February 2005 Bar Examination Sample Answers

DISCLAIMER
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Question 1 - Sample Answer 1.

1. a) To remove the case to federal court, Tennessee (TN) must file a notice of removal in the federal court within 30 days of service of the first pleading showing grounds for removal. TN must include in the notice the grounds for removal and must attach all pleadings from the state court and must sign the notice pursuant to Federal Rule 11. TN must follow up with service of the notice on diverse parties (Georgia and Brown) as well as on the state court where the case was first filed. TN must obtain GA's consent to removal.

   b) Within 30 days of service of the notice of removal, the Brown's attorney may file an opposition to the removal and seek remand by filing their opposition in the federal court. They may seek remand, at least of Ms. Brown's individual claim, because her personal injury claim may not be removed, as it sets forth no grounds for federal subject matter jurisdiction. The claim is one for personal injuries (a tort claim), thus it does not arise under federal law, so no federal question jurisdiction exists. Although Ms. Brown is diverse from TN, as she is a citizen of AL and TN is a citizen of TN (a corporation organized in TN), no federal diversity jurisdiction exists because her claim is only for $50,000, rather than being in excess of $75,000, as required for federal diversity jurisdiction. Thus, no federal subject matter jurisdiction exists as to Ms. Brown's personal injury claim. She can seek remand in opposition to TN's removal now or she can raise the lack of subject matter jurisdiction at any time.

   c) Based on the above-discussed facts, the federal court will likely remand Ms. Brown's case against GA and TN but may retain jurisdiction over Timmy's wrongful death case. For the reasons discussed in question 1b, Ms. Brown's well-pleaded complaint sets forth no grounds for federal subject matter jurisdiction, as no federal question exists and the amount in controversy requirement is not met for diversity jurisdiction. However, Timmy's complaint does contain a basis for federal subject matter jurisdiction. His complaint is one arising under state tort law, so there is no federal question jurisdiction. Yet, the claim satisfies the requirements for diversity jurisdiction. As above, Timmy is a citizen of AL, TN is a citizen of TN, and GA is a citizen of GA (a corporation organized under GA law). Therefore, Timmy, as plaintiff, is completely diverse from GA and TN. Further, the amount in controversy in Timmy's case is $2,000,000, which far exceeds the rule's requirement that the amount in controversy exceed $75,000. Because Timmy's wrongful death suit satisfies the requirements of diversity jurisdiction, his suit enjoys original federal jurisdiction.

   Finally, although Timmy's claim may be heard in federal court, the court will likely remand

his case as well. Under the Federal Rules, a forum defendant may not remove a case to federal court. GA is clearly a forum defendant. Although GA did not file the notice of removal, because GA had to consent and join in the removal, it is considered to be "removing" under the Rule. Because GA is a forum defendant, it may not remove, and the court must remand Timmy's claim as well.

d) If GA is dismissed 6 months into the suit, TN may then remove. Once the forum defendant is dismissed, a non-forum defendant may seek removal within 30 days of the dismissal. However, if GA's dismissal occurs 16 months after suit was filed, TN may not remove. Under the Rules, in a diversity case, no defendant may remove more than one year after suit is instituted. Therefore, if GA's dismissal occurs more than one year after suit is filed, TN will not be permitted to remove because the basis for federal jurisdiction in Timmy's case is the federal courts diversity subject matter jurisdiction.

2. The issue is whether, despite an insufficient amount in controversy, the federal court may exercise supplemental jurisdiction over Ms. Brown's claims. The federal court may exercise supplemental jurisdiction over claims when no original jurisdiction exists in two instances: 1) where the plaintiff in a federal question case asserts additional claims relating to the same transaction or occurrence or 2) where anyone except the plaintiff asserts claims in any suit arising out of the same transaction occurrence. In this case, although the attorney for TN may allege the federal court has supplemental jurisdiction over Ms. Brown's claims, his argument will fail because 1) this is not a federal question case and 2) she is a plaintiff asserting a claim without original subject matter jurisdiction.

3. TN may add GA as a third party defendant through impleader. The court will have supplemental jurisdiction over this claim, as it relates to the same transaction or occurrence as the main claim and TN is not a plaintiff. TN can amend its pleadings adding GA once without leave of court. TN need not add GA at this time because the claim is not one against the plaintiff arising out of the same transaction or occurrence as the main demand. TN may bring a separate suit for contribution or indemnification now or at a later time because its implead claim is not compulsory, as would be a counterclaim against the Browns arising out of the same transaction or occurrence as the Brown's original complaint.

Question 1 - **Sample Answer 2.**

1. a) Defendants seeking removal should file the petition of removal in the federal district court which encompasses the state court where the original action was filed. All Defendants, however, must seek removal together, unless their claims are separate and distinct. In this case, Defendants Tennessee and Georgia are alleged to be joint tortfeasors, so removal will only be possible if they file a joint petition for removal.

   Since the law suit was originally filed in the State Court of Fulton County, notice of removal should be filed in the Northern District of Georgia, with the original complaint attached. There is a time limit for filing for removal; I believe Defendants have 20 days after service of process to file for removal, or 1 year from the point at which removal becomes possible.

When Defendants petition for removal they should also serve the state court and plaintiffs to notify them. Their right to petition for removal will be waived if they file substantive answers in state court such as counterclaims.

b) The Browns can accept removal to federal court or move in federal court for remand to state court arguing that removal was improper. Even if the Browns fail to seek remand, if there is no subject matter jurisdiction, the federal court will remand on its own as subject matter jurisdiction cannot be waived. However, as discussed below, subject matter jurisdiction is present here, so the Browns will have to move for remand if they want the case returned to state court.

The procedure for remand is simply to file a motion in federal court explaining that removal was improper and serving the Defendants. I believe the motion to remand needs to be filed within 30 days.

c) Although there is subject matter jurisdiction in federal court, removal was improper. Plaintiffs' claims are tort claims under state law. Thus, the only basis for subject matter jurisdiction would be diversity. The amount in controversy requirement is satisfied because the Browns seek $2,050,000 in damages. There is also complete diversity. Plaintiffs are citizens of Alabama by virtue of their domicile, which Defendants are citizens of Georgia and Tennessee respectively, by virtue of their incorporation. There is no indication that the corporate Defendants have second states of citizenship.

Although diversity is complete, the federal removal statute forbids removal of cases where one of the Defendants is a citizen of the forum state, even if the federal court has subject matter jurisdiction and the case could have been originally filed in federal court. This is the case here because of defendant Georgia Trucking. Thus, if Plaintiffs move for remand, the case will be remanded, but it can remain in federal court if the Plaintiff fails to move.

d) Once Georgia is no longer a defendant, removal becomes proper. There is a 1 year overall time limit on removal. This time limit is normally superceded by the shorter time limit that requires Defendants to move for removal within 20 days of learning of grounds for removal. However, in this case defendants could not remove while Georgia was a defendant, so the 1 year time limit applies.

Because of the 1 year time limit, Tennessee can only successfully remove to federal court if Georgia is dismissed as Defendant within that first year. Thus, if Georgia is dismissed within 6 months, Tennessee may properly remove. If Georgia is not dismissed from the case until 16 months after filing, however, Tennessee may not remove.

2. Brenda's argument that the case should be remanded based on her $50,000 claim will fail. Although $50,000 is less than the $75,000 amount-in-controversy requirements for diversity jurisdiction, the amount of Brenda's claims are properly aggregated for diversity jurisdiction purposes. Brenda's claim for $50,000 arised from the same transaction or occurrence (the accident) as her $2,000,000 wrongful death claim. The claims involve the same plaintiff and defendant and all of them are properly adjudicated together. Thus, the amount in controversy will not be grounds for removal of her single claim.

3. Tennessee may attempt to use either impleader or joinder to add Georgia as a party. Tennessee could argue that Georgia is a necessary party defendant and should therefore be joined as co-Defendant. This would require that Tennessee seek an order from the court

adding Georgia as Georgia will prefer to remain outside the litigation. Tennessee will likely be unable to show that Georgia is a necessary party, however, because there is no requirement that joint tortfeasors be sued together. There would be no jurisdictional problems here because as discussed above, subject matter jurisdiction would remain based on complete diversity and the specific removal problem would no longer be present.

Impleader would probably make more sense. Tennessee could seek to implead Georgia as a third party defendant for identification/contribution purposes. This would not require an order from the court but is more akin to Tennessee filing its own lawsuit against Georgia. Tennessee would be arguing that if there is a judgment in favor of the Browns against Tennessee, Georgia should have to indemnify or contribute to Tennessee. Jurisdiction would be proper because Tennessee and Georgia are diverse, and impleader would likely be proper because the contribution claim arises from the same transaction/occurrence.

It is not mandatory that Tennessee bring Georgia into the litigation. Even if Tennessee were to lose to the Browns without Georgia's involvement, Tennessee could initiate an independent, later lawsuit against Georgia seeking contribution.

Question 1 - **Sample Answer 3.**

1. a) The issue is what procedures and process is a defendant required to follow to remove a case from state court to federal court. The Federal Rules of Civil Procedure require that a party file a Notice of Removal with the federal court within 30 days after it becomes removable. The Notice of Removal should attach the complaint and summons served in the action, as well as any other documents filed in the action. Tennessee will be required to comply with these rules. In addition, the Notice of Removal must be filed in the state court to give the state court notice of the removal; after that point the state court can no longer exercise jurisdiction over the action. Finally, Tennessee must serve a copy of the Notice of Removal on all parties, and file a notice with the federal court that all parties have received a notice of the removal.

   b) Mr. & Ms. Brown can file a motion to remand in federal court. A motion to remand is a motion asking the federal court to send the case back to the state court. The motion to remand must set forth all facts demonstrating why the removal was improper, e.g., the requirements of removal have not been met. Mr. & Ms. Brown must file their motion to remand within the time limit required by the federal rules, and the motion must be served on all parties.

   c) I would anticipate that the Federal Court would grant a motion to remand, and rule that the case should not remain in Federal Court. There are several requirements that must be met before removal is proper that have not been met here. First, all defendants must agree and participate in the removal. Here, only Tennessee removed; Georgia answered in state court. Also, an action cannot be removed if a defendant is a resident of the state. Here, Georgia is a resident defendant, so the action cannot be removed.

d) The issue is when can a defendant remove a case to a federal court once the circumstances preventing removal are eliminated. A Defendant can remove a case within 30 days after it becomes removable as long as it is removed within one year of the commencement of the action. When Georgia is dismissed, the case becomes removable, but it must be removed within a year after the action was filed. Thus, Tennessee could remove 6 months after the suit is filed, but could not remove if Georgia was dismissed 16 months after the suit was filed.

2. The issue is whether a plaintiff's or plaintiffs' claims can be aggregated to satisfy the $75,000 requirement of diversity jurisdiction. A plaintiff's claims can be aggregated if they involve the same transaction or occurrence. Thus, the Brown's wrongful death claim of $2,000,000 and the negligence claim of $50,000 can be aggregated to satisfy the $75,000 amount in controversy requirement.

3. The issue is how does a defendant bring in a party to an action that it believes is liable for all or part of the judgment. Here, Tennessee believes Georgia is liable for all or part of a judgment that could be rendered against it. Tennessee can implead Georgia into the action. This is done by filing a third party complaint against Georgia, and it can be done without a court order. Although Tennessee has the right to implead Georgia, in this action, it is not mandatory. Unlike counterclaims, the FRCP do not state that actions against impleaded defendants are compulsory. Thus, TN would be able to file a separate action against Georgia for contribution based on Georgia's negligence.

Question 2 - **Sample Answer 1.**

(disclaimer)

A. Ima Hurt v. Blue Star Oil and Lube

Ima Hurt could bring a claim for negligence against Blue Star.. The elements of negligence are: (1) duty; (2) breach; (3) causation(actual and proximate); (4) damages. Here Blue Star had a duty to conduct its repairs of automobiles in accordance with the standard of conduct of a reasonably prudent mechanic. This duty was breached because Mike Mechanic failed to replace the oil pan properly. This failure was an actual cause of Ima's injuries because "but for"Mike's failure, the car would not have stalled in the middle of the road, and Daniel Driver would not have hit it. There is proximate causation because it is foreseeable that a car running out of oil would stall and could stall in the middle of the road. Mike was also negligent in telling Paula that she could continue to drive the car. Finally, the damages element is satisfied because Ima suffered injuries.

Blue Star can argue that Ima's recovery is barred under the doctrine of comparative negligence.If a plaintiff is more negligent than the defendant, her claim is barred. Here, Ima was not wearing her seat belt. However, evidence that a plaintiff failed to wear a seat belt is inadmissible to establish comparative negligence. Blue Star can also argue that Ima was drunk; and, therefore, she was negligent. Ima's blood alcohol level was over the legal limit. While a violation of a statute providing for criminal penalties can establish negligence per se; it would not do so here. A violation of a statute establishes negligence per se if the type of

wrong committed was the purpose of the statute. The purpose of a statute here would be to prevent drunk driving; here, Ima was not driving. Because Ima was not driving, her blood alcohol limit is likely irrelevant. Blue Star could also argue that the negligence of Dan was a superceding and force that cuts off its negligence. This is only true if the negligence of Dan was unforeseeable and caused an unforeseeable result. Blue Star cannot argue that the negligence of Dan precludes recovery by Ima under a theory of comparative negligence. Only the negligence of the plaintiff is considered under the doctrine of comparative negligence. Here, only Ima's negligent acts will be considered, as explained above they likely do not bar recovery.

B. Ima Hurt v. Paula Azure
Ima could also sue Paula for negligence. As stated above, the elements of a claim for negligence are 1) duty 2) breach 3) causation, and 4) damages. Here, Paula, as a driver, owed a duty of care to others on the road to maintain her car and drive it safely. Ima can argue that Paula breached this duty by continuing to drive with her oil light on. There is actual and proximate causation present. First, but for Paula's act of continuing to drive with the light on, the car would not have stalled in the middle of the road. Second, Ima can argue that it was foreseeable that Paula's car could run out of oil and stall out in the street causing an accident. Finally, Ima has sustained damages. Paula can argue comparative negligence of Ima as a defense. As explained under the previous section, this defense will most likely fail.

Paula can also argue that Blue Star's negligence was an intervening and superceding act that cuts off her liability. Namely, Paula can argue that Blue Star's statement to her that she actually was not running out of oil caused her to believe that she could continue to drive with the light on; thus, it was not foreseeable that her car would run out of oil or stall in the middle of the road. Paula can also argue that the truck driver in front Daniel was an intervening and superceding force cutting off her liability. Specifically, had the truck driver not changed lanes at the last minute, Daniel would have seen Paula and would have been able to stop. Finally, Paula can argue that Daniel's negligence of driving while intoxicated was an intervening and superceding force. Had Dan been sober, he may have been able to stop in time.

Question 2 - **Sample Answer 2.**
(disclaimer)

A. Ima Hurt v. Blue Star and Lube
Ima has a reasonable chance of succeeding on a negligence claim against Blue Star. The overall issue is whether Ima can meet the elements of a negligence claim and whether Blue Star will have any defenses thereto. The general rule is that to succeed on a negligence theory a plaintiff must prove that the defendant had a duty to her, that the defendant breached that duty, and that the breach caused plaintiff damages.

The rule is that a party has a duty of care towards all foreseeable plaintiffs. Ima will argue that Blue Star had a duty to perform maintenance for customers properly and to not give improper advice when car problems arise. Blue Star will argue that while it might have owed

such a duty to Paula, it did not owe such a duty to Ima since Ima was not its customer and (apparently) was unknown to Blue Star. However, Ima more likely will prevail on her argument that blue Star reasonably could have foreseen that if it improperly fixed a customer's car or gave that customer bad advice, that customer might hit and injure another driver or passenger, such as Ima, and therefore Blue Star owed a duty of care to Ima. Assuming that Blue Star had a duty of care to Ima, Blue Star undoubtedly breached that duty by improperly repairing the car and giving Paula bad information about the repair.

Next, Ima will need to prove that Blue Star's breach of duty to her caused her damages. The rule is that she must prove both cause in fact ("but for' causation) and proximate cause. In this case, Blue Stars negligence was a but for cause of Ima's injuries; almost assuredly if Mike Mechanic had not improperly repaired the car Paula would not have broken down in the road, Daniel would not have plowed into her, and Ima would not have been injured. The issue of proximate cause is somewhat closer.

Blue Star might argue that several intervening events make the link between its negligence and Ima's injuries too attenuated. First, Blue Star might argue that Paula's decision to keep driving was the proximate cause of Ima's damages. However, Mike Mechanic surely could have foreseen that when he advised Paula not to worry, she would keep driving, Paula's action do not sufficiently break the chain of causation. Blue Star might also argue that Daniel's drunk driving was the proximate cause of Ima's damages and broke the chain of causation. However, because it is foreseeable to a mechanic that if he improperly repairs a car it might stall and be rear-ended by a drunk driver, this argument by Blue Star likely will not succeed, either. Having proven causation, Ima would only need to prove damages. The facts as stated - Ima "suffered serious injuries" - make clear that this will not be an issue. Ima likely will be able to prove a prima facie cause of negligence.

In an argument related to causation, Blue Star still likely will raise the defense of comparative negligence but likely will not succeed. The issue is whether Ima was comparatively negligent such that her recovery is barred. The rule in Georgia is that if a plaintiffs negligence is greater than that of the defendant she cannot recover. Blue Star first will argue that Ima was comparatively negligent in allowing Daniel to drive and/assumed the risk of getting the car with him. This argument likely will not succeed because this negligence was not greater than Blue Star's negligence and Blue Star could have foreseen such negligence and assumption of risk. Blue Star will also argue that Ima was comparatively negligent by failing to wear her seatbelt. The rule in Georgia is that failure to wear a seatbelt cannot be proof of comparative negligence as a matter of law. Therefore, Blue Star likely will not succeed on any comparative negligence or assumption of risk arguments.

B. Ima Hurt v. Paula Azure

Ima is less likely to succeed on her claim against Paula. The overall issue here is the same, whether Ima can meet the elements of a negligence claim against Paula and whether Paula has any defenses thereto. The rule of the elements of negligence is the same as above. Here, Paula might argue that she had no duty of care to Ima, but certainly Paula has a duty to other motorists and their passengers. A sticking point will be whether Paula breached that duty of care. Generally, Paula did act with reasonable care, pulling over and telephoning her mechanic when she noticed a problem and attempting to pull over when the problem got worse. Ima might try to borrow from a statute that says that a motorist cannot leave his car on the roadway unattended as evidence of Paula's breach. However, while the rule is that a statute can be borrowed by someone whom it is meant to protect, and Ima is one of those

persons, such borrowing will not succeed as here, where compliance was impossible. Thus, Ima will have difficulty in showing breach of duty here.

Assuming she succeeds, she will also have to prove that Paula's actions caused her damages. Paula might raise the same issue of causation that Blue Star did - that Dan's actions was the proximate cause of Ima's damages. However, when Paula suddenly stopped in the roadway, it was certainly foreseeable to her that another motorist - drunk or not - might rear end her. Thus, Ima likely can prove causation and damages. Finally, Paula will try to argue comparative negligence as Blue Star did but likely will not succeed for the same reasons that Blue Star will not succeed. However, given the problem in showing breach.

Question 3 - Sample Answer 1.

(disclaimer)

1. Frank owns an undivided one-half interest in the property as a tenant in common. The issue is the effect on Frank's interest of the unrecorded agreement between Bob and Terry purporting to change their ownership interests. Frank is a good faith purchaser who apparently gave value in an arms-length transaction, so he will take Bob's interest subject to only those interests of which he had knowledge or notice. Notice may be actual, constructive or record notice. We must assume Frank had no actual notice because there is no mention he was aware of Bob and Terry's unrecorded 60/40 agreement. He might have constructive notice, defined as notice from facts which an inspection of the premises would have disclosed. Here, an inspection would have discovered Terry in possession, but Frank is already aware Terry has some interest by virtue of his recorded deed. Thus, his presence alone is not constructive notice that this percentage ownership later changed. That leaves record notice, which means compliance with the recording statute provides notice to the world (especially purchasers) or parties' rights and interest in land. Frank has no record notice of Terry's 60/40 agreement with Bob because the agreement was not recorded. Thus, Frank takes an undivided one-half interest, which is what the records reflect Bob owns.

2. Frank's title may currently be encumbered by First Bank's deed to secure debt, Second Bank's deed to secure debt, Collections USA's judgment against Bob, and possibly Don's lis pendens and Major Credit Card's judgment, all based on the record notice of these recorded liens and encumbrances. The lis pendens is doubtful, however, because an unliquidated tort claim would not ordinarily give rise to the right to record a lis pendens against the defendant's property prejudgement. However, the lis pendens itself may put Frank on ongoing notice to have the public records rechecked to ensure no judgment was ever recorded, even under a wrong name, against Bob and Terry. We are told Don never recorded, however, so the lis pendens will not ultimately encumber Frank's property. An action to discharge the lis pendens should succeed.

   Frank's property is also subject to an unperfected lien for the unpaid ad valorem taxes. Such liens typically are given super priority and, once perfected, likely would trump all other liens. Frank's property is not subject to Bob and Terry's written agreement as mentioned above. Frank's title is not subject to Major Credit Card's judgment as that judgment was only

against Terry. The property, based on date of recording, is as follows: (1) First Bank; (2) Collections USA's judgment; (3) Second Bank; and (4) Don's lis pendens (until discharged). However, once recorded, the tax lien will take first priority over all other liens.

3. As tenants in common, Frank and Terry share rents and property and split charges against the property. Since Frank paid more than his proportionate (1/2) share of the mortgage payments, he is entitled to a money judgment against Terry for those excess charges.

   Alternatively, Frank could sue for partition. A suit for partition can be in kind (physically divide the property) or by forced judicial sale, with the proceeds divided between the owners according to their interests after paying any charges one tenant paid which were greater than her proportionate share. Here, Frank could sue for partition and seek a forced judicial sale. The proceeds from which would first go to pay Frank the mortgage payments he made on Terry's behalf, before any remainder (if any) is divided evenly between Frank and Bob. Note that all properly recorded liens, including back taxes, would have to be satisfied first before any monies would be paid to Frank or Terry. The suit for partition does not discharge any prior liens unless they are paid.

Question 3 - Sample Answer 2.

(disclaimer)

1. Frank now owns an undivided 1/2 interest as tenants in common with Terry. When Bob conveyed an undivided 1/2 interest to Terry, they became tenants in common. In the absence of language creating a Joint Tenancy with rights or survivorship (JTWROS), a tenancy in common was created, when Bob conveyed his interest, Frank took as a tenant in common. Georgia is a race-notice state. This means that a purchaser who takes unaware of another's interest at the time of conveyance and records first has priority. Here, the 60%-40% agreement was never recorded. Frank had no actual or record notice of it. Frank then properly recorded his warranty deed from Bob. Therefore, the agreement to reduce Bob's share to 40% and Terry's to increase to 60% is not in Frank's chain of title. Because it is not in Frank's chain of title, he took an undivided 1/2 interest in the warehouse.

2. Frank's interest in the warehouse is encumbered by the liens that are in his chain of title. The facts are unclear as to exactly when the documents were recorded, but if they were recorded in the order in which they appear, the lien priority is as follows:

   First- First bank. Bob assumed the debt to First Bank. The facts state that the property was subject to a deed to secure debt in favor of First Bank, so it can be assumed that its deed to secure debt was recorded first.

   Second- Collections USA. Here, Collections USA held a judgment that was properly recorded before Second Bank recorded its deed to secure debt. Second Bank had record notice of this judgment. Therefore, Second Bank does not have priority over Collections USA.

   Third- For the reasons stated above, Second Bank is in third priority.

Fourth- Major Credit Card. Majors interest does not attach to Frank's interest. Don never recorded his judgment, so he is not in the chain of title.

3. Frank can sue for partition. Here, partition would force the sale of the warehouse, with the proceeds divided equitably between Frank and Terry. A co-tenant must pay his share of the mortgage payments and taxes. Here Frank paid Terry's portion of the mortgage, so he is entitled to reimbursement. However, partition sale proceeds will go to pay off all of the existing liens first, so there may not be any proceeds left.

   Frank may want to just sue for what he is owed. That way his interest remains intact and he and Terry can work on removing some of the liens on the property by paying them off. But, this will not terminate his joint ownership, so partition may be the only choice here.

Question 3 - Sample Answer 3.

(disclaimer)

1. Frank owns 50% of the warehouse property (subject to various liens as discussed below). Bob became the sole owner of the property when he purchased it from Sandy (assuming Sandy was the only owner of record). Bob transferred 1/2 of his interest to Terry leaving him a 1/2 interest in the property as a tenant-in-common with Terry. The deed conveying this interest was properly recorded and therefore Frank would have record notice of it. The agreement to reduce Bob's interest to 40% and increase Terry's interest to 60% was not recorded and Bob evidently had no notice of it. (If not for the recorded transfer to Terry in the record, Terry's presence might have been sufficient to put Frank on actual or inquiry notice to require him to determine Frank's interest. However, the recorded interest makes it reasonable for Frank to believe Terry's presence is pursuant to his 1/2 ownership interest and therefore would not impose an obligation on Frank to make further inquiry). Because Frank filed without any notice of Terry's increased interest and Frank was a good faith purchaser for value, Frank owns 1/2 interest as tenant in common with Terry despite the prior agreement with Bob giving Terry a 60% interest. This is pursuant to the race notice statute.

2. The liens on the property (in order of priority are):
   a. First Bank's lien (assuming it was properly recorded). This lien has priority because it was the first to attach to the property. The lien remains on the property (so long as properly recorded) whether a subsequent purchaser assumes it or merely takes "subject to" regardless of whether it is mentioned in the deed as an encumbrance. In this case Frank apparently had actual notice, so he would take subject to this lien even if not recorded.
   b. Second Bank's purchase money loan to Bob should have second priority even though the loan was made after a judgment lien was validly recorded. Second Bank's loan was a purchase money loan and, therefore, should enjoy priority over the judgment lien. Second Bank's lien was properly recorded immediately.
   c. Collections USA is next in line because it was validly recorded and arose before any

other judgment liens.

d. Don's judgment lien will be next (but only if the lis pendens is sufficient to protect Don's lien). The lis pendens does provide notice but a recorded judgment is probably required.
e. Terry's obligation to Major Credit Card is not a lien on Bob's property interest (therefore not on Frank's) because this was a personal (not partnership debt as the judgment of Don) and Terry's personal creditors cannot be reach Bob's (Frank's) share of the property.
f. If the State issues a tax lien this lien will likely move to the front of the line as tax liens generally have priority over prior existing liens.

3. Frank can sue for partition in equity. The court can either partition in kind (give each a piece of the property) or can sell the property in whole and give each their share of the proceeds after payment of liens. Frank has a right to be reimbursed by Terry for the amounts he has paid because of Terry's failure to satisfy his obligation to pay the mortgage payments. Frank will be entitled to sue for contributions for the amount he paid on Terry's behalf plus interest.

Question 4 - **Sample Answer 1.**

(disclaimer)

I. Ethical Propriety of A. Lawyer's contact with:

A. Sam

Sam is the farm manager of Kanna Lope Farms, Inc. And was the supervisor of farm employees Bob, a fourteen-year-old working on the farm as temporary summer help, and Dave, Bob's dad and a regular farm employee. One the day of the accident Sam was shorthanded at the farm with only Bob and Dave there to help deliver the farm's watermelons to the market. Sam left the farm to arrange the sale while Bob and Dave completed the loading. Dave decided to let Bob drive one of the trucks. During the trip Bob lost control of the truck and struck the vehicle driven by Ms. May, killing her. Sam was at the scene of the accident and overheard Bob make his statement to the police. Sam did not hear Dave speak with the EMTs on the scene.

After being employed by Ms. May's parents, Lawyer attempted to contact Sam on July 5th. This attempt to contact Sam is not in violation of the applicable Rules of Professional Conduct and/or Advisory Opinion of the State Bar of Georgia. However, when Sam returned Lawyer's phone call on August 10th and confirmed what Bob told the trooper, Lawyer should have explained that a lawsuit had been filed and that he was not allowed direct contact with Sam because he is the owner/farm manager of Kanna Lope Farms, Inc., the named defendant in the case. This communication with Sam, even through Sam called Lawyer is in violation of the Rules of Professional Conduct and the Advisory Opinion.

B. Dave

Lawyer's attempts to reach Dave before July 25th is not proper in that at the time he did not know that Dave had been terminated by Kanna Lope Farms, Inc. Once it was determined that Dave was no longer employed by the named defendant, Lawyer was within his right to attempt to speak with Dave.

C. Bob

Lawyer's conversation with Bob is borderline at best. Even though he asked Bob about the accident after he learned of Bob's termination, Bob is still 14 years old and the court might see Lawyer's conversation with Bob as a breach of professional conduct.

II. Admissibility into evidence of the following:

A. Bob's statement to the Trooper

Given that Bob's statement occurred 30 minutes after the accident it could be seen as res gestae in that it was so near the accident that his statement cannot be separated from the accident. More than likely, the court would rule Bob's statement to be inadmissible hearsay in that it was an out of court statement offered to prove the truth of the matter asserted. Since Bob is not a named party, the statement would not be seen as an admission by a party opponent.

B. Dave's statement to the EMT's

Dave told the EMTs, while trying to help extricate Ms. May from her car, "I knew Bob couldn't drive that truck pulling a trailer, he had never done so before, now I've killed this girl." This statement could be viewed as an excited utterance given that it was made soon after the accident occurred while Dave is helping the EMTs to remove Ms. May. Dave's statement is so close in proximity to the accident and the removal of Ms. May from the car it would more than likely be admitted even though it is hearsay.

III. Sam's conduct at the scene, admissible as evidence?

Sam stood by, or close to Bob, as he made his statement to the police. Bob told the police "I'm only 14, I don't have a license but Sam lets me drive all the time. I was just going too fast, I'm sorry, its call my fault." Sam's silence could be seen as a tacit admission. By standing there and not disputing the fact that he let Bob drive all of the time could be seen as an admission by Sam due to his silence. Georgia's law frowns on tacit admissions but if other evidence supports the claim of tacit admission the court may allow it in as evidence that Sam let Bob drive without a license.

IV. Would Lawyer gain any advantage with respect to the admissibility of the statements of Bob and Dave if they were joined as parties to the lawsuits?

Lawyer would not be allowed to use the statements that Bob and Dave made to him after the lawsuit was filed if they were joined as parties. However, if he joined Bob and Dave to the lawsuit the statement Bob made could be seen as an admission by a party opponent and the portion of Dave's statement to the EMTs concerning his knowledge that Bob could not drive the truck and that Bob had never done so before would be admissible as an admission by party opponent but it might be used to contradict Bob's statement as to Sam letting him drive the truck all the time.

Question 4 - Sample Answer 2.
(disclaimer)

1. The Rules of Professional Conduct provide that attorneys should not talk to or question adverse parties without the presence of the adverse party's attorney. The issue here is whether the individuals were adverse parties at the time of A. Lawyer's contact with them.

   Susie May's parents filed suit on July 25th against Kanna Lope Farms. Although the suit was against Kanna Lope it is plausible that Sam, Dave or Bob could've potentially been named in the suit. Furthermore, either of them, especially Sam, could be considered an agent for Kanna Lope due to his position as farm manager.

   A. Lawyer first contacted or attempted to contact Dave and Sam on July 5th (before filing suit). Under the RPC there were no adverse parties because no suit had been filed. A. Lawyer spoke to Bob that day after learning he'd been terminated. As above, the suit had not been filed so Bob was only a potential adverse party. It is likely that A. Lawyer's contact with the parties was acceptable before July 25th. However, there may be ethical problems considering the suit was imminent and Sam's position.

   After July 25th but before service, A. Lawyer questioned Sam. This may be an ethical violation if Sam, as farm manager, could be considered an agent for Kanna Lope.

2. (a). Bob's statement to Trooper

   Bob's statement would be admissible. Under the evidence rules this is an admission and is not hearsay. Bob's statement may be imputed to Kanna Lope because he is an employee speaking within his employment. Also, he had apparent authority to speak because he made the statement in the presence of Sam who didn't respond. Thus, his statement is admissible as an admission by a party.

   (b). Dave's statement to EMT

   Dave's statement is admissible as an excited utterance. The statement was made under the excitement of the accident and was spontaneous. Excited utterances are hearsay within an exception and are admissible. His statement could also be an admission by a party for the same reasons as Bob's statement to trooper (scope of employment).

   (c). Sam's conduct at the scene is not probative. He made no statements and no act he intended to serve as a statement unless his silence implied acquiescence of Bob's statement to trooper.

   (d). The statements of Bob and Dave may be more likely admissible if they were joined because they would be admissible against themselves so agency principles would not have to be considered.

Dave's excited utterance would be admissible regardless of his status as a party.

Question 4 - **Sample Answer 3.**
(disclaimer)

1. (a). An attorney may discuss matters with an opposing party until the attorney learns that the person is represented by counsel. With respect to Sam, there is nothing to indicate that A. Lawyer had actual knowledge that Kanna Lope Farms, Inc. was represented by an attorney when he spoke to Sam on August 10.

   However, A. Lawyer should have known that Kanna Lope would hire an attorney in this matter. When a corporation is represented by counsel, an attorney should not directly contact 1) a person with managerial authority, 2) a person who could impute liability on the corporation and 3) a person who could make an admission. Although it is unclear from the facts whether Sam has managerial authority on behalf of the corporation, it is clear that he fits into the last two categories. Since Sam was covered by the representation of Kanna Lope's lawyer and A. Lawyer had already filed suit against Kanna Lope, it was probably improper for A. Lawyer to contact him directly.

   (b). Dave would also be covered by the representation of Kanna Lope since he could make an admission and his actions could be imputed on Kanna Lope. The rules relating to speaking with employees of a corporation do not apply to former employees. Dave was terminated from Kanna Lope the day after the incident, which was before A. Lawyer spoke with Dave. However, A. Lawyer did not learn of Dave's termination until after he spoke with him.

   (c). A. Lawyer learned of Bob's termination before he questioned him about the accident. However, since Bob is only 14 years old, A. Lawyer should not have spoken with him outside the presence of a parent.

2. Hearsay is an out of court statement offered to prove the truth of the matter asserted. If a statement is hearsay, it is inadmissible unless it falls in one of the hearsay exceptions.

   (a). Since Bob's statement to the trooper is an out-of-court statement offered to prove the truth of the matter asserted (by inference, that he was negligent), it is hearsay. Bob's statement may fall within the excited utterance exception to hearsay. An excited utterance is a statement made at or near in time to an excitable event that is made while the person is still under the excitement of the event. The accident would certainly qualify as the type of event that would cause an excited utterance. However, Bob made this statement 30 minutes after the accident. A judge will need to determine whether he was still suffering under the stress of the event when made. Due to his age, he probably was.

   This would not be a statement against interest, another exception, because Bob is not dead, which is a requirement. It would not be an admission by a party opponent because Bob is not a party to the litigation.

(b). Dave's statement clearly qualifies as an excited utterance since it was made at the time of the accident after he watched his son accidently kill a girl.

3. Sam's conduct at the scene is probative and admissible. It is probative because it shows that Sam was negligent in allowing Bob to drive in the past and that he probably knew he would drive on this occasion. Usually, other acts are not admissible to show action on this occasion. However, one exception is where evidence is used to show failure to supervise, which is the case here.

   In addition, this will probably be an adoptive admission on the part of Sam since he was present and an ordinary person would deny a charge of this nature in front of a police officer.

4. A. Lawyers should join Dave and Bob. This would allow him to definitely get the statements in under the admission by a party opponent exception to hearsay. If a party to some litigation makes a statement that is against his interests, it is admitted under this exception.

MPT 1 - Sample Answer 1.
(disclaimer)

TO: Thomas Burke
FROM: Applicant
RE: In re: Rose Kingsley
DATE: February 22, 2005

Brief Statement of Facts

In 2002, Rose Kingsley ("Kingsley") was retained by Janice Moreno ("Moreno") to pursue a personal injury civil action that involved complex issues relating to hazardous substances & pollution. Thereafter, Kingsley engaged Karen Greene ("Greene") to aid in the Moreno litigation. Greene possessed some experience in matters relating to the underlying issues in the Moreno litigation. Kingsley & Greene entered into an agreement with respect to Greene's compensation for her work on the Moreno litigation. This agreement contained a contingent fee, with advances made for hourly work performed.

Greene later quit working on the Moreno litigation. Kingsley subsequently achieved a successful verdict & settled the Moreno litigation; thereby receiving her percentage of the settlement. Upon learning of the settlement & subsequent receipt of the fee, Greene now seeks a percentage.

Issues Presented

1. Was Karen Greene a partner or associate of Rose Kingsley for purposes of Rule 200 of the Franklin Rules of Professional Conduct ("FRPC")?

2. If not, were the disclosure requirements of Rule 200 of the FRPC complied with such that any

fee-splitting arrangement between Karen Greene & Rose Kingsley is enforceable?

Short Answers

1. No. Greene was neither a partner nor an associate of Kingsley.

2. No. The agreement is unenforceable as there was no disclosure to the client regarding the division of fees or the terms of such a division.

Discussion

1. Greene was neither a partner nor an associate of Kingsley's

   Chambers v. Kay ("Chambers") a Franklin Court of Appeals case from 2002 is dispositive on the issue presented. In Chambers, Kay, an attorney owned office space that was sublet to Chambers, also an attorney. Chambers used some of the "common" office equipment in day to day work. Despite this space-sharing agreement, both Chambers & Kay had separate practices, as indicated by individual office letterhead & separate professional addresses.

   Chambers agreed to work with Kay on a particular matter. Chambers maintained the files, conducted discovery (as directed by Kay), conferred with the client & appeared in court as co-counsel. Chambers was also listed on the pleadings as counsel.

   After a disagreement as to compensation following the close of the case, Chambers alleged Kay had breached their fee agreement. After noting that the fee agreement clearly did not comport with Rule 200 of the FRPC, the court went on to determine if Chambers was a partner or associate of Kays.

   A. Chambers was not a partner of Kays

      The court quickly disposed of this issue, as it noted that a partnership "is an association of two or more persons to carry on, as co-owners, a business for profit, connoting co-ownership in partnership property, with a sharing in the profits & losses of a continuing business." (Chambers, FN1). Based on the aforementioned facts in the Chambers case, the court found it clear there was no partnership between Chambers & Kay.

      In the instant case, this mater can also be quickly addressed. Kingsley maintained her office "allowed Greene to work there on the Moreno litigation only. Kingsley & Greene maintained separate legal practices with respect to the remainder of their case loads. There was no agreement indicating an intent to be co-owners and no agreement regarding profit/loss sharing. Rather, Greene was to receive compensation solely for the Moreno litigation. Therefore, Kingsley & Greene were not partners.

   B. Greene was not an associate of Kingsley

      There again, the Chambers case is instructive. In determining if one lawyer is an associate of another, whether one worked "for" or "with" the other is dispositive. If one lawyer worked "for" another, it was more likely that lawyer was an associate than

if that lawyer worked "with" the other. To break this issue down further, the court went on to note that while the totality of the circumstances should be considered, the two main factors to be considered were (1) supervision and (2) compensation.

1. The more supervision provided, the more likely an associate relationship exists

   In Chambers, the court analyzed the amount of control Kay maintained in the litigation, the level of oversight provided in factual matters Kay held, the level of control Kay maintained of the working environment & the relationship Chambers was allowed to maintain with the client. Ultimately, the court determined that Chambers worked "with" Kay, as Chambers was allowed to conduct discovery, appear in court, meet with the client and was listed on the pleadings as counsel.

   Our case is not as clear cut, as Greene did not have the same level of control as Chambers and had limited client access. However, she did control discovery.

2. The manner of compensation is indicative of the relationship

   In Chambers, the court went on to state that the more indicative evidence of the relationship between Kay & Chambers was their compensation agreement. Kay compensated Chambers solely on a contingent basis.

   In our case, Greene did receive hourly compensation. However, it was clear that such compensation was solely an advance of any contingent fee. Therefore, coupled with the discovery control Greene maintained, and her independent work dealing with the facts of the case, it seems more likely a court would find Greene worked "with" Kingsley and thus was not an associate.

2. The fee agreement between Kingsley & Greene is not enforceable

Pursuant to Rule 200 of the FRPC, a client must consent in writing to any fee agreements between lawyers after "full disclosure that a division of fees will be made & the terms of such division." (Rule 200, FRPC).

Here, Kingsley does have a written fee agreement with Moreno, and that engagement letter mentions that Greene would be engaged. The engagement letter goes on to state that the total fee would not increase based on Kingsley & Greene's combined work. Further, Greene orally explained the details of her fee agreement with Kingsley. (See Memo dated November 1, 2002).

However, under relevant case law, Rule 200 of the FRPC is a bright-line rule; the rule is satisfied "only by full compliance with the rule's written disclosure & written consent requirements. (Margolin v. Shemania) (Franklin Ct. App. 2000) (Margolin). Disclosure must be in writing; oral disclosure is insufficient.

Therefore, only the engagement letter can be considered when determining if Rule 200 of the FRPC was properly complied with. The engagement letter, taken alone, fails to disclose either Greene's fee agreement with Kingsley or the underlying terms. Therefore, the disclosure was incomplete. Thus, the agreement between Greene & Kingsley is unenforceable.

Greene may be able to proceed on some equitable ground. However, since she was compensated for her work on an hourly basis, no recovery is likely.

MPT 1 - Sample Answer 2.
(disclaimer)

TO: Thomas Burke
FROM: Applicant
RE: Fee-splitting Dispute Between Rose Kingsley & Karen Greene
DATE: February 22, 2005

This memo outlines the following issues:

I. Whether Greene was a partner or an associate of Kingsley for purposes of Rule 200 of the Franklin Rules of Professional Conduct; and,

II. Whether the requirements of Rule 200 have been met by the fee-splitting agreement between Kingsley and Greene and the communication with Moreno.

I. I) The requirements for Rule 200 depend upon whether a lawyer is: 1) a partner or associate or 2) only "temporarily engaged." Karen Greene is not a partner of Rose Kingsley. A partnership is an association of two or more persons to carry on, as co-owners, a business for profit, connoting co-ownership in partnership property, with a sharing in profits and losses of a continuing business. (Chambers). Kingsley maintains a solo practice and Greene is starting her own practice. They are only working on the Moreno case together. Therefore, they are not partners.

   An associate is a lawyer who works for, rather than with, another lawyer. (Chambers). In determining whether a temporarily-engaged lawyer works for another lawyer, the court will look at the totality of the circumstances, including the other lawyer's supervision and, in particular, the compensation of the temporarily-engaged lawyer. The more closely the lawyer is supervised, the more likely she is an associate. And compensation based or a salary tends to show a lawyer is an associate versus contingency-fee compensation.

   In the Kingsley case, Kingsley admits she did not supervise Greene very closely. The factors the court will look at include:

   a. a) Direct and indirect control at the representation – Kingsley did all of the trial work and appeared to use Greene only for technical issues in the preliminary investigation and for the purposes of discovery.

   b. b) Oversight of the temporarily engaged lawyer in legal and factual aspects of case – Kingsley supervised Greene on legal issues because she's a new lawyer. She did not

supervise her on technical issues because she was depending on her expertise as a mechanical engineer.

c. c) Control over the working environment – Greene worked in Kingsley's office and used her staff and facilities, but this use was only for the Moreno case. Their agreement stated that Greene was only being used for assistance on the Moreno case.

d. d) Relationship with the client – Kingsley insisted on doing all the face-to-face contact with the client, so she controlled the relationship. The only contact Greene appeared to have was in describing the fee-splitting agreement. Kingsley appeared to condone this, as she did not object when she heard about it.

With respect to compensation, the agreement between Kingsley and Greene was 30% of the fee collected on the Moreno case. Because that was a contingency fee, Greene is primarily based on a contingency. She did receive $50 per hour, but that was simply an advancement payment of the contingency fee.

Based on the totality of the circumstances, Greene is probably not an associate of Kingsley. The supervision by Kingsley is a close question. However, the fact that Greene was being paid by such a large contingency fee tips the scales toward the finding that she is not an associate. The court, based on Chambers, appears to give the comparison factor more weight.

II. II. The requirements of Rule 200 have not been met. If the court finds Greene to be an associate, the fee-splitting agreement will be allowed without any further requirements under Rule 200.

However, if she is not deemed to be a partner or associate, Kingsley must: 1) have received written consent from the client after full disclosure of the division of fees and the terms of the division and 2) told the client that there would be no increase in the total fee as a result of the fee-splitting.

This second requirement was met by Kingsley. However, Kingsley did not state the terms of her fee agreement with Greene – that it was 30% of the total fee – with advances of $50 per hour worked. As a result, she has not met the requirements of Rule 200, even though she made a written disclosure and got consent in writing.

MPT 1 - Sample Answer 3.
(disclaimer)

Memorandum

TO: Thomas Burke
FROM: Applicant
RE: In re: Rose Kingsley

The following are my conclusions based on legal authority from the Franklin Court of Appeals and the relevant facts for the issues you requested:

1. 1. Whether Greene was a partner or associate for purposes of Rule 200 of FRPC.

   According to Rule 200 of FRPC, a lawyer cannot divide legal fees with another lawyer who is not a partner or associate unless certain steps are taken that involve the client at issue. So, if Karen Greene is determined to be a partner or associate, she will be entitled to possible fee divisions according to the Rule. A Franklin Court of Appeals case, Chambers v. Kay (2002), suggests that general partnership law applies in determination of whether Greene was a partner with Kingsley. For such to be applicable, it must show that Kingsley and Greene shared profits and losses of a business and had partnership property. In our present case, as in Chambers, no evidence exists to suggest that this is a partnership situation. Kingsley operates a solo practice and, other than the present case, did not share profits with Greene. Greene does not allege such either. So the main issue is whether Greene could be considered an associate of Kingsley.

   With respect to the associate issue, the Court of Appeals has held, also in Chambers, that a "totality of the circumstances" approach is used to determine whether a temporarily engaged lawyer (Greene) works for the other lawyer (which would create an associate situation for purposes of Rule 200) or works with the other lawyer (which would not create an associate situation).

   The Court focused on the other lawyers supervision along with the compensation of the other lawyer. Four factors were used in Chambers to evaluate the supervision aspect:

   1. Direct and indirect control of representation.
   2. Oversight of the other lawyer in legal and factual aspects of the case.
   3. Control over working environment.
   4. Relationship with client.

   In our present situation, as in Chambers, Kingsley did not closely supervise Greene regarding technical aspects of the case. Although she did supervise Greene's legal work and Greene was able to utilize Kingsley's office and staff. It is also not known yet whether Greene ever appeared in any preliminary court matters or signed pleadings listed as counsel with Kingsley, which would tend to show that Greene was working with and not for Greene. Chambers does state though that supervision alone is not dispositive, so it does not alone determine this issue. It appears the court in Chambers looked to the compensation agreement to determine the relationship. The pure contingent arrangement in Chambers led the court to find that an association relationship did not exist. In our present case, Greene was paying Kingsley an hourly rate, to suggest an associate situation but also a contingent rate to suggest otherwise. However, because the court noted in its last statement that an agreement to split any fee recovered from litigation combined with loose supervision leads to a conclusion that an associate relationship does not exist, I would conclude that Greene was paid an hourly minimal rate just for her work done but that the contingency arrangement itself, coupled with loose supervision by Kingsley, would support the position that she (Greene) was not an associate for purposes of Rule 200.

2. Whether requirements of Rule 200 were met by the Kingsley/Greene agreement and communication with Moreno.

A. Kingsley/Greene – It appears that the agreement between Kingsley and Greene does meet the requirements of Rule 200. The Rule only states, in regards to the agreement between attorneys, that the total fee charged by all lawyers is not increased solely because of the provision of fees and is not unconscionable. The comments also note that the fee division be proportionate to work done. In our present situation, the arrangement between Greene and Kingsley was not going to affect the recovery of Moreno, as evidenced by Kingsley's letter to Moreno, Greene's alleged conversation with Moreno and Kingsley's conversation with you. The fee is also not unconscionable because the arrangement between Kingsley and Moreno (33%) appears reasonable and customary as stated in your conversation with Kingsley.

B. Communication with Moreno – Rule 200 requires written consent after full disclosure in writing of fee division and terms of such division. The communication with Moreno does not satisfy this requirement and, although Kingsley may have breached the fee splitting arrangement (which is a matter of factual dispute) the agreement should not be enforced because of non-compliance with the Rule. In our situation, Kingsley's letter to Moreno does not disclose the terms of the agreement with Greene at all and the conversation between Moreno and Greene was not in writing and does not, therefore, correct the mistake of Kingsley's letter. The Franklin Court of Appeals has held, in Margolin v. Shemania, that Rule 200 is a bright line rule. It is to protect the client to the fullest extent possible and that full compliance with the rule is required.

In Margolin, the court held the agreement was unenforceable because the communication regarding the arrangement was not made to the client. It emphasizes repeatedly the requirement that full disclosure be in writing. The purpose of the Rule, as stated in Margolin, is to protect the client. Although the court did not seem pleased with a possible breach of fee-splitting agreements between lawyers, it ultimately held the contract to be unenforceable for noncompliance with Rule 200. Our present situation is fully applicable to this case. Full disclosure was not given by either Greene or Kingsley in writing to Moreno and the contract is, therefore unenforceable. The requirements of Rule 200 have not been met.

MPT 2 - Sample Answer 1.

(disclaimer)

William L. Caldwell
Belle, Bruce & Caldwell LLP
473 Bayliss Court, Suite 8500
Margot Bay, Franklin 33501

RE: Reynolds v. Preferred Medical Providers

Dear Mr. Caldwell:

We have received your arbitration demand regarding the matter of Reynolds v. Preferred Medical

Providers. In response, we reject your demand for arbitration because MICA is not preempted and does not apply. We reject your preemption arguments on two grounds: (1) the Federal Arbitration Act does not preempt MICA Section 63.1; and (2) Section 1395mm of the Medicare Act does not preempt MICA Section 63.1.

With regard to the conflict between the Federal Arbitration Act (FAA) and MICA, that although the FAA does state that written contract provisions regarding arbitration agreements are valid, irrevocable, and enforceable, the FAA has been interpreted by the Franklin Court of Appeals not to preempt MICA despite its language. In Smith v. Modern Care, the Franklin Court of Appeals addressed the possibility of conflict between Section 63.1 and MICA and found that in light of the federal act of McCarran-Ferguson, there is no federal preemption of MICA. See Smith. In Smith, the court held that the McCarran Ferguson Act was enacted to reserve to the states the power of regulating the business of insurance. Accordingly, the Court of Appeals in Smith reasoned that MICA constitutes an insurance regulation and, therefore, cannot be preempted by the FAA. Further, the Franklin Court of Appeals specifically distinguished the preemption of the olympia statute in Casaro v. Super Sub Associates from the consideration of FAA preemption of Section 63.1 of MICA due to the fact that Casaro did not address the effect of McCarran-Ferguson. In interpreting McCarran-Ferguson, the Franklin Court of Appeals found the later enactment of the FAA did not invalidate the previously enacted McCarran-Ferguson Act. Further, since McCarran-Ferguson was not invalidated by the passage of the FAA, the McCarran-Ferguson Act's express intent to reserve regulation of insurance to the states should be respected. Therefore, as long as Preferred Medical is involved in the business of insurance, then MICA Section 63.1 will not be pre-empted by the FAA. Your client, Preferred Medical Providers, is a health maintenance organization. In Smith, a health maintenance organization (HMO) is considered to be in the business of providing insurance, as was Modern Care in Smith. Therefore, MICA section 63.1 applies in light of the McCarran-Ferguson Act and the requirements of MICA must be adhered to for enforcement of arbitration clauses in health care plan contracts.

Furthermore, we reject your arbitration demand because Section 1395mm of the Medicare Act does not preempt MICA Section 63.1. In determining preemption, it is necessary to look at Congressional intent. [Casaro] In discerning intent and interpreting the purpose and scope of Section 1395mm, it is also helpful to look at The Congressional Record surrounding the passage of the law when the statute does not specifically address a particular issue. In determining Congress' intent via the statute itself and the Congressional Record, it appears as though Congress did not intend Section 1395 to preempt state laws such as MICA either through field or conflict preemption. For field preemption, there must be a showing of a clear and manifest purpose to exclusively occupy a field. The statute itself does not express a purpose to exclusively and manifestly occupy the field of arbitration clauses in health care plan contracts. Further, the record suggests that Congress in fact intended to minimize federal intrusions into state healthcare regulation of elderly medical services. Further, the record expressly states Congress' expectation that states append additional protection they deem appropriate in the area of ensuring senior citizens are fully informed. Additionally, MICA was a statute enacted for such purposes. Therefore, Section 1395mm was not intended by Congress to preempt the field of arbitration clauses in health care plans and safeguards surrounding their enforceability. Furthermore, there is no conflict preemption – which arises when a state statute is in direct conflict with a federal statute and there can be no compliance with both laws. This is not the case in viewing Section 1395mm and MICA 63.1. It is possible to comply with both laws, one regarding requirements and approval of marketing materials and the other regarding a specific consent and notice requirement for arbitration clauses in health care plan contracts. Therefore, due to the fact of field or conflict preemption, MICA Section 63.1 applies. Further, due to your client's noncompliance, we reject the

arbitration demand.

Very truly yours,

Applicant

MPT 2 - Sample Answer 2.
(disclaimer)

TO:William L. Caldwell
FROM:Applicant
DATE:February 22, 2005
RE:Reynolds v. Preferred Medical Services

In response to your demand for arbitration, please consider the following. The Federal Arbitrator Act (FAA) does not preempt the Franklin Medical Insurance Contract Act (MICA) §63.1. Further, 42 U.S. (§1395mm(c) of the Medicare Act (MA) does not preempt MICA §63.1.. Therefore, as you have admitted in your letter of February 21, 2005, because Preferred's arbitration disclosure does not comply with the requirements of MICA §63.1, the arbitration clause is invalid and unenforceable by law. Thence, on behalf of my client, Ms. Reynolds, I will proceed with the litigation and seek a resolution by jury trial.

The FAA does not preempt MICA as you allege, despite the Court's ruling in Casaro. Although the FAA applies in state court as well as in federal court, the FAA is a law of general applicability and does not relate to the business of insurance. Smith The court in Casaro did not decide the effect of the federal McCarran-Ferguson Act, 15 U.S.C.§1012 et seq. Thus, Casaro is not applicable in this case as you have alleged.

Under McCarran-Ferguson, Congress displayed a clear intent to reserve to the states the regulation of the business of insurance. See Smith. The statute provides that "no Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance. . .unless such Act specifically relates to the business of insurance. . .]." Hence, MICA can not be preempted by federal if it relates to the business of insurance unless the federal law specifically relates to the business of insurance. Smith. The FAA is a law of general applicability and cannot preempt MICA because MICA is a law regulating insurance. Smith.

MICA regulates the insurance business because it has an impact on that industry and is, more importantly, directed toward that industry. MICA regulates the language and terms of the policies of insurers, thus it regulates the performance of an insurance contract.

Furthermore, courts will apply MICA regulation to HMOs like Preferred. Smith. The court in Smith held that HMOs are in the business of insurance because a policyholder pays a fee for a promise

of medical services. So, Preferred is subject to MICA, and MICA is not preempted by the FAA, thus the requirements of MICA must be satisfied, and as you have admitted that the clause does not meet those requirements, the dispute cannot be settled by arbitration.

As to your other argument, the Medicare Act §1395mm does not preempt MICA either. Under the clear letter of the Medicare Act, all Congress intended was to prevent deception by requiring that insurance companies submit brochures, application forms, enrollment contracts and other promotional or informational material for the Secretary's approval. See Congressional Record. Moreover, the Secretary's approval does not validate all acts of the insurance company. On the contrary, state regulation may as well apply to the extent that a state deems appropriate. See Congressional Record.

By enacting the Medicare Act, Congress did not intend to preempt MICA by either field or conflict preemption. Under field preemption, Congress must manifest an intent by specific words or by necessary implication. Casaro. And the burden of proving preemption in this manner is on the party wanting to establish such preemption by clear and manifest purpose. Here, the Congressional Record reveals the intent of Congress: that state law may apply as well, if at all. More importantly, though, the words of the statute do not manifest a clear purpose to preempt the field. Specifically, the statute only provides for the Secretary's approval of certain paraphernalia; not whether it is valid as against state law.

Secondly, conflict preemption doesn't apply either since there is no direct conflict between the states.

Sincerely,

Arthur McBride

MPT 2 - Sample Answer 3.
(disclaimer)

Dear Mr. Caldwell:

I am in receipt of your correspondence dated February 21, 2005, wherein you demand that my clients submit their dispute to arbitration, despite the admitted failure of your client's arbitration disclosure to comply with the requirements of MICA, on the ground that the Federal Arbitration Act and §1395mm of the Medicare Act preempt the applicable section of MICA, §63.1. I respectfully disagree with your position and reject your demand.

First, the Federal Arbitration Act (FAA) does not preempt MICA §63.1. In the recent case of Smith v. Modern Care of Franklin, dealing with facts very similar to ours, the Franklin Court of Appeals held that the McCarran-Ferguson Act (MFA) prevented the FAA from being used to preempt state law. In Smith, an HMO, like your client, entered an enrollment agreement with a subscriber, Smith, which agreement contained an arbitration clause that, like Preferred's, did not comply with MICA §63.1. The HMO cited Casaro v. Super Sub Associates for support for its argument that 63.1

is preempted by the FAA, which of course declares all arbitration provisions valid "save upon such grounds as exist at law or in equity for the revocation of any contract." The Smith court, however, distinguished Casaro on the ground that it did not deal with the effect of the MFA on the issue of preemption.

MFA states not only that "[t]he business of insurance. . .shall be subject to the laws of the several States" but also that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law entered by any State for the purpose of regulating the business of insurance. . .unless such Act specifically relates to the business of insurance." The Smith defendant was an HMO, like Preferred, and was therefore held to be in the "business of insurance." And, from MFA, the Smith court derived the rule that, if MICA is a "state law relating to the business of insurance, no federal law that purports to preempt MICA can do so unless the federal law is also a law that specifically relates to the business of insurance. The court held that FAA is "obviously not a federal law that relates to the business of insurance" but rather a law of general applicability, and therefore "the only way [it] could have the preemptive effect urged by [the HMO] is if MICA is not a state law regulating the business of insurance." The court held that MICA is such a law, therefore FAA cannot preempt MICA. With FAA out of the equation, then, your client's failure to comply with §63.1 negates the arbitration provision, so our lawsuit does not run afoul of it.

Further, §1395mm of the Medicare Act (MA) does not preempt §63.1. As you will recall from Casaro, the Fifteenth Circuit noted that there are two types of preemption: "field" preemption and "conflict" preemption. The former arises where "Congress intended to occupy the field to the exclusion of any state regulation of the field", and the court noted that "where the federal regulation purports to affect a field historically within the police powers of the states, the party asserting preemption has a particularly heavy burden to establish that preemption was the clear and manifest purpose of Congress." In amending MA to its current form, the congressional committee stated its intention that the Act not intrude on the states' "traditional police powers to regulate public health" and that the Act would therefore not "preclude concurrent state and federal regulation of the HMO Medicare benefits. . .information materials." The committee went on to recognize that "states may differ on the measure of protection they wish to provide for their elderly residents" and allowed for "more rigorous and comprehensive state standards for HMO providers. . .as long as such standards do not impede compliance with federal standards." Finally, the committee concluded that states can "append whatever additional protections [to MA] they deem appropriate, especially in the area of ensuring that senior citizens are fully informed of their rights. . . ." By this same rationale, there is no direct conflict between the federal statute and the state statue here, therefore conflict preemption would not be appropriate.

I am with kindest regards,

Very truly yours,

Arthur McBride