from his land investment or, at the very least, to recover some monetary damages for his investment. Franklin courts have four types of analysis that can constitute a "taking" under state law: total regulatory taking, partial regulatory taking, land-use exaction, or a "substantially advance" legitimate state interests analysis.

1. Total Regulatory Taking

At issue is whether Mr. Harrison has a viable claim for a total regulatory taking and whether that claim would remedy his claimed economic loss.

A total regulatory taking occurs when a property owner is called upon to "sacrifice all economically beneficial uses" in the "name of the common good." *Newpark Ltd. v. City of Plymouth*, Franklin Ct. App. (2007), See also *Lucas v. South Carolian Coastal Council*, 505 U.S. 1003 (1992). A Lucas-type total regulatory taking is limited to the "extraordinary circumstance" when "no productive or economically beneficial" use of the land is permitted and the owner is left with only a "token interest." *Id.* Moreover, the "absence of profit potential does not equate with impossibility of development." *Id.* However, lost profits are a "relevant factor" to consider in assessing the value of the property and the "severity of the economic impact" of rezoning on a

landowner.

In *Newpark*, a developer brought suit for inverse condemnation against a city when he purchased pasture land which had been previously zoned for 1-acre minimum residential lots. Developer wanted the city to rezone the land, after he had purchased it, to allow for 3.5 units per acre residential housing. The developer solely argued a total taking under both Franklin and federal law. The value of the land when developer purchased it was somewhere between \$2,000 to \$5,000 per acre and, even though developer paid \$10,000 per acre, the Franklin Court of Appeals in *Newpark* held that the \$2,000 per acre was still valuable and that the economic viability test outlined in *Lucas* turns on the analysis of "whether value remains in the property after governmental action" -- the deprivation of value must be such that it is "tantamount to depriving the owner of the land itself." *Id.*

Here, Mr. Harrison paid \$10,000 per acre for a ten acre tract. The property is zoned for single-family residential. Amy Connor, a realtor that is familiar with the location and the market stated that the cost of developing the land into lots, which includes plumbing and utilities and drainage systems will cost \$15,000 per lot for 30 lots and \$75,000 to remove the two existing buildings and parking lot--for a combined total of \$525,000 to renovate the land into residential use. However, that same realtor said the land is worth, as it stands, "a few hundred dollars per acre." This is probably enough value to not be considered a total taking under *Lucas*. The requirement for a *Lucas*-taking is that no "value remains in the property after governmental action."

It is worth noting that in a total-taking the city is given title to the land if it is forced to pay for it. However, because of the lack of viability of this type of claim in Mr. Harrison's, the total taking legal theory should probably not be pursued.

2. Partial Regulatory Taking

The issue is whether Mr. Harrison has a viable claim for a partial regulatory taking and whether that claim would remedy his claimed economic loss.

A partial regulatory taking may arise where there is "not a complete taking" but the regulation goes "too far" causing an "unreasonable interference" with the landowners right to use and enjoy the property. *Venture Homes Ltd. v. City of Red Bluff*. Franklin Ct. of App. (2010). See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). For a partial taking to occur the regulation must, at a minimum, "diminish the value of an owner's property," *but* not every regulation that diminishes the value of property is a taking. While there is no bright-line test for determining a partial taking, The United States Supreme Court, in *Penn*, held that a finding of when a regulation goes "too far" is a factual inquiry which follows three guiding factors: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Id.* The ultimate determination is whether government action "directly appropriates private property" such that "fairness and justice demand

that the burden of the regulation be borne by the public rather than by the private landowner." *Id.* As in all takings analysis, however, purchasing and developing real estate carries with it certain financial risks and it is not the government's duty to "underwrite" those risks. *Id.*

The first factor is the economic impact of the regulation. There is a line of cases which suggest that when the loss is a "small diminution in value" the factor "weighs heavily against" the finding of a partial taking. A small diminution in value leads to a plaintiff's failure to show the city "unreasonably interfered" with his use. *Id.* While not expressly stated in *Venture Homes*, it could be argued that the converse of the diminution in value is true as well, in that when the value of diminution is great, it weighs heavily in favor of a taking. In *Venture Homes*, the taking, while large quantitatively, 2.7 million dollars, that amount reflected only a 4% change in the value. The Franklin Court of Appeals found that this was too little a change in value to amount to an unreasonable interference. Here, however, Mr. Harrison paid \$10,000 per acre and the current value as estimated by the reator is a few hundred dollars per acre. Giving the realtor the benefit of the doubt and leaving room for error in appraisal, even if the value was \$1000 per acre that would result in a diminution of 90% of the value paid. It is worth discussing here as well as in the next factor that the city action was a denial of rezoning, not an affirmative act of changing a zoning regulation. Therefore, what Mr. Harrison paid for the land may not accurately reflect the value of the land at that time. The argument against this reasoning is the same as the argument in the next

factor which is that no reasonable investor could have expected that the city would hold the purchaser to the single lot development zoning regulation when it had been owned by the National Guard for almost 40 years and used exclusively as an armory. Even to remove the buildings on the land would require \$75,000 which is a diminution in 75% of value of what Mr. Harrison paid. The change in value is definitely substantial and can be found to be an unreasonable interference with Mr. Harrison's use which might even "weigh heavily" in his favor.

The second factor is the city's interference with reasonable investment-backed expectations which requires the court to consider the extent to which the regulation has "interfered with [the plaintiff's] reasonable investment-backed expectations." *Id.* The Franklin Supreme Court has held in *Sheffield Development Co. v. City of Hill Hieghts* (2006) that the "existing and permitted uses" of the property constitute the "primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable investment-backed expectations. This is the factor that weighs most favorably for Mr. Harrison. Here, the land had been used by the National Guard for 40 yeras exclusively as an armory and vehicle storage bulding. There are two buildings and a parking lot on three developed acres and the rest of the seven acres are wooded, heavily sloped, and undeveloped. While the bids on the property varied from \$20,000 to \$88,800 to Mr. Harrison's \$100,000 winning bid, Mr. Harrison believes, and probably rightly so, that the other bidders bid on the tract believing that the zoning ordinance would not be enforced. There is enough evidence to support a finding that a reaonable investor would have drawn that conclusion based

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on the past use of the land and current state of the land.

The third factor is the "least" important factor and it is the character of the governmental action. *Id.* This factor examines whether a regulation "disproportionately harms a particular property." Here, the zoning impacted only one tract of land, which is Mr. Harrison's so his is not the 'most harmed' property of those that are affected, he is the only property harmed. The third factor does not support Mr. Harrison's case but it does carry the "least weight" of the three factors.

Mr. Harrison has a viable claim for a partial regulatory taking that would probably compensate him for the change in value from what a reasonable investor would believe the land was valued at at the time of the purchase and the time the variance was denied--approximately 90% of his investment.

3. Land-use Exaction

A land use-exaction occurs when "governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development." *Newpark*. *Newpark* provides the example of a developer is required to rebuild a road but the improvements are not necessary to accommodate the additional traffic from the proposed development. Here, the city is not conditioning their approval on Mr. Harrison doing anything (e.g. building a road) (the requirement that Mr. Harrison develop the land into lots so it can

be used as residential lots is not a conditional requirement, but instead just compliance with already existing zoning ordinances), so a land-use exaction analysis is not appropriate.

4. "Substantially Advance" Legitimate State Interests

The issue is whether Mr. Harrison has a viable claim for a taking under the "substantially advance legitimate state interests" analysis and whether that claim would remedy his claimed economic loss.

The substantially advance legitimate state interests analysis was developed in Franklin before the United States Supreme Court rejected the analysis in *Lingle v. Chevron*, 544 U.S. 528 (2005). The Franklin Supreme Court has not ruled if this test is still a viable claim in Franklin or if the analysis has changed since *Lingle*. The essence of this test requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved. The court can look at the legitimate state interest the ordinance is "supposed" to advance, not the city's "actual purpose." Here, it can be argued that there is no purpose in providing single family housing in that area of town due to the lack of businesses and development around the area and that the city's purpose of providing housing is not substantially advanced by requiring this lot to be developed into houses when there are no other houses or businesses near it.

Assuming this test is still valid in Franklin, which is highly unlikely due to Franklin courts repeated iterations of how the U.S. 5th amendment taking and the Franklin taking are identical save for minor changes in wording, this test might result in

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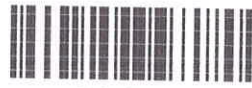
a finding of taking but is not as good of a claim as a partial regulatory taking.

Conclusion

Mr. Harrison's best course of action is to pursue a partial regulatory taking under *Penn* and that should compensate him for the difference in value as well as allow him to keep the land. In addition, the city may just choose to let him rezone the land which is in his interests so that he may lease to the truck-driving school and derive a profit.

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

Applicant Number



03940

MPT-2

215

THE MPT[®]

MULTISTATE PERFORMANCE TEST

In re Community General Hospital

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In re Community General Hospital

FILE

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FILE

Jackson, Gerard, and Burton LLP
Attorneys at Law
222 St. Germaine Ave.
Lafayette, Franklin 33065

MEMORANDUM

To: Examinee
From: Hank Jackson, Partner
Date: February 24, 2015
Re: Community General Hospital; Response to OCR Audit

Our client, Community General Hospital, is subject to the Health Insurance Portability and Accountability Act of 1996, commonly called "HIPAA," and its related regulations. Frances Paquette, the hospital CEO, sent me the attached letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services outlining three cases in which allegations have been made of improper disclosures of patient health information. She is very concerned about the inquiry and fears that the government may file an enforcement action resulting in penalties and adverse publicity. She needs our assistance in responding.

Please review the accompanying materials and draft a letter responding to the OCR and persuading it that no enforcement action under HIPAA is warranted. The OCR has discretion as to whether it brings an enforcement action. Take that into account in drafting your letter: be persuasive but not confrontational. Your response should cite the specific applicable regulations and apply them to the facts of each case.

An investigative report from the hospital's medical records director is attached. To help orient you, I have also attached a short memorandum I wrote to the CEO when the federal HIPAA regulations, known as the "Privacy Rule," were put into final form in 2002. While there have been updates to the HIPAA regulations since this 2002 memorandum was drafted, I have reviewed its content in light of those changes and have confirmed that the content is unaffected by subsequent additions or clarifications to the HIPAA regulations.

U.S. Department of Health and Human Services

Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

February 9, 2015

Community General Hospital
600 Fremont Blvd.
Lafayette, Franklin 33065

Re: Results of Audit for Compliance with HIPAA Regulations

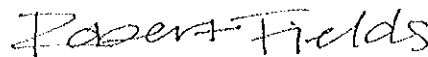
Dear Community General Hospital:

As a result of complaints received and a recent audit of patient health care records at your facility, we preliminarily find that disclosures of protected health information may have been made in violation of the provisions of 45 C.F.R. § 164.500 *et seq.* We found no written authorization for disclosure of the protected health information in the medical charts of three patients: Patient #1 (reporting a wound to police over the patient's objection); Patient #2 (disclosing to police suspicions about arsenic poisoning of a decedent and then releasing the decedent's entire medical record); and Patient #3 (disclosing information relating to a patient's treatment which later resulted in the patient's arrest).

You are hereby notified that unless we receive a response justifying the disclosures within 20 days of your receipt of this letter, this office will consider pursuing an enforcement action and seeking appropriate civil penalties.

Please direct your response to the undersigned at the address noted above. Thank you.

Sincerely,



Robert Fields
Investigator

**COMMUNITY GENERAL HOSPITAL
INTRAOFFICE MEMORANDUM**

TO: Frances Paquette, CEO
FROM: Megan Larson, Medical Records Director
DATE: February 13, 2015
RE: Your request relating to Office of Civil Rights letter

As requested, I investigated the facts and circumstances relating to the patients identified in the Office of Civil Rights letter of February 9, 2015. I also reviewed the relevant health care records and interviewed hospital personnel. In each instance, the disclosure of the patient's health information was duly noted in the patient's chart. In no case does the chart contain a signed authorization from the patient or the patient's representative for release of protected health information on our usual form. My investigation discovered information beyond that which appears in the medical charts, information that would not have been available to the OCR when it conducted its audit of the charts.

Patient #1

Patient #1, an 18-year-old male, was brought to the Emergency Department on September 20, 2014, with a gunshot wound to his right calf. Patient #1 said that he was the victim of a gang dispute. The treating physician told Patient #1 that the physician would have to report the gunshot wound to the police. Patient #1 vehemently objected, saying that any report would further endanger him because a police inquiry would certainly prompt retribution from gang members.

After treating the wound, and despite the patient's objection, the treating physician called the Lafayette Police Department and reported the wound. The next day, the physician sent a written report by first-class mail to the police department. See Attachment A. The report contained no additional records.

I was told that the patient's family had filed a complaint with the OCR.

Patient #2

Patient #2, a 67-year-old man, was admitted to the hospital on November 7, 2014, and died at the hospital on November 9, 2014. On admission, the patient complained of severe headaches and diarrhea, confusion, and drowsiness. Soon after admission, the patient began vomiting, complained of stomach pain, and experienced severe convulsions. Nursing staff observed leukonychia (white fingernail pigmentation). After death, an autopsy was conducted. The pathologist concluded that the cause of death was multi-system organ failure caused by arsenic poisoning. See Attachment B, pathology report.

Our executive vice president knows the decedent's family, which owns a large-scale manufacturing business in Lafayette. She was also aware of considerable strife between the decedent and members of the family over ownership of the business. She reviewed the pathology report the day after the decedent's death. That same day, she invited a police detective to lunch and informed him of the patient's death, of the conclusion of the pathology report, and of her awareness of the serious conflict between the patient and other members of his family. Later that day, she told the Medical Records Department to give to the detective the entirety of the records of the patient's last two hospital stays (the most recent stay and one six months before his death), including the admission records, his progress notes, and the pathology report. The hospital provided the earlier records because the pathologist had used those records to rule out other causes for the fatal illness.

A family member learned of the disclosure to the police and is quite upset. He has filed a complaint about the disclosure to the OCR.

Patient #3

Patient #3, a 35-year-old male, was admitted to the Emergency Department on December 17, 2014, accompanied by his sister. The sister said that a neighbor had called her to the patient's apartment after hearing loud noises. The sister had found the patient emptying his cupboards and throwing plates and glassware against the wall. The sister persuaded the patient to come to the hospital with her.

An interview with the patient eventually established that he had taken PCP ("angel dust"), together with alcohol. Throughout the interview, the patient became increasingly agitated and belligerent. His speech was rapid, and his thoughts were disorganized and chaotic. He

reported being threatened by persons who his sister later stated had died years ago. By the end of the interview, the patient had focused his agitation on his employer, saying that he was angry about work conditions and constantly felt belittled and undermined at his workplace.

The patient wanted to leave the hospital. The treating physician advised him not to leave, but the patient insisted. The patient began shouting, "I hate my boss and I hate what she's done. I'm going to get her . . ." He then ran out of the hospital. The patient's sister then told the hospital staff that she thought the patient had a gun at home.

Shortly thereafter, a Franklin state trooper came into the Emergency Department on an unrelated matter. Because of a concern for the safety of others, the treating physician reported to the trooper Patient #3's name, his combative demeanor, and the threat to his employer, but not a specific cause of the patient's combative behavior. Patient #3 was later arrested on the street two blocks from his workplace, but was unarmed. The County Jail released him shortly thereafter. Patient #3's lawyer has complained to the OCR about the treating physician's disclosure of protected health information to the trooper.

**COMMUNITY GENERAL HOSPITAL
EMERGENCY DEPARTMENT**

Luke Ridley, M.D.
600 Freemont Blvd.
Lafayette, Franklin 33065

September 21, 2014

Via First-Class Mail, USPS

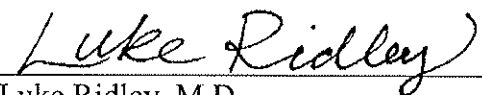
Chief of Police Alexander Mason
Lafayette Police Department
Municipal Building
1102 Third Avenue
Lafayette, Franklin 33065

Re: Report of gunshot wound

Dear Chief Mason:

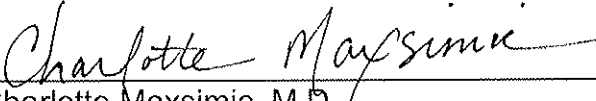
Following up on my telephone call to you yesterday, this is to report that on September 20, 2014, I treated David Meyers of 55 Baker Street, Lafayette, Franklin 33065, at Community General Hospital in Lafayette, Franklin, for a gunshot wound to his right calf.

Sincerely,



Luke Ridley, M.D.

Community General Hospital Pathology Report	
Patient Name: Stewart Weller	Case No.: CGH-0-03-13231
DOB: 1/16/1947	Collected: 11/9/2014
Sex: Male	Received: 11/10/2014
MRN: 51552435	Deliver to: File
Provider: Blue Cross / Blue Shield	
POST-MORTEM PATHOLOGY REPORT	
Diagnosis:	Arsenic poisoning
Tests:	Admission and Emergency Department records Physical examination Stomach wash Blood (10 ml), hair, urine, feces
<p><i>Admission and ER records:</i> On admission on 11/7/2014, patient complained of headaches, diarrhea, confusion, drowsiness. In the Emergency Department, patient vomited, suffered severe convulsions, and complained of stomach pain. Patient pronounced dead on 11/9/2014 at 20:43.</p> <p><i>Physical examination (post-mortem):</i> Observable white fingernail pigmentation (leukonychia), including transverse white lines across fingernails (Mee's lines). Faint garlic odor around mouth. Irritation of nasal mucosa, pharynx, larynx, and bronchi. Fatty yellow liver. Lungs display excessive accumulation of serous fluid. Degenerative changes to liver. Heart displays excessive accumulation of serous fluid.</p> <p><i>Blood, hair, urine, feces:</i> Toxic levels of arsenic compounds, more than 12 times expected from normal environmental exposure, and most likely ingested as arsenic trioxide.</p>	
Conclusion:	Death resulting from multi-organ system failure caused by acute arsenic poisoning.


 Charlotte Maxsimic, M.D.
 CGH Pathology

November 10, 2014

Jackson, Gerard, and Burton LLP

Attorneys at Law

222 St. Germaine Ave.
Lafayette, Franklin 33065

MEMORANDUM

To: Frances Paquette, CEO, Community General Hospital
From: Hank Jackson, Partner
Date: August 30, 2002
Re: Federal HIPAA Regulations, or the "Privacy Rule"

You asked me to review the new federal HIPAA regulations and to provide you with an introduction to them as they relate to the privacy of health information held by Community General Hospital. This memo is a very brief summary of what is known as the "Privacy Rule" and what can happen if the Hospital does not comply with the Privacy Rule's provisions.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 201 *et seq.*, required creation of published standards and regulations for the exchange, privacy, and security of patient health information. The regulations were published in final form on August 14, 2002. Community General Hospital is a "covered entity" under the regulations.

The regulations govern the circumstances under which a covered entity may disclose to others information in any form or medium, whether electronic, paper, or oral, that can be individually identifiable with a patient. "Individually identifiable" health information means that the information identifies the individual or provides a reasonable basis to believe that it can be used to identify the individual. The Privacy Rule refers to such information as "protected health information" (PHI).

A covered entity may not disclose PHI, except either (1) as permitted or required by the Privacy Rule or (2) as authorized by the identified individual (or personal representative) in writing. PHI includes information, including demographic data, that relates to

- the individual's past, present, or future physical or mental health or condition;
- the provision of health care to the individual; or
- the past, present, or future payment for the provision of health care to the individual.

As a general proposition, Community General should not disclose PHI to outside persons unless permitted by the regulations or upon a patient's written authorization. Community General may, of course, disclose PHI internally to the individual. Community General may also use and disclose PHI internally without written authorization for purposes of its own treatment, payment, and health care operations. Other permitted disclosures include certain public interest and benefit activities and certain carefully defined research, public health, and health care operations.

The Privacy Rule also permits use and disclosure of PHI without an individual's authorization for several national priority purposes. Some of these national priority purposes permit disclosures to public health authorities responsible for protecting public health and safety, or to agencies responsible for auditing and investigating the health care system and public benefits programs. Still others relate to disclosures required in judicial or administrative proceedings, or to disclosures concerning decedents to coroners, pathologists, medical examiners, and funeral home directors.

Finally, several of these national priority purposes relate to disclosures required by law or for purposes of law enforcement or public safety. They permit a covered entity to disclose PHI without individual authorization under the following circumstances:

- As required by law (including by statute, regulation, or court order).
- For law enforcement purposes, in six carefully defined circumstances, including:
 - (1) as required by law or by administrative requests;
 - (2) to identify or locate a suspect, fugitive, material witness, or missing person;
 - (3) to respond to a law enforcement official's request for information about a victim or suspected victim of a crime;
 - (4) to alert law enforcement to a person's death, if the covered entity suspects that criminal activity caused the death;
 - (5) when a covered entity believes that PHI is evidence of a crime that occurred on its premises; and
 - (6) in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

- Where the covered entity believes that disclosure is necessary to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone it believes can prevent or lessen the threat (including the target of the threat).

In most cases, when the Privacy Rule *permits* Community General to disclose PHI, it requires Community General to make reasonable efforts to limit the information that it discloses to the “minimum necessary” to accomplish the intended purpose of the disclosure. While the “minimum necessary” standard applies to many uses and disclosures, there are situations (specified in the HIPAA regulations) in which covered entities are not subject to this “minimum necessary” limitation.

The U.S. Department of Health and Human Services Office for Civil Rights (OCR) is responsible for administering and enforcing compliance with the Privacy Rule and may conduct complaint investigations, review compliance, and impose substantial civil money penalties for violations of the Privacy Rule.

LIBRARY

Excerpt from Franklin Statutes

Chapter 607. Professions and Occupations, Mandatory Reporting

§ 607.29 Gunshot or stab wounds to be reported. The physician, nurse, or other person licensed to practice a health care profession treating the victim of a gunshot wound or stabbing shall make a report to the chief of police of the city or the sheriff of the county in which treatment is rendered by the fastest possible means. In addition, within 24 hours after initial treatment or first observation of the wound, a written report shall be submitted, including a brief description of the wound and the name and address of the victim, if known, and shall be sent by first-class U.S. mail to the chief of police of the city or the sheriff of the county in which treatment was rendered.

**Excerpts from Health Insurance Portability and Accountability Act (HIPAA) regulations,
45 C.F.R. §§ 164.502 and 164.512**

45 C.F.R. § 164.502 Uses and disclosures of protected health information: general rules.

(a) **Standard.** A covered entity may not use or disclose protected health information, except as permitted or required by this subpart

(1) **Covered entities: Permitted uses and disclosures.** A covered entity is permitted to use or disclose protected health information as follows:

(i) To the individual;

. . . and

(vi) As permitted by and in compliance with this section, [or] § 164.512

* * *

(b) **Standard: Minimum necessary**

(1) **Minimum necessary applies.** When using or disclosing protected health information or when requesting protected health information from another covered entity . . . , a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.

(2) **Minimum necessary does not apply.** This requirement does not apply to:

(i) Disclosures to or requests by a health care provider for treatment;

* * *

(v) Uses or disclosures that are required by law, as described by § 164.512(a); and

(vi) Uses or disclosures that are required for compliance with applicable requirements of this subchapter.

* * *

(f) **Standard: Deceased individuals.** A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual.

(g) (1) **Standard: Personal representatives.** As specified in this paragraph, a covered entity must . . . treat a personal representative as the individual for purposes of this subchapter.

* * *

(4) **Implementation specification: Deceased individuals.** If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

* * * *

45 C.F.R. § 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual . . . in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law.

- (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.
- (2) A covered entity must meet the requirements described in paragraph . . . (f) of this section for uses or disclosures required by law.

* * *

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if [any of] the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process [or] as otherwise required by law.

A covered entity may disclose protected health information:

- (i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries

* * *

(3) **Permitted disclosure: Victims of a crime.** Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime . . . if:

(i) The individual agrees to the disclosure; or

(ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) **Permitted disclosure: Decedents.** A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

* * *

(j) **Standard: Uses and disclosures to avert a serious threat to health or safety.**

(1) **Permitted disclosures.** A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

(i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat;

* * *

(4) **Presumption of good faith belief.** A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) . . . of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

* * *

2) MPT2 - Please type your answer to MPT 2 below (Essay)

===== Start of Answer #2 (1237 words) =====

MPT 2 Applicant #113

Jackson, Gerard, and Burton LLP

Attorneys at Law

222 St. Germaine Ave.

Lafayette, Franklin 33065

February 24, 2015

U.S. Department of Health and Human Services

Office of Civil Rights

1717 Federal Way

Lafayette, Franklin 33065

Re: Justification of Disclosures; Response to OCR Audit

Dear Mr. Fields,

ARBar__2-24-15__AM_MPT

I am writing to you on behalf of Community General Hospital in response to your letter dated February 9, 2015 regarding the OCR Audit and, in particular, three instances of disclosures of protected health information under HIPAA. I have reviewed your letter and the applicable provisions of HIPAA and Franklin state law, as well as received additional information from Community General Hospital regarding the facts and circumstances relating to the three patients identified. This additional information would not have been available to the OCR from its review of the medical charts. As a result of this investigation and review, I firmly believe that the disclosure of health information related to the three patients mentioned in your letter is in compliance with HIPAA and the applicable portions of the Franklin state code. I have provided a brief synopsis of the applicable regulations and facts regarding each patient below.

Patient #1:

Community General Hospital ("CGH") does not dispute that it is a covered entity for the purposes of HIPAA under 45 C.F.R. § 164.500. The regulations permit CGH to disclose protected health information to the individual or in compliance with 45 C.F.R. § 164.502. With respect to a patient who does not authorize the disclosure of their protected health information, the regulations permit a covered entity to disclose such information to a law enforcement officer for law enforcement purposes when such disclosure is required by law (45 C.F.R. § 164.512 (a)(1)). In doing so, the covered entity must meet the requirements of one of the six particular circumstances in § 164.512 (f)(1)-(6).

The Franklin State Code (§ 607.29) requires gunshot wounds to be reported by a licensed health care professional to the chief of police or county sheriff "by the fastest possible means." In addition, the law requires a written report with a brief description of the wound along with the name and address of the victim to be sent by certified mail within 24 hours after initial treatment. This mandatory reporting requirement clearly is permitted by the provisions of HIPAA that permit disclosure without patient authorization when required to do so by laws that require reporting of certain types of injuries (45 C.F.R. § 164.512 (f)(1)(i)).

The investigation into Patient #1's treatment and disclosure demonstrates that the patient was admitted to the Emergency Department with a gunshot wound. The treating physician advised the patient that the physician would have to report the gunshot wound to the police pursuant to Franklin state law. Immediately after treatment, the physician reported the wound to the Lafayette Police Department. The next day, the physician sent a written report by first class mail containing the name and address of the victim, describing the wound as "a gunshot wound to his right calf." No further records were provided to the Police Department. This reporting by the treating physician clearly falls within the mandatory reporting provision of the Franklin state code, as well as the permitted disclosures under HIPAA.

Patient #2

The disclosure of the health information related to Patient #2 is permitted under 45 C.F.R. § 164.512(f)(4). This provision governs the reporting of health information about individuals who have died to law enforcement officials. Such reporting is permitted when the covered entity suspects that such death may have resulted from criminal conduct. Generally, health information disclosed without patient authorization must be the minimum necessary to accomplish the intended purpose of the disclosure. However, the "minimum necessary" standard is not required when the covered entity is complying with other HIPAA disclosure provision. 45 C.F.R. § 164.512 (b)(1)-(2).

In the case of Patient #2, the decedent was admitted to the hospital on November 7, 2014. He died two days later as a result of symptoms indicative of arsenic poisoning. A subsequent autopsy confirmed the presence of lethal levels of arsenic. The executive vice president of CGH knew the family of the decedent and had a good-faith basis for suspecting criminal activity in light of her personal knowledge of the decedent and the autopsy report. She informed law enforcement of the patient's death, as well as turned over the patient's admission records, progress notes, pathology report, and the records from the past two hospital stays. It is CGH's position that the "minimum necessary" standard does not apply when the hospital is complying with the disclosure provisions regarding suspected death from criminal conduct. Even if the minimum necessary standard does apply, however, the hospital's disclosure of Patient #2's prior records is in compliance because the pathologist preparing his report had relied on those prior records to rule out other causes for his fatal illness.

Patient #3

Finally, HIPAA provisions permit the unauthorized disclosure of patient health information when it is necessary to avert a serious threat to health or safety. (45 C.F.R. § 164.512(j)). Such disclosure is permitted when the covered entity believes in good faith that the disclosure is 1) necessary to prevent or lessen a serious and imminent threat to the health or safety to a person or the public; and 2) is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. In addition, pursuant to 45 C.F.R. § 164.512(j)(4), CGH is entitled to a presumption that they have acted in a good faith belief with regard to the disclosures made to prevent a serious threat to health or safety.

Patient #3 was admitted to the Emergency Department on December 17, 2014 and was eventually established to have taken a dangerous drug in conjunction with alcohol. The patient's sister, who accompanied him to the emergency room, described the patient's behavior as extremely agitated and belligerent. The patient appeared to be hallucinating, and remained in a clear state of agitation during his time in the hospital. His agitation was primarily focused on his employer. The patient was advised not to leave the hospital, however, he began to shout threats to his employer, including that he was going to "get her" and ran out of the hospital. The sister advised the emergency staff that the patient kept a firearm in his home. On the basis of the sister's information and the prior behavior of the patient, including numerous threats towards the patient's employer, the treating physician reported the name and address of Patient

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#3 to a Franklin state trooper. In keeping with the minimum necessary requirement, the treating physician did not report the specific cause of the patient's behavior or any of his medical information, aside from the threats and his combative demeanor. This information was provided on the good faith information and belief available to the treating physician, in the interests of preventing or lessening a serious threat to the public, and to a person reasonably able to prevent that threat. As such, the facts and circumstances clearly demonstrate CGH's compliance with the applicable HIPAA provisions.

I hope you will consider this letter to be adequate justification for the disclosure these patients' information, which was based in each instance on permitted disclosure provisions contained within HIPAA and made in good faith. Please feel free to contact me for any further information.

Sincerely,

MEE Question 1

For many years, a furniture store employed drivers to deliver furniture to its customers in vans it owned.

Several months ago, however, the store decided to terminate the employment of all its drivers. At the same time, the store offered each driver the opportunity to enter into a contract to deliver furniture for the store as an independent contractor. The proposed contract, labeled "Independent-Contractor Agreement," provided that each driver would

- (1) provide a van for making deliveries;
- (2) use the van only to deliver furniture for the store during normal business hours and according to the store's delivery schedule; and
- (3) receive a flat hourly payment based upon 40 work hours per week, without employee benefits.

The proposed Independent-Contractor Agreement also specified that the store would not withhold income taxes or Social Security contributions from payments to the driver.

The store also offered each driver the opportunity to lease a delivery van from the store at a below-market rate. The proposed lease required the driver to procure vehicle liability insurance. It also specified that the store would reimburse the driver for fuel and liability insurance and that the lease would terminate immediately upon termination of the driver's contract to deliver furniture for the store.

All the drivers who had been employed by the store agreed to continue their relationships with the store and executed both an Independent-Contractor Agreement and a lease agreement for a van.

Three months ago, a driver delivered furniture to a longtime customer of the store during normal business hours. The customer asked the driver to take a television to her sister's home, located six blocks from the driver's next delivery, and offered him a \$10 tip to do so. The driver agreed, anticipating that this delivery would add no more than half an hour to his workday.

In violation of a local traffic ordinance, the driver double-parked the delivery van in front of the sister's house to unload the television. A few minutes later, while the driver was in the sister's house, a car swerved to avoid the delivery van and skidded into oncoming traffic. The car was struck by a garbage truck, and a passenger in the car was seriously injured.

The passenger has brought a tort action against the store to recover damages for injuries resulting from the driver's conduct. Pretrial discovery has revealed that delivery vans routinely double-park; survey evidence suggests that, in urban areas like this one, 80% of deliveries are made while the delivery van is double-parked.

In this jurisdiction, there is no law that imposes liability on a vehicle owner for the tortious acts of a driver of that vehicle solely on the basis of vehicle ownership.

The store argues that it is not liable for the passenger's injuries because (a) the driver is an independent contractor; (b) even if the driver is not an independent contractor, the driver was not making a delivery for the store when the accident occurred; and (c) the driver himself could not be found liable for the passenger's injuries.

1. Evaluate each of the store's three arguments against liability.
2. Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? 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 (1096 words) =====

1a. *The Driver as an Independent Contractor*

The driver is probably not an independent contractor for the furniture store. At issue is whether or not the furniture store exercised enough control over the driver to qualify them as an employee rather than as an independent contractor.

Typically, one working for a business is considered to be an employee of that business. However, it is possible to create an employer / individual relationship that results in the individual being an independent contractor instead of an employee. The most central issue in this inquiry is the amount of control over the activities and behavior of the individual that the employer exerts. Under these facts the "Independent-

Contractor Agreement" requires that each driver provide their own van for making deliveries. However, the furniture store provides a below-market rate lease opportunity to the drivers which has the effect of the store choosing the vehicle that will be used. Also, the driver is required to purchase their own liability insurance. That factor might help support the notion that the driver is an independent contractor. But the furniture store stipulates that the van can only be used to make deliveries during normal business hours and according to the store's delivery schedule - both factors that would be under the control of the independent contractor if they were truly in charge of themselves. As well, the fact that the furniture store allows for only 40 hours of flat pay per week seems to indicate that the furniture store is stipulating how much time the delivery person will work. This also runs counter to the notion that they are independent contractors because as an independent contractor they would bill and be paid for the actual hours they worked, regardless of the store's schedule.

The fact that the furniture store does not withhold income taxes, social security, or pay benefits for the drivers is certainly a bonus for the company but this alone is not dispositive of the matter and is probably one of the more self-serving elements of a test of the furniture store's creation of an independent contractor relationship.

Because of the extreme amount of control that the furniture store exercises over the drivers, they are most likely employees and not independent contractors.

2a. Even if Driver not an Independent Contractor, the Driver was not making a delivery for the store when the accident occurred

The driver will probably still be seen as operating within the scope of his employment even though he was not officially making a delivery for the store because the deviation was so small. At issue is whether or not the deviation by the driver will be seen as within the scope of his employment or as a frolic and take him outside the scope of his employment and allow the employer to escape vicarious liability because of that.

Employers are typically only vicariously responsible for the torts of their employees who are acting within the scope of their employment. When an employee goes on a complete frolic from their normal scope of work, the deviation will operate to remove the employer from vicarious responsibility for the employee's torts. However, instances where the deviation is small and perhaps foreseeable to the employer, it has been found that the deviation does not amount to a frolic and the employer is still liable. This is the case when an employee driving a company vehicle may take a detour of a few blocks on the way home to get groceries. Under these facts, the delivery driver was making a delivery for a longtime customer of the furniture store of a piece of furniture only a few blocks away from his current stop. Although some courts may see this departure from the delivery schedule and instructions of the furniture store as a frolic, it is just, and perhaps more, likely that the deviation will be seen as minimal and the employer will still be held vicariously liable.

3a. The Driver himself could not be found liable for the passenger's injuries

The driver himself is probably liable for the injury to the passenger due to his negligence. At issue is whether the violation of the traffic ordinance was the type of negligence that could cause tortious liability to attach to the driver for the passenger's injury.

A prima facie case of negligence requires the proving of a (1) duty, (2) breach of that duty, (3) causation, and (4) damages. When there is a statute or traffic ordinance as in these facts, it may replace the normal standard of reasonable care under the circumstances owed by most parties. This is certainly the case when the statute was designed to protect the type of harm that occurred. The facts presented seem to indicate that the double parking statute was likely created to address the possible injuries likely to be caused due to accidents from the great number of double parked cars used in deliveries. Because of this fact, the driver's violation of this statute can be seen as negligence per se and satisfy the duty and breach factors of the prima facie case for negligence. The passenger would need to prove that the breach was the actual and proximate cause of her injuries and this is clearly the case under these facts - the car the passenger was in had to swerve to avoid the delivery van and but for that she would not have been injured. Her injuries satisfy the damages component.

Because of the establishment of the prima facie case for negligence under a

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negligence per se theory, the driver himself would likely be liable for the passenger's injuries.

2. What rights, if any, does the store have against the driver?

The store will be able to file a claim for indemnity against the driver for any damage award that it has to pay to the passenger. At issue is what rights does a third-party have against the original tortfeasor if they are found vicariously liable for their tortious behavior.

When a third-party is found liable for the tortious behavior of another party they have the ability to sue for indemnification against that amount from the original tortfeasor. This is compared to contribution where the third-party is also themselves to blame and they would then seek a contribution amount from the other tortfeasor based on their level of negligent fault. Here there has been no claim of negligent entrustment so it would appear that the store would be able to seek indemnification from the driver for any damage award they have to pay the passenger.

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

MEE Question 2

State A, suffering from declining tax revenues, sought ways to save money by reducing expenses and performing services more efficiently. Accordingly, various legislative committees undertook examinations of the services performed by the state. One service provided by State A is firefighting. The legislative committee with jurisdiction over firefighting held extensive hearings and determined that older firefighters, because of seniority, earn substantially more than younger firefighters but are unlikely to perform as well as their younger colleagues. In particular, exercise physiologists testified at the committee's hearings that, in general, a person's physical conditioning and ability to work safely and effectively as a firefighter decline with age (with the most rapid declines occurring after age 50) and that, as a result, firefighting would be safer and more efficient if the age of the workforce was lowered.

State A subsequently enacted the Fire Safety in Employment Act (the Act). The Act provides that no one may be employed by the state as a firefighter after reaching the age of 50.

A firefighter, age 49, is employed by State A. He is in excellent physical condition and wants to remain a firefighter. His work history has been exemplary for the last two decades. Nonetheless, he has been told that, as a result of the Act, his employment as a firefighter will be terminated when he turns 50 next month.

The firefighter is considering (a) challenging the Act on the basis that it violates his rights under the Fourteenth Amendment's Equal Protection Clause, and (b) lobbying for the enactment of a federal statute barring states from setting mandatory age limitations for firefighters.

1. Does the Act violate the Equal Protection Clause of the Fourteenth Amendment? Explain.
2. Would Congress have authority under Section Five of the Fourteenth Amendment to enact a statute barring states from establishing a maximum age for firefighters? 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 (666 words) =====

Question 2

Applicant 113

1. Equal Protection Clause

The issue is which standard of scrutiny will apply to the firefighter's claim and whether the burden is on the firefighter or the government. The 14th Amendment of the United States Constitution applies to the states through the due process clause of the 5th Amendment. The equal protection clause is used to ensure equal protection of the laws as applied to protected classes. The equal protection clause applies when a state enacts a law that discriminates against some people based on various classifications.

In order to prove discrimination, the state law must either be discriminatory on its fact or have a discriminatory impact and a discriminatory purpose. If a law is discriminatory, the next step in the analysis is to determine which type of scrutiny should be applied. The Supreme Court has outlined three different types of scrutiny: 1) rational basis review 2) intermediate scrutiny and 3) strict scrutiny. Strict scrutiny applies to protected classes, such as race and national origin. Intermediate scrutiny applies to quasi-protected classes, such as gender and illegitimacy. Rational basis review applies to all other classifications.

Strict scrutiny provides that a law will only be upheld if it is necessary to achieve a compelling government interest. Intermediate scrutiny allows a state law to be upheld if it is substantially related to an important government interest. Rational basis review, by contrast, will be upheld upon a showing that the law is rationally related to a legitimate government interest. The three standards of scrutiny have corresponding burdens of proof, with that of strict and intermediate scrutiny on the government. For rational basis, however, the burden is on the plaintiff to demonstrate that there is no rational relationship to any legitimate government interest--a very high and difficult bar.

Here, plaintiff is a firefighter adversely affected by a new state law that requires mandatory retirement at the age of 50. The first question is to determine whether or not the law is discriminatory on its face--which it is by clearly barring people over the age of 50 from being firefighters. The law also has discriminatory intent with a discriminatory purpose, as it is intended to prevent people from over age 50, which the state

legislative committee found to be generally unfit for firefighting. However, discrimination based on age is not entitled to a higher degree of scrutiny, and the plaintiff will have to show that the law does not meet rational basis review--a difficult showing. The state likely does have a legitimate interest in creating a workforce of effective firefighters and apparently they have evidence that firefighters over 50 cannot always meet the physical requirements. The equal protection clause is unlikely to prevail.

**As another note, the plaintiff in State A is 49, and does not turn 50 until next month. The plaintiff must show an injury-in-fact, causation, and redressability in order to bring suit against the state under the principles surrounding standing. The plaintiff may risk the court declining Art.III jurisdiction based on standing if he brings his suit before turning 50.

2. Congressional authority under 14th Amendment

The issue is whether or not Congress has acted outside the scope of their power. Unlike the states, which have police power, Congress must act according to its enumerated powers and under the provisions of the Constitution. Congress has enabling clauses under the 13th, 14th, and 15th Amendments to enact laws that govern state action regarding the subject of discrimination. Congress does not, however, have the power to create additional rights under the 14th Amendment, only to modify and increase the protections to those rights already covered. In order to enact a law under the 14th Amendment, Congress must demonstrate that the state's have

(Question 2 continued)

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engaged in widespread violations regarding discrimination and craft a law that congruently and proportionally remedies those violations. It is unlikely, especially in light of the state's legitimate interest and legislative research, that Congress will be able to meet its burden in crafting such a law.

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

Acme Violins LLC (Acme) is in the business of buying, restoring, and selling rare violins. Acme frequently sells violins for prices well in excess of \$100,000. In addition to restoring violins for resale, Acme also repairs and restores violins for their owners. In most repair transactions, Acme requires payment in cash when the violin is picked up by the customer. It does, however, allow some of its repeat customers to obtain repairs on credit, with full payment due 30 days after completion of the repair. In those cases, the payment obligation is not secured by any collateral and the payment terms are handwritten on the receipt.

Acme maintains a stock of rare and valuable wood that it uses in violin restoration. Acme also owns a variety of tools used in restoration work, including a machine called a “Gambretti plane,” which is used to shape the body of a violin precisely.

Six months ago, Acme borrowed \$1 million from Bank. The loan agreement, which was signed by Acme, grants Bank a security interest in all of Acme’s “inventory and accounts, as those terms are defined in the Uniform Commercial Code.” On the same day, Bank filed a properly completed financing statement in the appropriate state filing office. The financing statement indicated the collateral as “inventory” and “accounts.”

Last week, Acme sold the most valuable violin in its inventory, the famed “Red Rosa,” to a violinist for \$200,000 (the appraised value of the instrument), which the violinist paid in cash. The sale was made by Acme in accordance with its usual practices. The violinist, who has done business with Acme for many years, was aware that Acme regularly borrows money from Bank and that Bank had a security interest in Acme’s entire inventory. The violinist did not, however, know anything about the terms of Acme’s agreement with Bank.

Acme is 15 days late in making the payment currently due on its loan from Bank. Bank’s loan officer, who is worried about Bank’s possible inability to collect the debt owed by Acme, has asked whether the following items of property are collateral that can be reached by Bank as possible sources of payment:

- (1) Acme’s rights to payment from customers for repair services obtained on credit
- (2) Used violins for sale in Acme’s store
- (3) Violins in Acme’s possession that Acme is repairing for their owners
- (4) Wood in Acme’s repair room that Acme uses in repairing violins
- (5) The Gambretti plane, used by Acme in violin restoration
- (6) The Red Rosa violin that was sold to the violinist

Yesterday, a creditor of Acme obtained a judicial lien on all of Acme’s personal property.

1. In which, if any, of the items listed above does Bank have an enforceable security interest? Explain.
2. For the items in which Bank has an enforceable security interest, is Bank’s claim superior to that of the judicial lien creditor? Explain.

3) Please type your answer to MEE 3 below

Ⓐ

Ⓐ

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

(Essay)

===== Start of Answer #3 (986 words) =====

1. Which, if any, of the items listed does the Bank have an enforceable security interest?

_____ The issue is whether the Bank has an enforceable security interest in Acmes property and accounts. In order for a creditor to have a valid security interest in materials the secured party must attach the security interest to property. In order for a security interest to attach there must be a valid security agreement, value must be given, and the debtor must have rights in the property. A valid security agreement is signed by the parties and gives a description of the collateral. Value is given when the debtor receives value, ie obtains money from the loan. A secured party then perfects its security interest by filing a valid financing statement with the appropriate state

agency, normally the secretary of state. A valid financial statement identifies both the secured party and the debtor and describes the collateral. Accounts are open lines of credit where a debtor is owed money, such as accounts receivable from customers. Inventory is goods held for the sale by the debtor and used in their business. Security interest in inventory are presumed to be here and after acquired inventory due to the nature of inventory. Equipment is machinery or intents held by the owner to aid in their work, they are not held for sale. A buyer in the ordinary course of business takes free and clear of all security interest if they buy from a seller who is in the business of selling this type of good and take without notice of the security agreement. A secured party can attach a security interest to the identifiable proceeds. Proceeds can be many things, such as cash from the sale of inventory.

Here the Bank perfected their interest in inventory and accounts of Acme by filing a properly completed financing statement with the appropriate state office. The security interest would attach to all of Acme's inventory and accounts. First acme's rights to payment from customers for repair services obtained on credit are accounts receivable from customers. The security interest has attached to the accounts, value was given, a valid security agreement was signed, and Acme has rights in these accounts. As accounts receivable the Bank has an enforceable security interest in the customer accounts. Second, used violins for sale in Acme's stores are inventory, they are goods being kept and sold in the store, The security interest has attached to the used violins, value was given, a valid security agreement was signed, and Acme has rights in these violins. The Bank has an enforceable security interest in the used violins. Third the violins in Acme's possession that Acme is repairing for their owners.

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The Bank does not have an enforceable security interest in the owners violins. These items are not considered inventory. Nor does Acme have an interest in the goods. Therefore the Bank's security interest has not attached to the owner's violins. Fourth the wood in the repair room that Acme uses in repairing violins. This wood is considered inventory. They are goods kept on hand to aid in Acme's business of repairing violins. The security interest has attached to the wood, value was given, a valid security agreement was signed, and Acme has rights in the wood. Therefore there is an enforceable security interest in the wood. Fifth, the gambretti plane. This plane is considered equipment. As such it is not covered by the security interest executed and the Bank does not have an enforceable security interest in the plane.

Finally Red Rosa violin. The violin would be considered inventory, it was held for sale by Acme. The security interest attached to the violin as previously discussed. The Bank had an enforceable security interest. However a buyer in the ordinary course of business takes free and clear of all security interest. The violinist bought the violin from Acme who is in the business of selling used violins. The violinist was aware that Acme borrowed money from the Bank, however the violinist was unaware of the terms of the agreement between Acme and the Bank. The violinist did not have knowledge of the security interest in Red Rosa. She would be a buyer in the ordinary course of business and the Bank would not have a valid security interest in the Red Rosa violin. The Bank may be able to claim a security interest in the \$200,000 from the sale of Red Rosa. They would have to be able to identify the specific proceeds, such as where they went whether any of that money remains at the store or in one of Acme's accounts.

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2. For the items in which the Bank has an enforceable security interest, is the Bank's claim superior to that of the judicial lien creditor?

_____The issue here is whether the judicial lien creditor has priority over the Bank. A secured creditor must perfect their interest in collateral. A secured party perfects its security interest by filing a valid financing statement with the appropriate state agency, normally the secretary of state, once a security interest has attached to the collateral. In determining who has priority the normal rule is First in time first in right. This means that the first party to perfect their security interest has priority. In disputes between a perfected security interest and an unperfected security interest the perfected security interest takes priority. A judicial lien creditor that obtains a valid judgment prior to a security party perfecting their security interest will take priority.

Here as discussed in part 1 the bank has perfected their security interest by filing a properly executed financing statement with the appropriate state agency. The bank perfected their security interest prior to the time that the judicial lien creditor obtained their judgment against Acme. As such Acme was the first in time and as such their security interest takes priority over the judicial lien creditor.

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

MEE Question 4

Seventeen years ago, a property owner granted a sewer-line easement to a private sewer company. The easement allowed the company to build, maintain, and use an underground sewer line in a designated sector of the owner's three-acre tract. The easement was properly recorded with the local registrar of deeds.

Fifteen years ago, a man having no title or other interest in the owner's three-acre tract wrongfully entered the tract, built a cabin, and planted a vegetable garden. The garden was directly over the sewer line constructed pursuant to the easement the owner had granted to the sewer company. The cabin and garden occupied half an acre of the three-acre tract. The man moved into the cabin immediately after its completion and remained in continuous and exclusive possession of the cabin and garden until his death. However, he did not use the remaining two and one-half acres of the three-acre tract in any way.

Eight years ago, the man died. Under the man's duly probated will, he bequeathed to his sister "all real property in which I have or may have an interest at the time of my death." The man's sister took possession of the cabin and garden immediately after the man's death and remained in exclusive and continuous possession of them for one year, but she, too, did not use the remaining two and one-half acres of the tract.

Seven years ago, the man's sister executed and delivered to a buyer a general warranty deed stating that it conveyed the entire three-acre tract to the buyer. The deed contained all six title covenants. Since this transaction, the buyer has continuously occupied the cabin and garden but has not used the remaining two and one-half acres.

A state statute provides that "any action to recover the possession of real property must be brought within 10 years after the cause of action accrues."

Last month, the property owner sued the buyer to recover possession of the three-acre tract.

1. Did the buyer acquire title to the three-acre tract or any portion of it? Explain.
2. Assuming that the buyer did not acquire title to the entire three-acre tract, can the buyer recover damages from the sister who sold him the three-acre tract? Explain.
3. Assuming that the buyer acquired title to the entire three-acre tract or the portion above the sewer-line easement, can the buyer compel the sewer company to remove the sewer line under the garden? 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 (651 words) =====

1. Yes, the buyer acquired title to a portion of the tract of land, the one-half acre that he used. Adverse possession allows a non-owner of land to gain title to the land if certain requirements are met. To satisfy the requirements of adverse possession, the adverse possessor must possess the land: (1) continuously; (2) actually; (3) notoriously; (4) hostily; (5) openly; and (6) exclusively. All these requirements must last for the statutory period. If these requirements are satisfied for the requisite time period, the possessor obtains title to the land. If a possessor only occupies part of the land, he is only entitled to that portion of the land unless he has "color of title". Color of title means that he entered the land with what he thought was a valid will or deed showing his entitlement to the property. Without color of title, a possessor only receives title to that land which he occupied or used. Here, the relevant statutory period is 10 years, meaning that the possessor must satisfy all these requirements for 10 years. Generally, tacking of time

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between different possessors is allowed if there is a relationship between the possessors. For example, tacking is allowed if a deed is exchanged or rights granted in a will.

Here, the original man entered the land without color of title, meaning that if he satisfied all the requirements, he was only entitled to title for land he used. While he did satisfy the requirements for adverse possession, he only possessed the land for seven years, not the statutory ten. However, at his death, the man passed the land onto his sister in his will, establishing a relationship, and allowing tacking to occur. She only occupied the land for a year (pushing the total up to eight). The sister disposed of the land by conveying it in a general warranty deed. Again, this conveyance allowed tacking to continue. The buyer occupied the land for more than the two years remaining in the adverse possession, and consequently, the ten year statutory period was satisfied, and the buyer acquired title to a portion of the tract by adverse possession. The buyer did not gain title to the entire portion of the tract because no one with color of title occupied the land and satisfied the requirements for the ten year statutory period. Although the sister entered the property with color of title (under a will that seemed to convey the land to her), there was not a ten year period between the current action and the sister beginning possession.

2. Yes, the buyer can recover damages from the sister who sold him the entire three acre tract. In selling the property to the buyer, the sister conveyed a general warranty deed. A general warranty deed is a deed that offers the most protection to the buyer as it contains six covenants, and in it, the seller warrants the validity of the deed all the way up the chain of title. One of the covenants contained in the deed warrants that the seller owns everything that she is conveying to the buyer. Based on a breach of this covenant, the buyer is entitled to damages from the

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sister.

3. No, the buyer cannot compel the sewer company to remove the sewer line under the garden. Generally, an easement travels with the property if there is notice of the easement. Here, although the land was acquired through adverse possession, the easement was properly recorded with the local registrar of deeds. This recording gave the buyer constructive notice of the existence of the easement. If he had checked the property in the deed office, he would have discovered the easement. The buyer could try and argue that the easement has been terminated through a method of termination, but there is no way for the buyer to compel the sewer company to remove the sewer line.

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

MEE Question 5

MedForms Inc. processes claims for medical insurers. Last year, MedForms contracted with a data entry company (“the company”) to enter information from claims into MedForms’s database. MedForms hired a woman to manage the contract with the company.

A few months after entering into the contract with the company, MedForms began receiving complaints from insurers regarding data-entry errors. On behalf of MedForms, the woman conducted a limited audit of the company’s work and discovered that its employees had been making errors in transferring data from insurance claims forms to the MedForms database.

The woman immediately reported her findings to her MedForms supervisor and told him that fixing the problems caused by the company’s errors would require a review of millions of forms and would cost millions of dollars. In response to her report, the supervisor said, “I knew we never should have hired a woman to oversee this contract,” and he fired her on the spot.

The woman properly initiated suit against MedForms in the United States District Court for the District of State A. Her complaint alleged that she had been subjected to repeated sexual harassment by her supervisor throughout her employment at MedForms and that he had fired her because of his bias against women. Her complaint sought \$100,000 in damages from MedForms for sexual harassment and sex discrimination in violation of federal civil rights law.

After receiving the summons and complaint in the action, MedForms filed a third-party complaint against the company, seeking to join it as a third-party defendant in the action. MedForms alleged that the company’s data-entry errors constituted a breach of contract. MedForms sought \$500,000 in damages from the company. MedForms served the company with process by hiring a process server who personally delivered a copy of the summons and complaint to the company’s chief executive officer at its headquarters.

MedForms is incorporated in State A, where it also has its headquarters and document processing facilities. The woman is a citizen of State A. The company’s only document processing facility is located in State A, but its headquarters are located in State B, where it is incorporated and where its chief executive officer was served with process.

State A and State B each authorize service of process on corporations only by personal delivery of a summons and complaint to the corporation’s secretary.

The company has moved to dismiss MedForms’s third-party complaint for (a) insufficient service of process, (b) lack of subject-matter jurisdiction, and (c) improper joinder.

How should the District Court rule on each of the grounds asserted in the company’s motion to dismiss? Explain.

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 (876 words) =====

(a) *Motion for insufficient service of process*

The court should deny company's motion.

The issue here is whether personal service upon a CEO of a company constitutes valid service pursuant to the Federal Rules of Civil Procedure

Pursuant to Rule 4 of the Federal Rules of Civil Procedure ("FRCP") service of process may be done by actual service upon the defendant (in-person service). Furthermore pursuant to Rule 4 of the FRCP, service may be properly done by serving the summons and complaint at the defendant's usual abode to an individual of suitable age (usually

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over the age of 18). Under the latter method, service does not have to be given to the actual defendant. When a case is filed in federal court, it is often an issue as to whether federal or the state's substantive law should be applied. When a case is filed in federal court, the federal court usually is to apply only state substantive law. This is pursuant to the *Erie* doctrine. When a case is in federal court, and there are conflicting procedural laws (between state and federal laws) the federal procedural law is usually the one that must be applied as long as the federal procedural law is constitutional.

Here, both State A and State B have a service of process law whereby service on corporations is only to be done by delivery of the summons and complaint to the corporations secretary. This conflicts with FRCP Rule 4 for service of process, which was stated above. Pursuant to FRCP Rule 4, service may be had on an individual if it is done at his or her usual abode on a person of suitable age. Here, there is no question that Medforms service was done pursuant to the FRCP. This is because they served company at its headquarter, which is obviously there usual abode; furthermore, the service was given to someone of suitable age (the CEO). Because State A and State B have conflicting procedural laws with the FRCP's rule on service of process, the FRCP procedural law will govern this issue pursuant to the Erie Doctrine. As such, the FRCP will govern and the service should be found to have been proper.

The District Court should deny company's motion to dismiss for insufficient service of process.

(b) Motion for lack of subject matter jurisdiction

The court should also deny company's motion to dismiss for lack of subject matter jurisdiction.

The issue here is whether there is complete diversity present between company and MedForms.

In order for a federal district court to hear a case, there must be proper subject matter jurisdiction ("SMJ"). To have proper SMJ, a federal court can either have (1) federal question SMJ, or (2) diversity of citizenship SMJ. Under diversity of citizenship SMJ, there must be (1) complete diversity between the parties and (2) the amount in controversy must exceed \$75,000. When determining an individual's citizenship, courts look to an individual's domicile. An individual is domiciled in the place where he or she is physically present with the intent to remain indefinitely. When determining corporations citizenship, they can have more than one place of citizenship. A corporation is deemed to be a citizen of the place where it is incorporated, as well of the place where it has its principal place of business.

Here, MedForms Inc. is a citizen of State A. The facts state that State A is where it is incorporated and also where it has its headquarters. Company is a citizen of State B. The facts state that company is incorporated and has its headquarters in State B. It does not matter that it has a processing facility in State A--this does not make them a State A citizen. Furthermore, the amount in controversy that MedForms seeks from

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company exceeds \$75,000. This is the amount that the sought in their well pleaded complaint. Therefore both requirement for diversity of citizenship SMJ have been met.

The District Court should deny Company's motion to dismiss for lack of SMJ.

(c) *Motion to dismiss for improper joinder*

The court should grant Company's motion for improper joinder

The issue here is whether a defendant may properly join a third party defendant if the suit does not arise out of the same transaction or occurrence as the original suit in question.

A defendant may properly bring a third party claim against a third party defendant if the claim arises out of the same common nucleus of operative fact as the original suit in question. This means that the claim brought by the defendant against the third party defendant must arise out of the same transaction or occurrence as the original suit between plaintiff and defendant.

Here, MedForms claim against Company does not arise out of the same common nucleus of operative fact from the original claim by the woman. MedForms third party claim is a separate breach of contract claim against Company that does not arise out of the same transaction or occurrence as the woman's original sex discrimination claim. As such, this is not a proper joinder of parties by MedForms.

MEE Question 6

A husband and wife were married in 2005.

In 2009, the husband transferred \$600,000 of his money to a revocable trust. Under the terms of the properly executed trust instrument, upon the husband's death all trust assets would pass to his alma mater, University.

In 2012, the husband properly executed a will, prepared by his attorney based on the husband's oral instructions. Under the will, the husband bequeathed \$5,000 to his best friend and the balance of his estate "to my wife, regardless of whether we have children." The husband failed to mention the revocable trust to his attorney during the preparation of this will, and the attorney did not ask the husband whether he had made any significant transfers in prior years.

In 2013, the husband and wife had a daughter.

In 2014, the husband was killed in an automobile accident. After his death, the wife found the husband's will and the revocable trust instrument on his desk. On the first page of the will, beginning in the left-hand margin and extending over the words setting forth the bequests to the husband's best friend and his wife, were the following words: "This will makes no sense, as most of my assets are in the trust for University and neither my wife nor my daughter seems adequately provided for. Estate plan should be changed. Call lawyer to fix." The statement was indisputably in the husband's handwriting. The wife also found a voice message on the phone from the husband's lawyer, which said, "Calling back. I understand you have concerns about your will."

The husband is survived by his wife, their daughter, and the husband's best friend. The assets in the revocable trust are now worth \$900,000. The husband's probate estate is worth \$300,000. He owed no debts at his death.

All the foregoing events occurred in State A, which is not a community property state. State A has enacted all of the customary probate statutes, but of particular relevance to the wife are the following:

- (i) If a decedent dies intestate survived by a spouse and issue, the decedent's surviving spouse takes one-half of the estate and the decedent's surviving issue take the other half.
 - (ii) A revocable trust created by a decedent during the decedent's marriage is deemed illusory and the decedent's surviving spouse is entitled to receive one-half of the trust's assets.
1. How should the assets of the husband's probate estate be distributed? Explain.
 2. How should the assets of the revocable trust be distributed? Explain.

6) Please type your answer to MEE 6 below

(Essay)

===== Start of Answer #6 (517 words) =====

1. The assets of the husband's probate estate should be divided up according to his will with \$5,000 to his best friend, and the rest of the estate going to the surviving spouse. To revoke a will, there must be clear intent by the maker of revocation. Most states require that the will actually be destroyed to formally revoke. Even in the states that do not require physical destruction, revocation must be evidenced by clear intent or by the adoption of new will that implicitly revokes the old will. Here, there is neither clear intent to revoke or a new instrument. While the decedent wrote on his will that it "didn't make sense" and that the "plan should be changed", there is nothing to indicate that the decedent, at the time of writing those phrases, disclaimed the present will or revoked it at the present. The only indication given by the decedent's writing on the will is the future intent to change the will, and that future intent is not enough to evidence of current intent to revoke the will. Consequently, the will is valid, and the estate should be divided according to the will.

A child who is born after the creation of a will and who is left out of the terms of the will is called a pretermitted child. Generally, a probate court will include the child in the distribution of the assets, even though the child isn't mentioned, unless: (1) the decedent shows a clear intent to exclude the child; (2) the decedent has other children, and the other children do not receive anything under the will; or (3) the child is otherwise provided for outside of the will. In this case,

(Question 6 continued)

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END OF EXAM