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Applicant Number

MPT-1
724

MPT®
Multistate Performance Test

In re Girard

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In re Girard

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FILE

Collins & Timaku LLP
Attorneys at Law
800 Bagby St., Suite 150
Franklin City, Franklin 33715

MEMORANDUM

TO: Examinee
FROM: Hannah Timaku
DATE: July 30, 2024
RE: Laurel Girard matter

We represent Laurel Girard in a landlord-tenant dispute. Girard rents an apartment at the Hamilton Place apartment complex. Yesterday morning, she received a "Three-Day Notice to Cure or Quit" (Notice) from her landlord, Hamilton Place LLC (Hamilton). The Notice alleges that Girard failed to pay a portion of her rent and also violated the no-pet clause in her lease.

The Notice gives Girard three days to either "cure" the alleged lease violations or "quit" (vacate) the premises. Hamilton is threatening to file an eviction action against Girard seeking a court order terminating the lease if she remains in the apartment and does not cure the alleged violations within the three-day time frame. Needless to say, this is a time-sensitive matter that requires our immediate attention.

Please prepare an objective memorandum to me analyzing whether the alleged violations in the Notice are valid bases for termination of Girard's tenancy. Be sure to explain and support your conclusions. In addition, based on your analysis, let me know what steps we should advise the client to take. Once I have reviewed your memorandum, I will determine the appropriate legal response to the Notice and pass along your advice to the client.

Do not include 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 conclusions.

Collins & Timaku LLP
Attorneys at Law

MEMORANDUM TO FILE

FROM: Hannah Timaku
DATE: July 30, 2024
RE: Laurel Girard matter

Today I met with Laurel Girard regarding a dispute with her landlord. This memorandum summarizes the interview:

- This morning, Girard received a Notice to Cure or Quit from her landlord referencing her failure to pay rent and her ownership of a cat.
- Since January 2023, Girard has lived at the Hamilton Place Apartments, where she rents a one-bedroom apartment from her landlord, Hamilton Place LLC.
- Her initial monthly rent was $1,500. On June 1, 2024, Hamilton notified Girard that her rent would be increasing to $1,650, effective July 1, 2024.
- Girard was alarmed by the 10% increase in her rent and felt it was unfair, so for the month of July she paid only $1,500 and did not pay the additional $150.
- When I spoke with her, she specifically asked if she is required by law to pay the additional $150 of rent. I told her we would research the matter.
- We then talked about Girard's cat.
- Girard told me that she experiences anxiety. She often feels overwhelmed and, at times, has panic attacks. The medication she is taking helps somewhat, but it does not eliminate her symptoms.
- About six months ago, Girard's therapist, Sarah Cohen, recommended that Girard consider getting an emotional support animal to help alleviate the symptoms of her mental health condition.
- Initially Girard resisted her therapist's advice because she was working long and unpredictable hours in a retail position and didn't think she would have the time to properly care for an animal.

- But about two months ago, Girard got a new job as an office assistant, with set hours and a very predictable work schedule.
- Shortly after starting her new job, Girard visited the local animal shelter and adopted a kitten, whom she named Zoey.
- Girard is already very attached to Zoey and has noticed a dramatic improvement in her overall mental well-being since she brought Zoey home from the animal shelter. She has fewer panic attacks and generally feels a lot less overwhelmed. After she gets home from work and eats dinner, she watches TV on the couch while Zoey snuggles on her lap. Even the simple act of petting Zoey makes Laurel feel relaxed and, in her own words, "like I can handle anything that comes my way, no matter how stressful and challenging."
- Two weeks ago, Girard needed to take Zoey to the veterinarian for a 12-week vaccination booster shot. She put Zoey in a cat travel carrier and was walking with Zoey to her car when she ran into the on-site property manager for Hamilton Place. When the manager saw Zoey in her travel carrier, the manager told Girard that she was not allowed to have pets. When Girard responded that Zoey is her emotional support animal, the property manager rolled her eyes and sarcastically commented, "Sure! Whatever!"
- That day, Girard asked her therapist, Sarah Cohen, if she could write a letter explaining how important Zoey is for Girard's mental well-being. Girard just received the letter from Cohen a few days ago.
- She told me she loves living at Hamilton Place but will move out if that's the only way she can keep Zoey.

RESIDENTIAL LEASE AGREEMENT

This Residential Lease Agreement (Lease) is entered into and effective as of January 1, 2023, by and between Hamilton Place LLC (Landlord) and Laurel Girard (Tenant).

FOR AND IN CONSIDERATION OF the mutual promises and agreements contained herein, Tenant agrees to lease the Premises (as hereinafter defined) from Landlord under the following terms and conditions:

1. **PREMISES:** 7700 Riverside Drive, Franklin City, Franklin 33725, Apartment 12, a one-bedroom, one-bathroom apartment on the first floor (the Premises).

2. **RENTAL AMOUNT:** Beginning January 1, 2023, Tenant agrees to pay Landlord the sum of $1,500 per month by no later than the 3rd day of each calendar month. Said rental payment shall be delivered by Tenant to Landlord at [address omitted]. Rent must be actually received by Landlord in order to be considered in compliance with the terms of this Lease.

3. **RENT INCREASES:** Tenant agrees that Landlord may raise the rent no sooner than 12 months after the commencement of this lease.

4. **SECURITY DEPOSIT:** Tenant shall deposit with Landlord the sum of $1,500 as a security deposit to secure Tenant's performance of the terms of this Lease. After Tenant has vacated the Premises, Landlord may use the security deposit for cleaning the Premises, any damage or unusual wear and tear to the Premises, or any other rent or amounts owed pursuant to this Lease.

5. **INITIAL PAYMENT:** Tenant shall pay the first month's rent of $1,500 and the security deposit in the amount of $1,500 for a total of $3,000. Said payment shall be made by cashier's check or money order and is due prior to occupancy.

6. **TERM:** The Premises are leased on the following two-year lease term: from January 1, 2023, until December 31, 2024. This Lease will automatically renew on a month-to-month basis following the initial lease term, unless Landlord or Tenant provides 30 days' advance written notice of termination to the other party.

* * *

10. **LATE CHARGE/BAD CHECKS:** A late charge of $50 shall be incurred if rent is not paid when due. If rent is not paid when due and Landlord issues a "Notice to Cure or Quit," Tenant must tender payment of any amounts owed by cashier's check or money order only.

* * *

15. **PETS:** No pet of any kind (including but not limited to any dog, cat, bird, fish, or reptile) may be kept on the Premises, even temporarily, absent Landlord's written consent. If Landlord consents to allow a pet to be kept on the Premises, Tenant shall sign a separate Pet Addendum and pay the required pet deposit and additional monthly rent, as set forth in the Pet Addendum.

* * *

20. **DEFAULT:** Tenant agrees that Tenant's performance of and compliance with each of the terms of this Lease constitutes a condition on Tenant's right to occupy the Premises. If Tenant fails to comply with any provision of this Lease within the time period after delivery of written notice by Landlord specifying the noncompliance and indicating Landlord's intention to terminate this Lease by reason thereof, Landlord may terminate this Lease.

* * *

LANDLORD:

Jim Fortnum _____ Dated: January 1, 2023

For Hamilton Place LLC

TENANT:

Laurel Girard _____ Dated: January 1, 2023

Hamilton Place LLC
2000 Greens Blvd., Suite 201
Franklin City, FR 33705

June 1, 2024

Ms. Laurel Girard
7700 Riverside Drive, Apt. 12
Franklin City, Franklin 33725

Re: Rent Increase for Lease dated January 1, 2023

Dear Ms. Girard:

Please be advised that effective July 1st, 2024, the monthly rent on your existing Residential Lease Agreement will increase from $1,500 to $1,650 per month. This is a $150 increase.

Payment of the new monthly rent will be due in accordance with your existing Residential Lease Agreement.

Sincerely,

Jim Fortnum

Leasing agent
Hamilton Place LLC

THREE-DAY NOTICE TO CURE OR QUIT

TO: Laurel Girard (Tenant)

ADDRESS: Hamilton Place Apartments, 7700 Riverside Drive, Apartment 12
Franklin City, Franklin 33725 (Premises)

NOTICE TO THE ABOVE-NAMED TENANT(S) OF THE ABOVE-REFERENCED PREMISES:

You are in violation of the following provisions set forth in the Residential Lease Agreement dated January 1, 2023 (Lease):

Paragraph 2, which requires rent to be paid in full by the 3rd day of the month

Paragraph 15, which prohibits pets from being kept on the Premises

Please cure the above violations by taking the following actions immediately:

1. Pay the sum of $150 in rent owed for July 2024, plus the $50 late fee imposed under Section 10 of the Lease, by cashier's check or money order.

2. Remove any and all unauthorized pets from the Premises.

PLEASE TAKE NOTICE THAT if you fail to cure the above violations or deliver possession of the Premises to Hamilton Place LLC **WITHIN THREE (3) DAYS,** Hamilton Place LLC will declare a forfeiture of the Lease and institute legal proceedings against you to recover possession of the Premises and to have the Lease forfeited, which could result in a judgment against you including rent, damages, costs, and attorneys' fees. If a judgment is entered against you, your credit rating and ability to obtain rental housing may be negatively impacted.

Dated: July 29, 2024

Jim Fortnum

Leasing agent
Hamilton Place LLC

SARAH COHEN, M.Ed., LPC Wellington Counseling Associates Inc.	FRANKLIN #72386 Phone: 664-555-1970

Re: Laurel Girard (DOB 06/17/1998)
Need for Emotional Support Animal

Date: July 26, 2024

To: Hamilton Place LLC

The above-mentioned individual is currently under my care. I have been treating this individual for the past four years, and I am familiar with her history and the functional limitations imposed by her mental health condition. Her emotional difficulties meet the definition of disability under the Franklin Fair Housing Act.

Due to her emotional disability, Ms. Girard has certain limitations related to coping with anxiety. To help alleviate these difficulties and to enhance her ability to function optimally, she is in possession of an emotional support animal (a cat named Zoey). The presence of this animal is necessary for Ms. Girard's emotional/mental health because its presence mitigates the symptoms she is currently experiencing. In particular, the presence of this animal assists Ms. Girard in regulating psychological distress associated with anxiety and panic attacks.

Please let me know if any other information is needed.

Sincerely,

Sarah Cohen

Sarah Cohen, M.Ed., LPC
Franklin Licensed Professional Counselor #72386

LIBRARY

Franklin Tenant Protection Act
Franklin Civil Code § 500 *et seq.*

§ 500 Applicability

(a) Notwithstanding any other law, after a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate tenancy.

(b) For the purposes of this statute, the following definitions shall apply:

(1) "Owner" includes any person, acting as principal or through an agent, having the right to offer residential real property for rent.

(2) "Residential real property" means any dwelling or unit that is intended for human habitation.

(3) "Tenant" means a person lawfully occupying residential real property for 30 days or more, including pursuant to a lease.

(4) "Tenancy" means the lawful occupancy of residential real property by a tenant.

§ 501 Termination for Cause

(a) Just cause to terminate tenancy includes any of the following:

(1) Material breach of a term of the lease.

(2) Maintaining or committing a nuisance.

. . .

(b) Before an owner of residential real property files an eviction action seeking to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation.

. . .

(g) Any waiver of the rights under this section shall be void as contrary to public policy.

§ 505 Limitation on Rent Increase

(a) An owner of residential real property shall not, within any 12-month period, increase the rental rate for a dwelling or a unit more than 10 percent.

. . .

Franklin Fair Housing Act
Franklin Civil Code § 750 *et seq.*

§ 755 Definitions As used in this Act, the following definitions apply:

. . .

(c) "Disability" shall be broadly construed to mean and include any of the following definitions:

i. "Mental disability" includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. Examples of mental disability include, but are not limited to, anxiety, post-traumatic stress disorder, or clinical depression.

ii. "Physical disability" [definition omitted]

. . .

(m) "Service animals" [definition omitted]

(n) "Support animals" are animals that provide emotional, cognitive, or other similar support to an individual with a disability. A support animal does not need to be trained or certified. Support animals are also known as comfort animals or emotional support animals.

(o) "Assistance animals" include service animals and support animals, as described in subsections (m) and (n) above. An assistance animal is . . . an animal that . . . provides emotional, cognitive, physical, or similar support that alleviates one or more identified symptoms or effects of an individual's disability.

§ 756 Assistance Animals

(a) Tenants, occupants, invitees, and others with disabilities are permitted to have assistance animals as defined in § 755(o) in all dwellings (including common and public use areas), subject to the restrictions set forth in subsection (c) below.

(b) Information confirming that the individual has a disability, or confirming that there is a disability-related need for the accommodation or modification, may be provided by any reliable third party who is in a position to know about the individual's disability or the disability-related need for the requested accommodation or modification, including a medical professional . . . [or] health-care provider. A support animal certification from

an online service that does not include an individualized assessment from a medical professional is presumptively considered not to be information from a reliable third party.

(c) Provisions applicable to all assistance animals as defined in § 755(o) include:

i. An individual with an assistance animal shall not be required to pay any pet fee, additional rent, or other additional fee, including additional security deposit or liability insurance, in connection with the assistance animal.

ii. An individual with an assistance animal may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear.

iii. No breed, size, and weight limitations may be applied to an assistance animal (other than specific restrictions relating to miniature horses as service animals under the Americans with Disabilities Act).

iv. Reasonable conditions may be imposed on the use of an assistance animal to ensure that it is under the control of the individual with a disability or an individual who may be assisting the individual with a disability, such as restrictions on waste disposal and animal behavior that may constitute a nuisance, so long as the conditions do not interfere with the normal performance of the animal's duties. For example, a "no noise" requirement may interfere with a dog's job of barking to alert a blind individual to a danger or someone at the door, but incessant barking all night long or when the individual is not at home may violate reasonable restrictions relating to nuisance.

v. An assistance animal need not be allowed if the animal constitutes a direct threat to the health or safety of others (i.e., a significant risk of bodily harm) or would cause substantial physical damage to the property of others, and that harm cannot be sufficiently mitigated or eliminated by a reasonable accommodation.

. . .

Westfield Apartments LLC v. Delgado
Franklin Court of Appeal (2021)

Plaintiff Westfield Apartments LLC rented an apartment to defendant Maria Delgado. Westfield brought a successful eviction action against Delgado and obtained an order from the trial court forfeiting the lease agreement and terminating Delgado's tenancy. The issue on appeal is whether Delgado's failure to obtain renter's insurance justified forfeiture of the lease and termination of her tenancy. We hold that the breach was not material and reverse the trial court's order.

BACKGROUND

Delgado and Westfield entered into a residential lease agreement in August 2018. The lease contained a forfeiture clause stating that "any failure of compliance or performance by Renter shall allow Owner to forfeit this agreement and terminate Renter's right to possession" (Forfeiture Clause). The lease also contained an insurance clause stating that Delgado "shall obtain and pay for any insurance coverage necessary to protect Renter" "for any personal injury or property damage" (Insurance Clause). After two years of Delgado's failure to obtain this insurance, Westfield gave Delgado a three-day "notice to perform or quit," which required Delgado to either obtain the insurance or vacate the premises within three days. Delgado refused to obtain renter's insurance or move out.

Westfield then commenced an eviction action against Delgado. The trial court concluded that the failure to obtain renter's insurance constituted a material breach of the lease. As a result, the trial court held that Delgado had breached the lease by failing to obtain renter's insurance and Westfield was entitled to forfeit the lease.

DISCUSSION

The lease in question is subject to the Franklin Tenant Protection Act, Fr. Civil Code § 500 *et seq.* (FTPA). Where, as here, the tenant has lived in the premises for more than 12 months, the landlord must have "just cause" to terminate the lease. "Just cause" includes "material breach of a term of the lease." Fr. Civ. Code § 501(a)(1).

Materiality

Courts have consistently concluded that "a lease may be terminated only for material breach, not for a mere technical or trivial violation." *Kilburn v. Mackenzie* (Fr. Sup. Ct.

2003). Although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. *Id.* To be material, the breach "must 'go to the root' or 'essence' of the agreement between the parties," such that it "defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Id.* (quoting Walker's Treatise on Contracts § 63 (4th ed. 1998)). This materiality limitation even extends to leases that contain clauses purporting to dispense with the materiality limitation.

In *Vista Homes v. Darwish* (Fr. Ct. App. 2005), the landlord brought an eviction action against a tenant who failed to pay $10 of the total $1,000 rent owed to the landlord. The court observed that payment of the rent in accordance with the terms of the lease is one of the essential obligations of the tenant, and the failure of the tenant to properly discharge this obligation is a legal cause for dissolving the lease. However, because the rent shortfall was *de minimis* (only 1% of the rent amount owed), the court concluded that the breach was not material. *See also Pearsall v. Klein* (Fr. Ct. App. 2007) (no material breach where tenant left minor amounts of debris outside apartment because debris did not damage apartment and landlord could remove debris and back-charge tenant for the cost). *But cf. Sunset Apartments v. Byron* (Fr. Ct. App. 2010) (harboring a pet when a lease contains a "no-pet clause" constitutes a material breach of the lease agreement).

Westfield argues that the Forfeiture Clause forecloses any materiality argument or defense by Delgado because the Forfeiture Clause allows the landlord to regain possession of the premises if there is "any failure of compliance or performance" by the tenant. It is Westfield's position that the Forfeiture Clause trumps the FTPA's "material" breach requirement. However, the FTPA makes clear that its tenant protection provisions cannot be waived. Fr. Civ. Code § 501(g).

Not every default by a tenant justifies the landlord's termination of the tenancy, especially where the breach involves a nonmonetary covenant in the lease and/or a lease provision that is for the tenant's benefit. Here, the Insurance Clause was not related to the payment of rent. Notably, Westfield had the ability to detect and cure the breach far in advance of bringing suit but chose not to do so. Moreover, the Insurance Clause benefited Delgado, not Westfield, by protecting her against loss of her personal property in the apartment. Delgado's failure to comply with the Insurance Clause was a trivial breach,

and Westfield has no ground to argue that it was harmed by Delgado's failure to obtain insurance.

Public Policy Considerations

Public policy and other considerations also lead us to conclude that the failure to obtain renter's insurance is not a material breach of the lease. The FTPA was born out of the shortage of affordable housing. Among other things, it prohibits landlords from terminating leases without a specific enumerated "just cause," Fr. Civil Code § 501(a), and also seeks to safeguard tenants from excessive rent increases, Fr. Civil Code § 505(a), by imposing certain statutory limitations and obligations on landlords that landlords would otherwise not be subject to under normal freedom-to-contract principles. *Stark v. Atlas Leasing* (Fr. Ct. App. 2003). While the freedom to contract is important, the Franklin legislature has determined that free-market principles do not apply to residential leases due to the unequal bargaining power between landlord and tenant resulting from the scarcity of adequate housing. *Id.* Here, Delgado and Westfield's lease reflects the unequal bargaining power recognized by *Stark* and other courts in that the unilateral forfeiture clause entirely benefits Westfield as the landlord. The Forfeiture Clause makes any breach by Delgado grounds for Westfield to forfeit the lease and imposes no obligations at all on Westfield.

Permitting landlords like Westfield with superior bargaining power to forfeit leases based on minor or trivial breaches would allow them to strategically circumvent FTPA's "just cause" eviction requirements and disguise pretext evictions under the cloak of contract provisions. FTPA's public policy goals of providing stable affordable housing to Franklin residents and preventing pretext evictions outweigh the free-market and freedom-to-contract principles allowing a landlord to include a unilateral forfeiture clause in a residential rental contract.

A materiality requirement has the added benefit of preventing potentially unmeritorious litigation. Permitting forfeiture for trivial breaches of a lease could unleash a torrent of unmeritorious evictions. Without the protection of a materiality requirement, tenants potentially are in jeopardy of defending frivolous eviction actions for trivial breaches. For example, Delgado's lease prevents her from even bringing a musical instrument onto the premises. If we upheld the forfeiture clause as Westfield argues, Delgado could risk forfeiture of the lease, and eviction, for absurdly trivial reasons, e.g., if she hung a violin with no strings on

her wall for decoration because it was a family heirloom or if for a few days she had in her apartment a gift-wrapped electronic keyboard for a niece's upcoming birthday. This court will not uphold forfeiture clauses that could result in such frivolous litigation.

Reversed.

MPT1
ANSWER

CONFIDENTIAL MEMORANDUM

TO: Hannah Timaku, Supervising Attorney

FROM: Examinee

RE: Laurel Girard Matter; Landlord-Tenant Dispute

DATE: July 30, 2024

ISSUE

The prominent issue is whether Laurel Girard's noncompliance with the terms of her residential lease entered into by and between herself and Hamilton Place, LLC constitutes a material breach of the terms and therefore permits Hamilton Place, LLC to properly file an eviction suit to vacate the premises.

BRIEF ANSWER

Yes, Hamilton Place, LLC may commence legal proceedings against Ms. Girard for her failure to comply with the rental increase as failure to pay constitutes a material breach of the residential lease terms. However, the presence of Mr. Girard's emotional support cat, Zoey, does not constitute a material breach of the residential lease terms as she is within her right to have said assistance animal under Franklin Civil Code Section § 756.

DISCUSSION

(A) Hamilton Place, LLC abided by the terms of its residential lease and did not violate Franklin Civil Code § 505 when it implemented a 10% rent increase.

Ms. Girard's failure to pay the rent increase implemented by Hamilton Place, LLC will constitute a material breach of her residential lease. *See Westfield Apartments LLC v. Delgado* (2021). This case is similar to Franklin Court of Appeal's analysis in *Westfield Apartments LLC v. Delgado* (2021). In *Westfield Apartments LLC*, a landlord attempted to evict a tenant for failure to comply with a term contained in a residential lease agreement. *Id.* The tenant, having agreed to obtain and pay for renter's insurance, failed to comply with this condition for over two years. *Id.* At that time, the landlord provided the tenant with a three-day "notice to perform or quit." *Id.* When the tenant failed to adhere to the notice, the landlord brought suit seeking forfeiture of the lease. *Id.* The court ultimately held that the tenant's failure to maintain renter's insurance for the premises did not constitute a material breach. *Id.* It reasoned that a material breach "must 'go to

the root' or 'essence' of the agreement between the parties, such that it defeat the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Id.* (citing to *Kilburn v. Mackenzie (*Fr. Sup. Ct. 2003). Furthermore, the court held that "payment of the rent in accordance with the terms of the lease is one of the essential obligations of the tenant, and failure of the tenant to properly discharge this obligation is a legal cause for dissolving the lease." *Id.* (citing *Vista Homes v. Darwish* (Fr. Ct. App. 2005)). Ms. Girard had an essential obligation under her residential lease with Hamilton Place, LLC and her failure to abide by said term constituted a material breach therefore giving Hamilton Place, LLC legal cause to bring forth a suit of forfeiture/eviction.

In *Westfield Apartments LLC v. Delgado* (2021), the court also acknowledged that the Franklin legislature sought to reduce the unequal bargaining power that is often found between a landlord and tenant. *Westfield Apartments LLC v. Delgado* (2021). Pursuant to that initiative, the Franklin Legislature implemented the Franklin Tenant Protection Act in an effort "to safeguard tenants from excessive rent increases." *Id.; see also* Franklin Civil Code § 500 *et seq.* Under §505(a) of the code, a landlord is not permitted to increase a tenant's rent, within any 12-month period, more than 10 percent. Franklin Civil Code §505(a). Under the present facts, Hamilton Place, LLC did not violate the Franklin Tenant Protection Act. Pursuant to the terms of the residential lease agreement, Ms. Girard permitted Hamilton Place, LLC to "raise [] rent no sooner than 12 months after the commencement of [the] lease." Residential Lease Agreement (3). Ms. Girard received notice of the rent increase 17 months after the commencement of the lease. The notice provided to Ms. Girard indicated that rent would be increased by $150.00. In doing so, and as acknowledged by Ms. Girard, the rent increase did not exceed the 10% parameters as dictated under Franklin Civil Code §505(a). Therefore, Hamilton Place, LLC did not violate the lease terms under which Ms. Girard agreed to be subject to and her argument believing that the rent increase was unfair will likely be found to be unsubstantiated.

(B) Hamilton Place, LLC violated Franklin Civil Code Section §756 when it threatened to evict Ms. Girard due to the presence of her emotional support animal.

Due to the superior bargaining power held by landlords, the Franklin legislature by way of the Franklin Fair Housing Act prevents landlords from evicting tenants without "just cause" despite the presence of a contractual provision in a residential lease. *See Westfield Apartments LLC v. Delgado* (2021). Under the Franklin Fair Housing Act, Ms. Girard is permitted to have her emotional support animal, Zoey, on the premises she is renting from Hamilton Place, LLC. *See* Franklin Civil Coe § 750 *et seq.* Ms. Girard has been diagnosed with an emotional disability of anxiety as recognized under the Act. Franklin Civil Code § 755(c). Due to her condition, Franklin Civil Code § 756(a) permits Ms. Girard to have an assistance animal at her residence despite the fact that there is a no-pets provision in her residential lease agreement. Franklin Civil Coe §756(a). Although the code does not require confirmation of her disability-related need, Ms. Girard's provider gave Hamilton Place, LLC such confirmation on July 26, 2024 three days prior to Ms. Girard's receipt of its Notice to Quit. The contents of that document provided by Ms. Girard's psychiatrist came from a reliable third party who was in the position to know of Ms. Girard's disability as she has been Ms. Girard's provider for the past four years. Therefore, Hamilton Place, LLC violated the Franklin Fair Housing Act when it attempted to evict Ms. Girard based upon the presence of her assistance animal, Zoey. If a court permits Hamilton Place, LLC to act in such a manner, its conduct would violate the public policy considerations the Franklin legislature sought to protect when enacting the Franklin Fair Housing Act. *Westfield Apartments LLC v. Delgado* (2021).

CONCLUSION

Because the rent increase implemented by Hamilton Place, LLC did not constitute a violation of the Franklin Tenant Protection Act, Ms. Girard's failure to comply with the term resulted in a material breach of the residential lease. Therefore, Hamilton Place, LLC has legal cause to bring an action of eviction against her. Hamilton Place, LLC may not however bring a cause of action against Ms. Girard for the presence of her assistance animal as the presence of said animal is valid pursuant to the Franklin Fair Housing Act.

Applicant Number

MPT-2
724

MPT®
Multistate Performance Test

CDI Inc. v. Sidecar Design LLC

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CDI Inc. v. Sidecar Design LLC

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FILE

Breen & Lennon LLP
Attorneys at Law
520 Jackson Blvd.
Bristol, Franklin 33708

MEMORANDUM

TO: Examinee
FROM: Damien Breen
DATE: July 30, 2024
RE: Sidecar Design matter

We have been consulted by Yolanda Davis, the manager of Sidecar Design LLC, an internet design firm. About a week ago, Sidecar received a letter from the attorney for a former client, Conference Display Innovations Inc. (CDI), demanding $606,000 in damages. Davis has asked for advice about what damages, if any, Sidecar Design may be required to pay to CDI.

This dispute arises from Sidecar's work on a web-based payment system for CDI. According to Davis, one of Sidecar's own employees, John Smith, accessed the payment system, billed one of CDI's customers, and transferred the money to himself.

As you'll see, CDI's demand letter identifies several different legal claims. I would like you to prepare a memorandum to me analyzing the claim that Sidecar has violated the federal Computer Fraud and Abuse Act (CFAA). Another associate is researching the remaining claims, including whether Sidecar has liability under the doctrine of *respondeat superior*. For purposes of this memorandum, however, you should assume that Sidecar is liable for Smith's actions.

Your memorandum should analyze the following two questions:

(1) Is Sidecar Design liable to CDI under the CFAA?

(2) Assuming that Sidecar Design is liable, what damages, if any, can CDI recover under the CFAA?

Do not include a statement of facts in your memorandum. Instead, be sure to integrate the facts as appropriate into your legal analysis.

Breen & Lennon LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Damien Breen
RE: Summary of Interview with Yolanda Davis
DATE: July 26, 2024

This memorandum summarizes an interview with Yolanda Davis, the manager of Sidecar Design LLC. Sidecar is a website design and creation business. On July 23, 2024, Sidecar received a demand letter from CDI Inc., a business that designs display installations for conventions and business gatherings.

CDI contracted with Sidecar to create a website and a secure payment system so that CDI could expand its business nationwide. According to Yolanda Davis, the staff at CDI "knew nothing about websites or how to operate them." CDI and Sidecar signed a written contract; we do not yet have a copy of that contract.

Pursuant to their contract, Sidecar built a payment system that allowed CDI's customers to pay invoices from CDI with a credit card. The payment system stored credit card information for each customer. CDI used that information to bill its customers, and the system deposited the payments received into a CDI bank account. The amounts charged through this system could be substantial, from around $60,000 to over $200,000.

During the period in which it was creating the website and payment system, Sidecar had a password that gave it full access to all the data present in the system, including customer credit card information. CDI staff members knew this; indeed, CDI asked Sidecar to create the password-protected system to secure customer information. CDI also repeatedly insisted that Sidecar not use any of CDI's customer data once it had been entered, and Sidecar consistently agreed not to do so.

Nonetheless, as it built the system for CDI, Sidecar's login credentials gave it the ability to reach and even to alter customer data as well as CDI's own bank account information. This allowed anyone with the password to charge a customer's account without the customer's knowledge. For example, a person with the password could temporarily change the deposit account to which improperly billed funds would be deposited.

During this time, Sidecar hired John Smith, a software engineer, to work on the project. Smith programmed the payment system for CDI and set up the customer accounts. Unknown to anyone at Sidecar, and before the system had been completed, Smith charged $25,000 to one of CDI's customers and arranged to transfer those funds to his own bank account.

Sidecar eventually finished its work and transferred control of the website and payment system to CDI. At that point, Sidecar's work under its contract with CDI ended. CDI repeated its request that Sidecar not use any of CDI's data. In return, Sidecar advised CDI to change its login credentials for the payment system. Within two days, using the as-yet-unchanged login credentials, Smith charged an additional $50,000 to the same CDI customer and deposited those funds to his own bank account.

Shortly afterward, this CDI customer discovered the fraudulent billings and requested that CDI refund the total amount taken: $75,000. That customer also terminated a pending contract with CDI worth $125,000.

CDI immediately changed the password that Sidecar had used. CDI then hired a cybersecurity firm to investigate and remedy the data breach. That investigation identified Sidecar as the source of the data breach. Acting on the cybersecurity firm's recommendation, CDI shut its website down for five days. The security firm charged CDI $4,000 to investigate and fix the problem. The firm charged CDI an additional $500 to upgrade its security system with stronger protections. CDI estimates that it paid its own employees $1,500 in overtime to help with the security firm's investigation.

CDI's counsel sent a demand letter to Sidecar Design. The letter requested payment of damages totaling $606,000. The letter threatened several different civil causes of action against Sidecar, including one arising under the Computer Fraud and Abuse Act.

After receiving the letter, Yolanda Davis verified that CDI had changed the password to its payment system. John Smith left his position at Sidecar a few days before the first contact from CDI about the data breaches. He disappeared, and Davis is now trying to track him down, so far without success.

Breen & Lennon LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Damien Breen
DATE: July 28, 2024
RE: Sidecar Design LLC

This chronology summarizes the results of my investigation into the events that occurred during and after Sidecar Design's work for CDI Inc.

5/31/2024 Sidecar Design begins work on a website and payment system for CDI.

6/5/2024 John Smith, a new Sidecar employee, begins work on the payment system. This work includes entering credit card information into customers' accounts.

6/28/2024 Using his access to CDI's payment system, Smith charges a CDI customer $25,000 and deposits that amount to his bank account.

7/2/2024 Sidecar completes building the website, and its contractual relationship with CDI ends. Sidecar instructs CDI to change the password for the payment system. CDI does not change the password.

7/5/2024 Using this password, Smith charges another $50,000 to the same CDI customer and deposits that amount to his bank account.

7/8/2024 Smith resigns from Sidecar Design and leaves no forwarding information.

7/9/2024 The customer charged by Smith contacts CDI, demanding reimbursement of $75,000. This customer also terminates a $125,000 contract with CDI.

CDI changes the password on the payment system. CDI also pays the customer $75,000.

7/11/2024 CDI hires a cybersecurity firm to investigate and fix the data breach and assigns an employee to work with this firm. On the firm's advice, CDI shuts down its website and payment system.

7/16/2024 CDI restores its website and payment system.

Jameson & Brooks, PC
63 Lockwood Road, Suite 600
Centralia, Franklin 33758

July 19, 2024

Ms. Yolanda Davis
Sidecar Design LLC
5564 Orbit Road
Bristol, Franklin 33716

RE: Claim for Damages from CDI Inc.

Dear Ms. Davis:

This letter serves as a formal demand for payment of $606,000 to CDI Inc. as damages for losses arising from Sidecar Design's access to and use of customer data held by CDI Inc. These losses were caused by your unauthorized billing of a CDI customer and your deposit of the amounts so obtained into accounts not held by CDI.

We seek damages in the following amounts:

Cost of investigating and correcting data breach	$6,000
Restitution to improperly billed customer	$75,000
Contract with customer terminated	$125,000
Punitive damages	$400,000
TOTAL	$606,000

If you do not pay the total amount demanded in this letter within 30 days of receiving it, we will commence legal action against you. We will assert claims based on breach of contract, trespass to chattels, intentional interference with contractual relations, fraud, and violation of the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

If you retain an attorney, we will provide further detail to that attorney about the dates and amounts of the transactions in question.

Sincerely,

Henry Brooks

Henry Brooks, Esq.
Counsel for CDI Inc.

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COMPUTER FRAUD AND ABUSE ACT

18 U.S.C. § 1030: Fraud and related activity in connection with computers

(a) Whoever—

. . .

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer; [or]

. . .

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value . . .,

shall be punished [as provided in a separate section] . . .

(e) As used in this section—

. . .

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

. . .

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service . . .

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves [losses to the claimant during any one-year period totaling at least $5,000]. Damages for a violation involving only [such] conduct . . . are limited to economic damages.

HomeFresh LLC v. Amity Supply Inc.
(D. Frank. 2022)

Defendant Amity Supply has moved for summary judgment seeking dismissal of all those claims by plaintiff HomeFresh LLC that are based on the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. The court grants Amity's motion in part and denies it in part. We take the facts as stated in HomeFresh's reply to Amity's motion as true. HomeFresh employed Joseph Flynn as its Vice President of Human Resources. During his employment, HomeFresh provided Flynn with a laptop computer that allowed him password-protected access to HomeFresh's servers both in the office and remotely.

Flynn's position gave him digital access to HomeFresh's personnel policies as well as the employment records for all its employees. While his employment contract and HomeFresh's employment policies prohibited him from accessing anything but personnel data, his company-provided computers and login credentials allowed access to all HomeFresh data. Thus, as a vice president, using his login credentials, he had access to any information stored on HomeFresh's servers, of any kind, including customer lists, account information, and contracts.

HomeFresh and Amity compete as suppliers of foodstuffs to food processing companies nationwide. Amity offered Flynn a job similar to his position at HomeFresh but at a much higher salary. Flynn and Amity negotiated the terms of the new position for several weeks before finalizing it. Flynn then gave HomeFresh two weeks' notice of his resignation but did not disclose that he would be joining Amity. During those two weeks, acting at Amity's suggestion and using his HomeFresh-provided laptop and login credentials, Flynn downloaded information on HomeFresh's principal customers. After he left HomeFresh, Flynn kept the laptop; no one at HomeFresh requested that he return it or deactivated his access credentials. Flynn then used the laptop to download additional customer data.

HomeFresh did not learn of Flynn's access until one of its customers informed it that Amity had full details about the customer's contract with HomeFresh. HomeFresh hired experts to investigate and learned that the laptop assigned to Flynn had accessed HomeFresh's customer data both before and after the date that Flynn left HomeFresh's employ to join Amity. At that point, HomeFresh terminated Flynn's user account, changed the password, and sent a cease-and-desist letter to Flynn. In the letter, HomeFresh demanded

that Flynn refrain from further access to HomeFresh's data and that he return the laptop. Flynn complied with these requests.

In its complaint, HomeFresh alleges several grounds for relief from both Amity and Flynn, including violation of the CFAA. With respect to that claim, HomeFresh alleges that Flynn's access to its data was either unauthorized or beyond the scope of his authorized access. In its motion, Amity counters that Flynn's access was authorized because HomeFresh failed to create technical barriers that would prevent Flynn's access to its customer data.

Congress enacted the CFAA in 1986 to address a growing public concern with access to computers by hackers. The Act was later expanded to cover information from any computer "used in or affecting interstate or foreign commerce or communication," a provision now uniformly held to apply to any computer that connects to the internet. 18 U.S.C. § 1030(e)(2)(B); *Van Buren v. United States*, 141 S.Ct. 1648, 1652 (2021). While the CFAA initially imposed criminal penalties, Congress later amended it to permit civil actions against a violator. 18 U.S.C. § 1030(g). Courts have uniformly held that courts should apply the statute consistently in both civil and criminal contexts. *U.S. v. Nosal,* 676 F.3d 854, 858 (9th Cir. 2012).

To maintain a civil action under the CFAA, a plaintiff must show, among other things, that the defendant accessed a computer either "without authorization" or in a way that "exceeds authorized access." 18 U.S.C. § 1030(a)(2), 1030(a)(4). In 2021, the United States Supreme Court decided *Van Buren*, which resolved a circuit split as to the meaning of the phrase "exceeds authorized access." In *Van Buren*, a police sergeant in Georgia was convicted under the CFAA after he used his work computer and login credentials to search a police database for a woman's license plate in exchange for payment from a third party. Through his work computer, the sergeant could reach the departmental database, and his login credentials gave him access to license plate information. No technical barrier to accessing that information existed. Rather, it was only a departmental policy that barred him from using that data for non-law-enforcement purposes.

The Supreme Court reversed Van Buren's conviction, concluding that an individual "exceeds authorized access" only when a person accesses data that the person does not have the technical right to access. "[A]n individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular

areas of the computer—such as files, folders, or databases—that are off limits to him." 141 S.Ct. at 1662. Because Van Buren had a computer and login credentials that gave him access to license plate data, he did not violate the CFAA, even if the purpose for his access violated departmental policy.

In this case, HomeFresh permitted Flynn to use computers, including a laptop, that gave him access to all its data, and his login credentials gave him access to data that included customer information. Even though HomeFresh's employment policies put customer data outside the scope of Flynn's duties, he could still reach that data using HomeFresh's computers. In effect, at the time he accessed customer data, Flynn was not a hacker—he did not need to use technical means to circumvent the password protection in HomeFresh's system because he had valid password access. In short, Flynn's use of the data while still employed by HomeFresh may have violated HomeFresh's employment policies, but it did not violate the CFAA.

HomeFresh next argues that, even if Flynn's access during his employment did not violate the CFAA, any access *after* he left HomeFresh necessarily violated the CFAA because his right to use HomeFresh's computers ended when his employment ended. This argument poses a question that the Supreme Court left explicitly unresolved in *Van Buren*: whether liability under the CFAA turns "only on technological (or 'code-based') limitations on access or instead also looks to limits contained in contracts or policies." *Id.,* 141 S.Ct. at 1658, fn. 8.

If only technological limitations, such as password protection, will suffice to terminate access for purposes of the CFAA, then it would not be until Flynn downloaded data after HomeFresh revoked his password that his actions violated the CFAA. By contrast, if the termination of his right to use HomeFresh's computers terminated his access as defined by the CFAA, any data downloaded *after* Flynn left HomeFresh would violate the Act. Indeed, courts in other jurisdictions have reached differing results on this question. This court, however, finds the latter approach more persuasive. That is, once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers. An employee who does so may be held liable under the CFAA.

For these reasons, Amity's motion for summary judgment as to any data accessed after Flynn left HomeFresh is denied. A triable issue of fact exists as to the alleged violations of the CFAA during that period. At the same time, the court grants Amity's motion as to any data Flynn downloaded while still employed by HomeFresh.

So ordered.

Slalom Supply v. Bonilla
(15th Cir. 2023)

At issue in this appeal is the district court's award of damages for violations of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. Plaintiff Slalom Supply (Slalom) is an online retailer of cold weather gear and sporting supplies. In 2019, Slalom hired defendant Sam Bonilla as a bookkeeper. Like many of Slalom's employees, Bonilla worked remotely from home. In October 2021, Slalom discovered that many accounts were in disarray and that Bonilla had failed to pay a key supplier. Bonilla had been devoting most of his working hours to his own consulting business.

Slalom terminated Bonilla's employment effective November 1. Bonilla's duties had covered all of Slalom's business accounts for customers, suppliers, and facilities. As a result, Bonilla had had password access to all Slalom's records using the internet from his home computer. In light of this, Slalom made sure to change all its system passwords that same day, including those passwords that had allowed Bonilla remote access.

In early December 2021, Bonilla hacked into Slalom's network and diverted two payments from customers—a total of $85,000—to his own account. After discovering this attack, and to preserve its relationship with these customers, Slalom fulfilled these orders at its own expense. Slalom then hired a cybersecurity firm to investigate the breach, which necessitated shutting down its website for four hours early on a Sunday morning during the holiday season. The investigation revealed that Bonilla had used hacking software to bypass the new passwords and had exploited his knowledge of Slalom's accounts to divert the two payments to his own account.

Two months later, Slalom sued Bonilla, asserting violations of the CFAA as well as other claims. Following a bench trial, the district court found that Bonilla had violated the CFAA and awarded Slalom damages under the Act. On appeal, Bonilla does not challenge the finding that his actions violated the CFAA but argues that the district court erred in its award of damages. We address each category of damages in turn.

Costs of Investigation and Remedy

The district court awarded Slalom $7,000 for damages associated with the cost of remedying Bonilla's hacking attack: $4,000 for the investigation, $1,500 to upgrade Slalom's

security system against future cyberattacks, and $1,500 for employee time devoted to protecting the data in its system.

To the extent that the issue of whether a defendant violated the CFAA involves the interpretation of the CFAA, it is a question of law that we review de novo. The CFAA permits recovery of "losses" only if the claimant's losses exceed a threshold amount of $5,000 during any one-year period. 18 U.S.C. § 1030(g). Bonilla argues that Slalom can recover only the cost of the investigation, that is, the $4,000 paid to the cybersecurity firm. According to Bonilla, any employee time or the amount spent to upgrade Slalom's system do not meet the CFAA's definition of compensable "losses." Under § 1030(e)(11), losses include "the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense."

We agree with Bonilla that the $1,500 spent to upgrade the security system does not meet the statutory requirement that costs relate to "restoring the . . . system . . . to its condition prior to the offense." *Id*. The statute's plain language suggests that a victim of hacking cannot use the violation as a means of improving its own security or system capability. That said, Slalom can recover the amount paid to its own employees to assist the cybersecurity firm during the investigation. Nothing in the statutory language requires a hacking victim to rely only on external help to remedy a breach. Further, the district court found that the $1,500 for employee time related solely to working on the investigation and did not relate to the upgrade to Slalom's system.

Thus, we agree with the district court that Slalom had pled and proven losses sufficient to meet the statutory $5,000 requirement. We reverse only that portion of the award, $1,500, relating to the costs of upgrading the system.

Lost Business

The district court awarded Slalom $85,000 as consequential damages resulting from the breach. This amount consists of the value of the goods that Slalom shipped to customers whose payments Bonilla diverted to his own account. In support of this award, Slalom submits that the definition of compensable "loss" under the CFAA includes "any revenue lost, cost incurred, or other consequential damages incurred *because of interruption of service*." 18 U.S.C. § 1030(e)(11) (emphasis supplied). Unfortunately for Slalom's argument, the plain text of the Act limits compensable losses to only those that result specifically from an "interruption in service."

Case law supports a narrow reading of § 1030(e)(11). "Lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." *Selvage Pharm. v. George* (D. Frank. 2018) (dismissing complaint that failed to allege facts constituting an interruption of service, e.g. installation of a virus that caused the system to be inoperable). *See also Next Corp. v. Adams* (D. Frank. 2015) ($10 million revenue loss resulting from misappropriation of trade secrets not a CFAA-qualifying loss because it did not result from interruption in service). Most cases based on lost revenue and consequential damages involve such things as the deletion of critical files that cost the plaintiff a lucrative business opportunity, *Ridley Mfg. v. Chan* (D. Frank. 2015), or the alteration of system-wide passwords, *Marx Florals v. Teft* (D. Frank. 2012). Courts have awarded such damages even where the interruption is only temporary, provided that the alleged damages result from the interruption. *Cyranos Inc. v. Lollard* (D. Frank. 2017) (affirming award of damages specifically tied to deactivation of website for two days during peak sales).

In the case at hand, Bonilla's hacking redirected two customer payments; it did not otherwise impair or damage the functionality of Slalom's computer system. The hacker did not delete any files or change any passwords in the system. The parties, however, agree that Slalom experienced a four-hour interruption in service when its website was subsequently shut down at the recommendation of experts. Slalom offered no evidence that specifically tied any losses to the four-hour shutdown of its website. To the contrary, its sales figures were comparable to those of previous years. In short, the only costs established by Slalom to have been "because of" this interruption were the amounts it paid to investigate the hack and protect its data. By contrast, Slalom's business decision to fulfill the two customers' orders happened *before that interruption*, not as a result of it. Since the interruption in service did not cause the claimed losses, we reverse the district court's award of $85,000.

Punitive Damages

Finally, the district court awarded Slalom $300,000 in punitive damages. On appeal, Bonilla argues that this award is out of proportion to the costs that Slalom incurred to remedy the breach.

We do not reach the proportionality issue because the CFAA limits the recovery of damages in civil cases to "economic damages." Courts have consistently refused to include punitive damages within the definition of "economic damages." "[T]he plain language of the CFAA statute precludes an award of punitive damages." *Demidoff v. Park* (15th Cir. 2014).

Accordingly, we affirm that portion of the judgment awarding Slalom the cost of investigating the data breach. The award of consequential and punitive damages is reversed.

So ordered.

MPT 2
ANSWER

Breen & Lennon LLP

Attorneys at Law

520 Jackson Blvd.

Bristol, Franklin 33708

MEMORANDUM

TO: Damien Breen

FROM: Examinee

DATE: July 30, 2024

RE: Sidecar Design Matter - Liability and Damages under CFAA

Dear Damien,

Below is my analysis of the claim that Sidecar Design LLC violated the federal Computer Fraud and Abuse Act (CFAA), Sidecar's liability, as well as potential damages that CDI can recover from Sidecar under the CFAA.

(1) Sidecar Design is likely liable to Conference Display Innovations Inc. (CDI) under the CFAA because John Smith exceeded his authorized access on July 5, 2024, after Sidecar completed its contractual relationship with CDI on July 2, 2024, but we will need to see the contract for more information.

Congress enacted the CFAA in 1986 to address a growing public concern with access to computers by hackers. *HomeFresh LLC v. Amity Supply Inc.* The Act was later expanded to cover information from any computer "used in or affecting interstate or foreign commerce or communication," a provision now uniformly held to apply to any computer that connects to the internet. 18 U.S.C. Section 1030(e)(2)(B); *Van Buren v. United States*, 141 S.Ct. 1648, 1652 (2021), While the CFAA initially imposed criminal penalties, Congress later amended it to permit civil actions against a violator. 18 U.S.C. Section 1030(g). Courts have uniformly held that courts should apply the statute consistently in both civil and criminal contexts. *U.S. v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012).

Here, the Franklin court will apply the CFAA because of the civil nature of the case and its direct issue with a computer using the internet.

To maintain a civil action under the CFAA, a plaintiff must show, among other things, that the defendant accessed a computer either "without authorization" or in a way that "exceeds authorized access." 18 U.S.C. Section 1030(a)(2), 1030(a)(4). In 2021, the United States Supreme Court decided *Van Buren*, which resolved a circuit split as to the meaning of the phrase "exceeds authorized access." In *Van Buren,* a police sergeant in Georgia was convicted under the CFAA after he used his work computer and login credentials to search a police database for a woman's license plate in exchange for payment from a third party. *HomeFresh*. Through his work computer, the sergeant could reach the departmental database, and his login

credentials gave him access to license plate information. *Id.* No technical barrier to accessing that information existed. Rather, it was only a departmental policy that barred him from using that data for non-law-enforcement purposes. *Id.*

The Supreme Court reversed Van Buren's conviction, concluding that an individual "exceeds authorized access" only when a person accesses data that the person does not have the technical right to access. *Id.* "[A]n individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of the computer--such as files, folders, or databases--that are off limits to him." 141 S.Ct. at 1662. Because Van Buren had a computer and login credentials that gave him access to license plate data, he did not violate the CFAA, even if the purpose for his access violated departmental policy. Similarly, in *HomeFresh*, Flynn was permitted to use computers that gave him access to data that included customer information. Since Flynn was not a hacker and had valid password access, his actions did not violate the CFAA.

Here, John Smith worked for Sidecar beginning on June 5, 2024. His work involved entering credit card information into customers' accounts. On June 28, 2024, during Smith's employment, he used his access to CDI's payment system and charged a CDI customer $25,000, which Smith then deposited into his own personal bank account. Because Smith was permitted to use CDI's payment system and it was during the contractual relationship between Sidecar and CDI, Smith had the technical right to access, and his use did not exceed his authorized access under the Supreme Court's definition of authorized access under the CFAA. This is comparable to Flynn in *HomeFresh* who had access to customer information during the course of his work and had valid password access; the case here with Smith is very similar. Thus, while Smith was working under the contract between CDI and Sidecar, his actions did not violate the CFAA.

Conversely, in *HomeFresh*, the court held that once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers. An employee who does so may be held liable under the CFAA. *Id.*

Here, Sidecar ended its contractual relationship with CDI on July 2, 2024. On July 5, 2024, Smith charged $50,000 to the same CDI customer and deposited that amount into his own bank account. Smith then resigned on July 8, 2024 and left no forwarding information. While Smith still had the right to use Sidecar's passwords and login credentials, the contract between Sidecar and CDI had ended when Smith used password information to take customer funds. CDI would likely argue that because its contractual relationship had ended, access by Smith had also ended, and I believe this would be very persuasive.

Conversely, the Supreme Court in *Van Buren* left a question explicitly unresolved: whether liability under the CFAA turns "only on technological (or 'code-based') limitations on access or instead also looks to limits contained in contracts or policies."

Here, to provide comprehensive counsel, we would need to see the contract between Sidecar and CDI. If Smith had technological access and was still employed by Sidecar, Sidecar might be able to prove that it is not liable under the CFAA. If the contract between CDI and Sidecar shows that access after the contract was done and Sidecar was no longer allowed to use access CDI's information, then Sidecar would be liable for the $50,000 charge under the CFAA.

(2) Assuming that Sidecar Design is liable, CDI can recover the following damages under the CFAA:

Here, the losses were within a one-year period, spanning June 28 to July 9 of 2024. CDI is claiming total losses of $606,000.

Costs of Investigation and Remedy

To the extent that the issue of whether a defendant violated the CFAA involves the interpretation of the CFAA, it is a question of law that courts review de novo. *Slalom Supply v. Bonilla*. The CFAA permits recovery of "losses" only if the claimant's losses exceed a threshold amount of $5,000 during any one-year period. 18 U.S.C. Section 1030(g). In *Bonilla*, Bonilla argued that any employee time or the amount spent to upgrade company computer systems do not meet the CFAA's definition of compensable "losses." Under Section 1030(e)(11), losses include "the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense."

In *Slalom Supply*, money spent to upgrade a security system did not meet the statutory requirement that costs relate to "restoring the . . . system . . . to its condition prior to the offense." 18 U.S.C. Section 1030(3)(11). The statute's plain language suggests that a victim of hacking cannot use the violation as a means of improving its own security or system capability. Here, CDI paid a security firm $500 for a computer system upgrade. Since this was likely not related to restoring the system to its condition prior to the offense, Sidecar does not owe this amount.

In *Slalom Supply*, Salom was able to recover the amount paid to its own employees to assist the cybersecurity firm during the investigation. Nothing in the statutory language requires a hacking victim to rely only on external help to remedy a breach. *Id.* Here, CDI paid a security firm $4,000 for investigating the breach and it was reasonable for CDI to rely on external help to remedy a breach. Thus, Sidecar is likely liable for the $4,000 if it is determined that Sidecar violated the CFAA.

Additionally in *Slalom Supply*, the district court found that the $1,500 for employee time related solely to working on the investigation and did not relate to the upgrade to Slalom's system, and thus was included in the investigation costs. Here, CDI paid its employees overtime of $1,500 to help with the security firm's investigation, and this amount would be recoverable if Sidecar is found to have violated the CFAA.

Lost Business

Case law supports a narrow reading of Section 1030(e)(11), as the plain text of the Act limits compensable losses to only those that result specifically from an "interruption of service." *Slalom Supply v. Bonilla.* "Lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." *Selvage Pharm. v. George* (D. Frank. 2018) (dismissing complaint that failed to allege facts constituting an interruption of service, e.g. installation of a virus that caused the system to be inoperable). *See also Next Corp. v. Adams* (D. Frank. 2015) ($10 million revenue loss resulting from misappropriation of trade secrets not a CFAA-qualifying loss because it did not result from interruption in service). Most cases based on lost revenue and consequential damages involve things such as the deletion of critical files that cost the plaintiff a lucrative business opportunity, *Ridley Mfg. v. Chan* (D. Frank. 2015), or the alteration of system-wide passwords, *Marx Florals v. Teft* (D. Frank. 2012).

Courts have awarded such damages even when the interruption is only temporary, provided that the alleged damages result from the interruption. *Cyranos Inc. v. Lollard* (D. Frank. 2017) (affirming award of damages specifically tied to deactivation of website for two days during peak sales).

In *Slalom Supply*, the hacking redirected customer payments but did not otherwise impair or damage the functionality of Slalom's computer systems. Slalom did incur, however, a four-hour interruption in service when its website was shut down at the recommendation of experts. Slalom offered no evidence of losses specifically tied to this shut down. Here, CDI has shown no evidence of losses specifically tied to its 5-day shut down, but it might be able to prove this by sales from previous years.

Also, *Slalom Supply* held that Slalom's business decision to fulfill two customer orders that happened before the service interruption was not a result of the interruption. The court reversed the payments made to reimburse the customer's money that was stolen. Here, CDI paid a customer $125,000 to reimburse the funds stolen from Smith. As explained above, $25,000 of this occurred before the contract finished and $50,000 after the contract finished. Since these funds were not due to the service interruption, it is unlikely that these could be attributed to lost business.

Punitive Damages

The CFAA limits the recovery of damages in civil cases to "economic damages." *Slalom Supply*. Courts have consistently refused to include punitive damages within the definition of "economic damages." *Id.* "[T]he plain language of the CFAA statute precludes an award of punitive damages." *Demidoff v. Park* (15th Cir. 2014).

Here, CDI is asking for $400,000 in punitive damages. Since the language of CFAA precludes an award of punitive damages, a court would not hold Sidecar liable to this amount if found to have violated the CFAA.

In sum, we need to see the contract between Sidecar and CDI to further our analysis on whether Sidecar might be liable for the $50,000 that Smith stole after the contract had ended. If Sidecar is found to have violated the CFAA, it would be liable for the $5,500 in costs that CDI incurred for its security investigation.

END OF EXAM

MEE Question 1

Four years ago, Connie, a professional homebuilder, purchased a five-acre, rectangular tract of land. On its western side, the tract was bordered by land owned by Diane. One month after Connie purchased the tract, Diane sued Connie in state court to establish her adverse possession claim to a 12-foot-wide strip immediately inside the western border of Connie's tract, where Diane had maintained a vegetable garden. The court issued a judgment in Diane's favor, which was filed at the county recorder's office.

Three years ago, Connie built a house on the eastern half of the tract. One month after Connie completed the house, she contracted to sell the entire five-acre tract to Bert and convey it by warranty deed. The purchase agreement contained no express warranties regarding the quality of the house's construction. At the closing, Connie delivered to Bert the warranty deed, which excepted from warranties "all titles, covenants, and restrictions on record with the county recorder."

One year ago, Bert conveyed the five-acre tract to Adam by a quitclaim deed that contained no warranties. Adam had never inspected the tract.

Three months ago, a major crack appeared in the foundation of the house due to faulty construction. This resulted in frequent water intrusion and substantial water damage to the house.

Two months ago, when Adam started to construct a fence around the entire five-acre tract, Diane correctly told him that he could not lawfully build a fence that would block her access to the portion that she owned by adverse possession.

A gravel road runs from north to south through the middle of the five-acre tract. The gravel road connects the adjoining northern lot to the highway that abuts the tract to the south. One month ago, during Adam's fence construction on the north side of the tract, Adam's northern neighbor correctly told him that she had an implied easement of necessity over the gravel road, preventing her land from being landlocked.

1. Does Adam have a cause of action against Connie based on the crack in the house's foundation? Explain.

2. Does Adam have a cause of action against Connie based on Diane's ownership of a portion of the tract by adverse possession? Explain.

3. Does Adam have a cause of action against Bert based on Diane's ownership of a portion of the tract by adverse possession? Explain.

4. Does Adam have a cause of action against Connie based on the neighbor's easement over the tract? Explain.

In answering these questions, assume that none of Adam's claims are barred by any statute of limitations.

MEE 1
ANSWER

1) Adam v. Connie - crack in foundation

Adam does not have a cause of action against Connie for the crack in the foundation. The main issue here is whether a subsequent owner of a newly constructed house has a workmanship warranty that the original new owner initially had.

When a new house is constructed a warranty of workmanship accompanies it for a few years warranting the house to be free from poor workmanship defects. This warranty is allowed to pass to subsequent owners if no action was undertaken to improve the property by the first owner. Additionally, a warranty deed is the highest form of conveyance that conveys to property to another warranting be free from encumbrances by the current owner and prior owners. These encumbrances include the fact the the grantor owns the property, the fact that they did not encumber it, and the fact there are not claims by third parties to a right in the property (right of quiet enjoyment). Further, a general warranty deed conveys that if a third party lays claim to the title the grantor will defend that claim at their own expense. The general warranty deed does not warrant a particular physical quality of the property or the structures on it. Further, a deed conveying title via a quitclaim deed is the lowest form of conveyance that conveys only the interest one has in the property (if any) and makes to warrants or guarantees.

Here, Adam bought the house and property four years after it was built. Even though he was a subsequent buyer in the new house he is too far removed from its initial construction date to obtain any protections under the workmanship warranty as these warranties generally last no more than two years. However, if the jurisdiction where the house is located has a workmanship quality law the extends for four years Adam would be able to seek refuge under it as no changes to the foundation or the house were made within the four years.

Further, he bought the property from Bert via quitclaim which means that Adam got the property rights that Bert had in the property but that Bert made no warranties or guarantees. Thus, Adam received the rights Connie grated to Bert via the warranty deed. While there are a substantial amounts of rights and warranties contained in a general warranty deed none of them contain a warranty to quality of a house.

Therefore, Adam will not have a cause of action against Connie because she did not warrant the house to be free from structural defects when she conveyed the property to Bert (who's rights Adam received under the quitcalim deed).

2) Adam v. Connie - Diane's ownership via adverse possession

Adam does not have a cause of action against Connie for Diana's ownership of a portion of the tract by adverse possession.

Generally, a warranty deeds guarantees a property to be free from claims of adverse possessors. However, if mentioned in the deed this can be altered. Here, in the warranty deed Connie gave to Bert she stated that the property was conveyed via a warranty deed "except from warranties 'all titles covenants, and restrictions on record with the county recorder.'"

Four years ago Diana claimed adverse possession on Connie's parcel of land and the court ruled in Diana's favor which this judgment was placed on the land's title at the county recorder's office. This all occurred before Connie transferred the land via warranty deed. While this normally would be a problem under a warranty deed Connie place dthe above mentioned clause in the deed thus negating the warrant for restrictions on the land that were of record. Here the restriction of adverse possession claim was on record and thus does not fall under the normal warranty grant.

Therefore, Adam has no cause of action against Connie because of the exception noted on the deed to Bert.

3) Adam v. Bert - Diane's ownership via adverse possession

Adam does not have a cause of action against Bert for Daina's ownership via adverse possession. The issue here is can their be a claim against a grantor who gave title via quitclaim deed for a mark on the title of the property.

When a buyer buys a property via a quitclaim deed they take only the property ownership the grantor had in the property (if any) and no warrants or guarantees are made by the grantor.

Here, Adam took received a quitclaim deed from Bert. Thus, Adam took with property from Bert free of any grants or warranties. This means that if anything is wrong with the property such as someone else having an ownership interest in it the grantee cannot attack the grantor. Further, the warranty of marketability is implied in all land sales unless otherwise waived. Here, the quitclaim deed waives this warranty.

Therefore, Adam has no cause of action against against Bert because he acquired the property from him via a quitclaim deed.

4) Adam v. Connie - neighbor's easement

Adam has a cause of action against Connie for the neighbors easement. The main issue here is whether a warranty deed conveys title assuring that there are no easements on the property.

The warranty of marketability is implied in all land sales unless otherwise waived. Further, a deed by warranty conveys the property guaranteeing that there are no exsisting easements on it.

Here, Adam received the warrants and grants under the warranty deed. Thus, he received the right of quiet enjoyment. However, he cannot quietly enjoy his property

because of the existing mark on title created by the neighbor's easement. Thus, under the warranty grants Connie is responsible for defending the right to the property and compensation if this cannot be negated. Further, this easement was not recorded when Connie transferred to Bert and thus does not fit under the exception.

Therefore,Adam has a cause of action against Connie because a third party has a claim of right in the property via the easement.

END OF EXAM

MEE Question 2

XYZ Corp owns all the common stock of CruiseCo, which operates a fleet of 24 oceangoing passenger cruise ships. In addition, XYZ owns 90% of the common stock of ResortCo, which operates several large hotels and marinas on ocean coastlines. As a result of its share ownership, XYZ has the power to choose all members of the boards of directors for both ResortCo and CruiseCo, and it has voted its shares so as to elect XYZ employees for all seats on each board. All three corporations are incorporated in State A, which has adopted a corporate statute identical in substance to the Model Business Corporation Act.

During the past two years, CruiseCo's profits have steadily declined because fewer people have booked cruises. Moreover, many of the marinas where CruiseCo's ships stop to refuel have increased their docking fees. CruiseCo's ships frequently dock at ResortCo-owned marinas as part of their ordinary operations. ResortCo charges CruiseCo the same docking fees as it charges other cruise lines.

Last year, XYZ demanded that ResortCo stop charging CruiseCo's ships docking fees. At a board meeting to consider this demand, ResortCo's directors voted unanimously to acquiesce to XYZ's demand, even though ResortCo was contractually entitled to those fees. Eliminating the fees would help CruiseCo by reducing its operating costs and hurt ResortCo by lowering ResortCo's revenues.

Six months ago, at a board meeting, ResortCo's directors voted unanimously not to declare or pay the usual yearly dividend. The directors' rationale for this decision was to retain funds to construct new hotels and increase ResortCo's market share. The board reached its dividend decision after considering for several hours a report on the financial implications of the potential dividend from the company's chief financial officer and its independent accountant, as well as an advisory opinion prepared by an outside law firm.

At ResortCo's properly called board meeting last week, the board considered an offer that had been presented to ResortCo's president half an hour before the meeting. The offer was from Ava, the owner of 1,000 acres of coastal land well suited for commercial property development, to sell her land to ResortCo for $50 million. Ava, who had no previous connection to ResortCo, had told the president that she would hold the offer open for only 48 hours. Citing the time-sensitive nature of the offer and the attractiveness of the property, ResortCo's directors discussed Ava's offer for only 15 minutes before unanimously voting to accept it. ResortCo's directors did not obtain any guidance about the transaction's fairness or potential impact on the company's financial condition from outside experts or from ResortCo's chief financial officer before voting. In fact, the price was above the property's fair market value.

1. Did XYZ, as a controlling shareholder of ResortCo, breach a fiduciary duty of loyalty to ResortCo or ResortCo's minority shareholders by causing ResortCo to stop charging CruiseCo docking fees? Explain.
2. If ResortCo's minority shareholders challenge the board's decision not to declare a dividend this year, are they likely to prevail? Explain.
3. Is the ResortCo board of directors' decision to purchase Ava's land protected by the business judgment rule? Explain.

MEE 2
ANSWER

1. XYZ's alleged breach of fiduciary duty of loyalty to ResortCo:

The issue here is whether XYZ's causing of ResortCo to stop charging CruiseCo for docking fees violated XYZ's fiduciary duty of loyalty to ResortCo or Resort Co's minority shareholders. Controlling shareholders of a corporation owe a fiduciary duty to the corporation and its minority shareholders. Included in the fiduciary duties are the duty of loyalty. The duty of loyalty forbids self dealing transactions. When a breach of the duty of loyalty action is brought, the burden of proof rests on the defendant to show that the transaction was fair to the corporation. A transaction is fair if it does not undermine the transaction wholly for the benefit of the self-dealer. The issue becomes whether forcing Resort Co to stop charging cruise co was fair. It likely wasn't.

First, CruiseCo and ResortCo are separate entities. Through their dealings, ResortCo has never gave Cruiseco special treatment because resort always charged cruise the same amount that it charged other cruise lines. The effect of this transaction is that it hurts resort co for the sole benefit of cruise co. It matters not that Resort is largely owned by XYZ, the transaction is purely self dealing and XYZ will have a hard time proving that this self dealing transaction is fair to resortco and especially the minority shareholders who have no stake in the success of cruiseco.

Thus, XYZ most likely breached the fiduciary duty of loyalty to resortco and the minority shareholders by causeing resort to stop charging cruiseco docking fees because it was a self dealing transaction and XYZ has no defense.

2. The Board's decision not to declare a dividend this year.

The issue here is whether resortco's minority shareholders can successfully challenge the board of director's decision not to declare a dividend this year. They cannot.

When a plaintiff brings an action against a board of directors alleging they made a bad business decision to the detriment of the company, the burden of proof rests on the plaintiff. Certain matters, such as the choice whether or not to declare a dividend, rests with the board of directors. It was within the board of director's ability to make such a decision and if the minority shareholders challenge this decision they will have to provide proof that the board acted unreasonably in making this decision. The board has the business judgment rule in its favor which gives rise to the presumption that such a decision was reasonable.

Further, the minority shareholders will not be able to prove that the board made this decision on an improper basis: the director's had a business goal in mind to retain funds to construct new hotels and increase the company's market share. Further, they reached this decision after considering for hours a report on the financial implications of the potential dividend from the company's CFO and an independent accountant, as well as an

advisory opinion prepared by an outside law firm. Clearly the board of directors was diligent in making this call and the minority shareholders will not be able to offer proof to overcome the presumption that the board of directors acted prudentially in making this business decision.

3. Decision to purchase land from Ava.

The issue here is whether the board of director's decision to purchase land from Ava will be protected under the business judgment rule. It probably will not. Again, the business judgment rule provides that when a plaintiff brings a claim for the breach of the duty of care the plaintiff must overcome a presumption that a business decision was prudentially made. A plaintiff can overcome the business judgment rule's presumption by providing a strong showing of unreasonableness on behalf of thedirectors.

Here, much of the board's decision was done haphazardly. The offer from Ava--someone who had zero connection with resortco-- was presented to the president a mere half hour before the meeting. While the offer was sensitive, the option left the offer open for 48 hours. Despite this, the board discussed Ava's offer for a mere 15 minutes (despite it being a $50 million transaction) before unanimously accepting it. Further, Resortco did not obtain any financial guidance on whether the transaction was fair or how it would effect their business from outside experts nor resortco's CFO. On top of that, the price was above the property's fair market value. From this, it is clear that resortco did not do their due diligence (ie they did zero homework on the transaction and just jumped in) on the transaction. The fact the offer was only open for 48 hours cannot justify this because much can be accomplished in 48 hours as opposed to 15 minutes. This procedure is in stark contract to the board's decision to withhold dividends, which would be protected under the business judgment rule.

Therefore, the board's decision to purchase the land is likely not protected by the business judgment rule.

END OF EXAM

The Boards of Bar Examiners did not select a representative passing answer for this question.

MEE Question 4

Wanda, who had been married to Harvey for 15 years, filed a complaint for divorce from Harvey shortly after she learned that he was having an affair with their married neighbor, Patrice. In the divorce proceeding, both Wanda and Harvey sought sole custody of their 13-year-old daughter.

Because Harvey and Wanda bitterly argued about and were highly critical of each other's parenting, the trial court appointed a neutral child-custody evaluator to investigate the family dynamics and provide an informed custody recommendation to the court. Both Wanda and Harvey told the evaluator that they were unwilling to share custody. The daughter told the evaluator that she was very upset because her parents were divorcing. She blamed her mother for the divorce and wanted to live with her father. The evaluator found that both parents were devoted to their daughter and recommended that the trial court grant Harvey sole physical and legal custody of the daughter, with Wanda to have liberal visitation with the daughter. The trial court granted the divorce and entered a custody order consistent with the evaluator's recommendation. Neither parent appealed this order.

Two months after the trial court entered the divorce decree and custody order, Patrice moved into Harvey's home. Wanda immediately petitioned the trial court to modify the custody order. She sought sole physical and legal custody of the daughter because of Harvey's nonmarital cohabitation with Patrice. Harvey opposed Wanda's petition, arguing that there was no justification for modifying the custody order. Neither Wanda nor Harvey requested joint custody, and the relationship between Wanda and Harvey remained bitter and acrimonious.

The trial court held a hearing on Wanda's petition to modify custody. The daughter testified, "I am still angry that my parents got divorced, but I do miss my mom and wouldn't mind seeing her more. Patrice is fine." Harvey testified that there had been no change in the daughter's behavior since Patrice moved into his home and that she and the daughter "get along well."

Wanda testified that the daughter should not be exposed to the nonmarital cohabitation of Harvey and Patrice. There was no other testimony.

1. Are the facts legally sufficient to authorize the trial court to consider whether to modify the existing custody order? Explain.

2. Assuming that the facts are legally sufficient to authorize the trial court to consider whether to modify custody, should the trial court modify the existing custody order to grant Harvey and Wanda joint physical and legal custody of their daughter? Explain.

MEE 4
ANSWER

1. The issue is whether the facts present a legally sufficient basis for the trial court to consider whether to modify the existing custody order.

Child custody orders are intended to create consistency and predictability for the care of the child. Therefore, once a child custody order has been entered, it is generally unmodifiable for a statutorily prescribed period, 1 year in most jurisdictions. If a party seeks to modify the order prior to that expiration of that period, they must show that there has been a substantial change in circumstances since the entry of the order presenting a risk to the well-being or health of the child.

Here, Wanda petitioned to modify custody two months after the initial entry of the custody order. Wanda based her petition on the fact that Patrice moved into Harvey's house and Wanda's belief that the daughter should not be exposed to non-marital cohabitation. There is no indication that daughter has been harmed by Patrice moving in through physical harm, a lack of attention and care from Harvey, animosity towards or from Patrice, etc. There are no other facts to indicate that any other circumstances have changed in the daughter's life as a result of Patrice moving in and Wanda provided no additional support for her motion. Therefore, the facts are likely legally insufficient to allow a court to consider whether to modify the existing custody order only two months after it was initially entered.

2. The issue is whether the trial court should modify the existing custody order to grant Harvey and Wanda joint physical and legal custody of their daughter, if the court is authorized to consider whether to modify custody.

Child custody determinations are based on the best interests of the child. Legal custody refers to the right to make major decisions for a child, including education, medical, and religion. Physical custody is the right to have the child stay in your home and to take responsibility for the day-to-day care of the child. Some jurisdictions impose a rebuttable presumption that joint legal custody is in the best interests of the child. Courts hesitate to award joint physical custody unless both parents agree to the arrangement. When determining the best interests of the child, courts consider several factors including: the age and needs of the child, the primary caregiver during the marriage, the preferences of the child if the child is of sufficient age and maturity, the ability for the parents to work together, and the existence of any history of domestic abuse.

The initial custody order awarded Harvey sole legal and sole physical custody of the daughter and gave Wanda "liberal visitation." At the time of the initial order, the daughter expressed a preference to live with her dad, but has since stated that she misses her mom and would like to see her more. The daughter said that Patrice is "fine" and Harvey testified that there had been no change in the daughter's behavior since Patrice moved in, believing that the two "get along well." However, the relationship between Harvey and

Wanda remains "bitter and acrimonious" and Wanda vehemently objects to Patrice living in the home with Harvey and daughter. The continuing animus between Harvey and Wanda is likely to be a significant factor in the court's decision regarding modification because joint legal and joint physical custody requires that the parents work together to some degree to participate in both the major and daily decisions regarding their child. Particularly, neither Harvey or Wanda appear to agree to joint physical or legal custody because Harvey initially petitioned for sole legal and sole physical custody and Wanda's recent petition to modify asserts that she wants sole legal and sole physical custody. The factors supporting a modification to joint legal and physical (daughter's preference) are likely to continue to be outweighed by the animus between the parties indicating an unwillingness or inability to work together for the benefit of their child.

Therefore, a court is unlikely to modify the custody order to grant Harvey and Wanda joint physical and joint legal custody of their daughter.

END OF EXAM

The Boards of Bar Examiners did not select a representative passing answer for this question.

INDIAN LAW QUESTION

John Star Eagle is a member of the Cheyene River Sioux Tribe and a resident of the Cheyenne River Sioux Reservation in South Dakota. Mr. Star Eagle is the biological father of twin girls, Vanessa and Felicity Star Eagle, who were born in Sioux Falls. Mary Johnson, a non-Indian resident of Sioux Falls, is the twins' biological mother. The twins are enrolled members of the Cheyenne River Sioux Tribe.

Mr. Star Eagle has had significant contact with the twins since their birth, despite the fact that they have continually lived in Sioux Falls with their mother. He visits them frequently and pays monthly child support. On one recent visit to Sioux Falls, Mr. Star Eagle became concerned about the twins' care while in their mother's custody. Ms. Johnson's home had fallen into disrepair, and she appeared to be under the influence of drugs or alcohol while caring for and supervising the children. Once Mr. Star Eagle returned home, he called the Sioux Falls Police Department and asked them to perform a wellbeing check on the twins.

When the police officers arrived at Ms. Johnson's home, they found the home in disrepair and Ms. Johnson to be suffering from paranoid delusions. They found methamphetamine and drug paraphernalia throughout the home, easily within reach of the twins. The police contacted the local child protection office of the state Department of Social Services (DSS) and asked that the twins be removed from the home and custody of their mother. DSS removed the twins and placed them in temporary foster care.

A temporary custody hearing was then held in Second Judicial Circuit Court in Minnehaha County, at which both Mr. Star Eagle and Ms. Johnson appeared with court-appointed counsel. Temporary custody (for 14 days) was awarded to DSS, which has since filed a Petition alleging abuse and neglect. In the Petition, DSS alleges that the twins qualify as "abused and neglected" children as that phrase is defined under South Dakota law. The Petition seeks continued custody of the twins and continued placement in foster care while DSS works with the family toward reunification.

Citing the Indian Child Welfare Act, Mr. Star Eagle filed a motion in circuit court to transfer the case to the Cheyenne River Sioux Tribal Court. The Cheyenne River Sioux Tribe filed a motion to intervene in the circuit court matter. The Cheyenne River Sioux Tribal Court has expressed its willingness to accept the transfer. Ms. Johnson has filed a motion objecting to both the proposed transfer to tribal court and the Tribe's intervention in the circuit court matter.

1) Does the Indian Child Welfare Act apply to this factual scenario?
2) How should the Circuit Court rule on Mr. Star Eagle's Motion to Transfer to Tribal Court?
3) How should the Circuit Court rule on the Tribe's Motion to Intervene?

Please explain your answers in detail.

ILQ
ANSWER

1. Whether the Indian Child Welfare Act applies to this scenario.

The Indian Child Welfare Act ("ICWA") applies to this factual scenario. At issue is whether ICWA applies to foster car proceedings and whether there are Indian children involved.

Congress passed ICWA to prevent the removal of Indian children from their Indian families and from their tribes. As such, ICWA applies to custody proceedings involving Indian children that includes: (1) foster care placements, (2) terminations of parental rights, (3) pre-adoptive placements, and (4) adoption placements. Under ICWA, and "Indian Child" is a child under 18 years of age who (1) is an enrolled member of a Tribe, or (2) is eligible to become a member of a Tribe based upon the Tribe's set mandates.

Here, both of the twin girls, Vanessa and Felicity Star Eagle, are considered an "Indian Child' under ICWA because both are under the age of 18 and are enrolled members of the Cheyenne River Sioux Tribe. Additionally, ICWA applies to the Department of Social Services' ("DSS") proceedings because this is a proceeding for foster care placement. DSS is essentially seeking to continue their custody of the twins and find a placement in foster care for the twins while DSS works toward reunification.

Thus, because the twin girls are both considered an "Indian Child" and this is a foster care placement proceeding, ICWA applies to this factual scenario.

2. Whether the Circuit Court should grant or deny Mr. Star Eagle's motion to transfer to Tribal Court.

The Circuit Court should deny Mr. Star Eagle's motion to transfer the foster care proceeding to Tribal Court. At issue is who may bring a transfer petition and what are the conditions for transfer to tribal court under ICWA.

Under ICWA, a Tribe, parent, or Indian custodian may move to transfer a foster care placement or termination of parental rights proceedings from state court to tribal court. The motion to transfer must be granted unless (1) one parent refuses transfer, (2) the tribal court refuses jurisdiction, or (3) other good cause exists. Here, because the twins' mother, Mary Johnson, objects to the proposed transfer to tribal court, the Circuit Court should deny the motion to transfer. In the absence of Ms. Johnson's objection to transfer to tribal court, the motion to transfer should be granted because the Cheyenne River Sioux Tribal Court has expressed its willingness to accept the transfer and no good cause exists to not grant the transfer. However, in the face of Ms. Johnson's objection to transfer to tribal court, the Circuit Court should deny Mr. Star Eagle's motion to transfer.

Additionally, this is not a case where the tribal court has exclusive jurisdiction over the girls. Under ICWA, a tribal court has exclusive jurisdiction over a custody proceeding of an Indian Child where (1) the Indian child resides on the reservation, or (2) the Indian Child is

a ward of the Tribe. In all other cases, the tribal court and state court share concurrent jurisdiction over the custody proceedings. Here, the twin girls reside in Sioux Falls, not on the Cheyenne River Sioux Reservation, and both girls are not wards of the Cheyenne River Sioux Tribe. Instead, both the tribal court and state court have concurrent jurisdiction over the case.

Because one of the parents has objected to the transfer from state court to tribal court, the Circuit Court should deny Mr. Star Eagle's motion to transfer to the Cheyenne River Sioux Tribal Court.

3. Whether the Circuit Court should grant or deny the Tribe's motion tointervene.

The court should grant the Tribe's motion to intervene. At issue is whether ICWA allows a Tribe to intervene in foster case proceedings.

Under ICWA, a Tribe, parent, or Indian custodian of an Indian child may intervene at any point in a foster care or termination of parental rights proceeding. Because the Cheyenne River Sioux Tribe has properly filed a motion to intervene in the foster care proceeding, the Circuit Court must grant the motion to intervene. Ms. Johnson's objections to the Tribe's intervention have no effect on the Circuit Court's decision as the Tribe must be allowed to intervene because Indian children are involved and it is a foster care proceeding.

The Circuit Court should grant the Tribe's motion to intervene as provided for under ICWA.

END OF EXAM