

# THE MPT

MULTISTATE PERFORMANCE TEST

## *July 2000 MPTs and Point Sheets*

*March v. Betts*

*Pauling v. Del-Rey Wood Products Co.*

*Franklin Asbestos Handling Regulations*



The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in July 2000 in nineteen jurisdictions: Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Maine, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Texas, and West Virginia.

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. The point sheet is not an official grading guide and is not intended to be a "model answer." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheet. User jurisdictions are free to modify the guidelines, including any suggested weights assigned to particular points. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet** or the NCBE website at [www.ncbex.org](http://www.ncbex.org).

# July 2000 Multistate Performance Tests and Point Sheets

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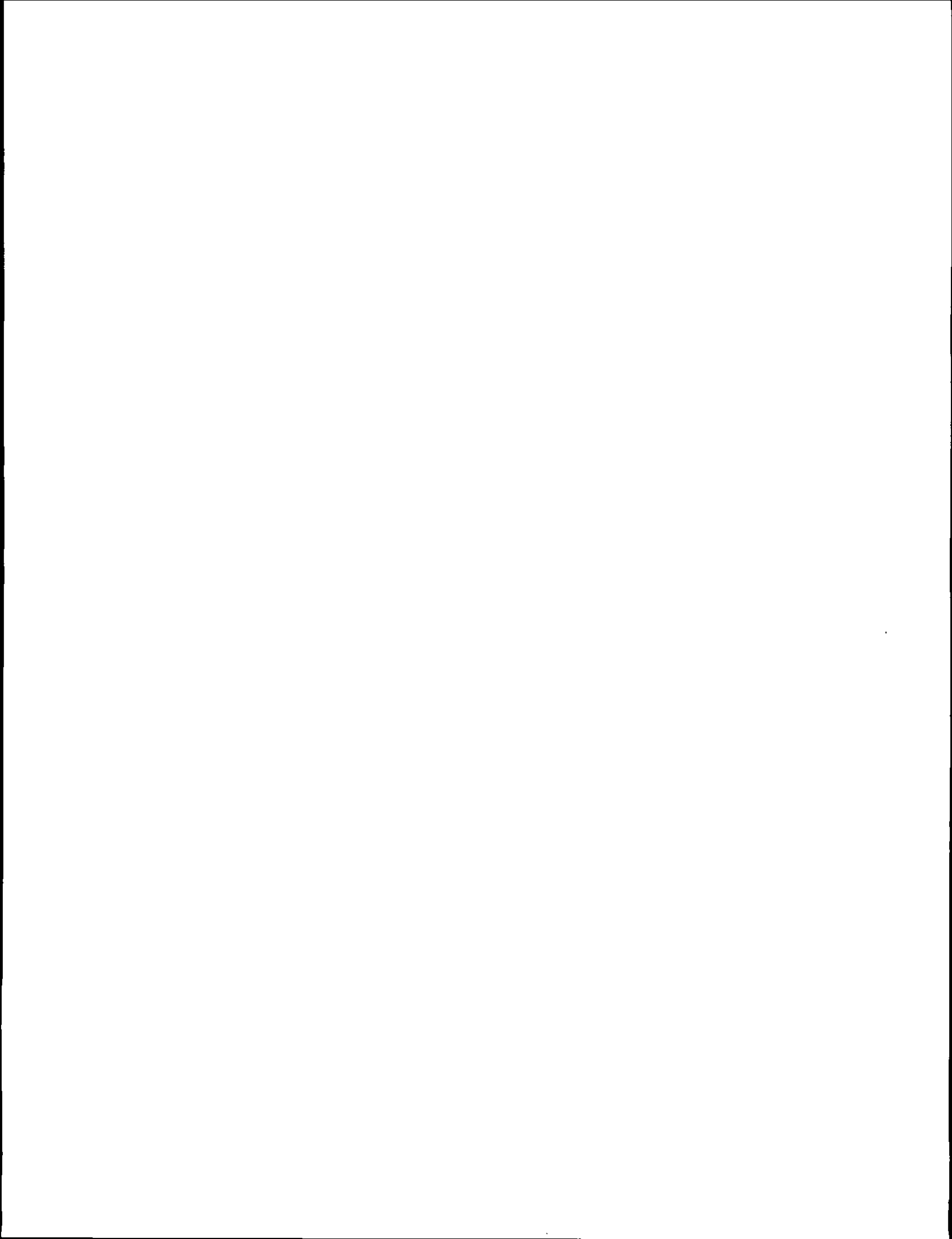
## INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may also include some facts that are not relevant.
4. The Library contains the legal authorities needed to complete the task, and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.



**FILE**

*March v. Betts*



Mitchell, Fitch & Dawson  
2205 Crescent Lane  
Porter City, Franklin 33214

**To:** Applicant

July 25, 2000

**From:** Craig Dawson

**Re:** Arlene March - Mediation Statement

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Last week, while staffing the Bar Association Pro Bono Clinic, I agreed to represent Arlene March. Last month, Ms. March rode home in a Sun Cab taxi with her wheelchair folded up in the trunk. An expensive custom-built back brace, which needed to be detached when the wheelchair was folded up, was left in the trunk when the taxi drove away. Efforts to retrieve the back brace have failed, and Sun Cab has denied all responsibility. In response to Ms. March's complaint to the Porter City Taxi Commission and her election to pursue mediation, the Commission has ordered mandatory mediation of the matter.

We need to file a persuasive written mediation statement with the Taxicab Commission's mediator. I intend to rely on three legal theories: that the cab driver breached a contract of bailment; that the cab driver was negligent; and that, in both cases, Sun Cab Association and the owner of the cab are vicariously liable.

Please draft a mediation statement for my signature in accordance with Sections 3a. and 3b. of the Taxicab Commission's mediation procedures. After you have completed this assignment, I will meet with Ms. March to discuss what relief she really wants, so don't draft Section 3c. of the letter.

Mitchell, Fitch & Dawson  
2205 Crescent Lane  
Porter City, Franklin 33214

**To:** File

July 18, 2000

**From:** Craig Dawson

**Re:** Notes of Interview with Arlene March

---

Arlene March sustained a serious spinal cord injury in a hit and run accident five years ago that left her largely paralyzed from the neck down. Because her spine was not completely severed, she still has some movement in and control over parts of her body. She is unable to work, and her only source of income is Supplemental Security Income (SSI). She requires 24-hour care. She is assisted by a nurse from Homecare, Inc. four hours a day, the maximum that medical assistance will pay for. The rest of the time, she is helped by her cousin, Maxine Taylor, who lives in Arlene's apartment rent-free in return for providing care and performing housekeeping duties.

Ms. March has two wheelchairs, one electric (which she can maneuver on her own, but which is not very portable and therefore difficult to take to places without wheelchair access) and one manual (in which she needs to be pushed). The electric wheelchair has built-in back support that enables Ms. March to sit up straight and alleviates some pain produced by sitting. The manual wheelchair, which folds up easily, has a custom-made, form-fitting back brace that must be inserted in place of the normal sling on the back of a folding wheelchair to provide the necessary support for Ms. March when she is using that wheelchair.

Last month, Ms. March and Ms. Taylor took a cab with the insignia of the Sun Cab Association home from Porter City Park, where they go on an average of two times a month to listen to concerts, watch the tennis players, or play chess at the outdoor chess tables. Because of the need for cab transportation between their home and the park, they took the manual wheelchair. The driver placed the wheelchair and the back brace in the trunk of the cab. When they reached Ms. March's home, Ms. March and the cabdriver got into a dispute about the fare, and her back brace was left in the

trunk when the driver, Gary Betts, drove off. The dispute is described in the complaint Ms. March filed with the Taxicab Commission, a copy of which she brought with her (attached).

Since losing her back brace, Ms. March has been trying to get a replacement. The Porter City Rehabilitation Institute, where she received treatment as an inpatient after her accident and where she has continued ever since, got her both wheelchairs and the back brace in the first place. Although her doctor, Dr. Maureen Korn, wrote her a new prescription for a replacement brace, Jeremy Steel, her social worker, said that Medicaid would not pay for it unless she were an inpatient. The cost of a new brace is over \$1,600, which she cannot afford out of her monthly SSI grant of \$328.

Ms. March wants to recover, at a minimum, two components of damages: the money to replace the lost brace and compensation for the limitations on her activity caused by not having the use of the back brace. I spoke to her at length about the choice between filing a lawsuit or seeking mediation under the new Porter City Taxicab Commission Mediation Program. She liked the fact that mediation could result in a much faster resolution of the problem and decided to pursue the mediation choice.

The Commission's files show that Cynthia Maxon is the owner of the cab and that she pays dues to and is a member of the Sun Cab Association. That gives her the right to buy insurance coverage through the Association, use the Association's logo and color scheme, and use the Association's dispatch services. There is no record in the Commission's files of Gary Betts as a registered driver for either Sun Cab or Cynthia Maxon.

**Porter City Taxicab Commission**  
**Disputes Between Passengers and Taxicab Drivers, Owners, and Associations**

Procedures for Mediation

If the parties are unable to resolve their dispute among themselves, the passenger may ask that the complaint be referred to the Commission's Mediation Program. The following procedures shall be followed:

1. The Secretary of the Commission shall appoint a mediator from the existing panel of mediators who shall be members in good standing of the Porter City Bar Association.
2. Within 30 days from the referral, a mediation session will be scheduled and the parties notified by mail of the session.
3. No later than 10 days prior to the date set for the mediation session, the passenger shall file with the Commission a written mediation statement, which shall be in letter format and which shall:
  - a. describe the dispute;
  - b. explain the legal and factual reasons why the taxicab driver, owner and/or Association is/are responsible and should be held to account;
  - c. state the relief sought.
4. No later than 5 days prior to the date set for the mediation session, the taxicab driver, owner, or Association shall file with the Commission a written reply to the mediation statement, which shall be in letter format and which shall:
  - a. describe its version of the dispute;
  - b. explain the legal and factual reasons why it is not responsible and should not be held to account;
  - c. state what resolution, if any, it proposes.

**Porter City Taxicab Commission  
Complaint - Form 220**

**Complainant:** Arlene March

**Complaint No.** 7639

**Address:** 2705 Hawthorne St., Porter City

On Sunday, June 11, 2000, at 7:00 p.m., myself and my cousin, Maxine Taylor, were picked up at Porter City Park and taken to 2705 Hawthorne Street by Sun Cab #206. I require help when traveling. When I arrived at my destination, the driver tried to charge me \$10. I knew that the amount that he told me was too much so I gave him \$8 instead. The driver insisted that the fare was \$10 and he started to argue with me and tried to show me how many zones he went through to get to my destination. While in the cab I looked at his license and got his name, Mr. Gary Betts. Maxine got out of the cab to get the wheelchair out of the trunk. While she was helping me into the chair, the cabdriver got upset, slammed the trunk, and drove off before we could get my back support out of the trunk.

On Monday, I called Sun Cab and spoke to Mr. Abner, the dispatcher. I explained my situation to him and Mr. Abner told me to call back the next day and he could give me some more information on Mr. Betts. I called the next day, which was Tuesday. Mr. Abner informed me that he and the driver had looked in the cab and couldn't find anything in the trunk. I told Mr. Abner that I needed my back support and he told me to call the place where I got my back support and to get an estimate. I called Porter City Rehabilitation Institute to get the price and it is valued at \$1644. When I called back and gave Mr. Abner the price, he told me the driver was let go, but they are not responsible. So I informed Mr. Abner that I would contact the Taxi Commission. I called the Commission and they told me to try and work it out with Sun Cab. I called back and spoke to Mr. Abner and he tried to estimate the cost of my back support himself and wanted to give me \$100 for it and \$8 back for the fare. On Wednesday, I called the Commission again and spoke to Mr. Smith and he sent Inspector Hall over to my house so I could make this formal complaint.

**Date:** June 20, 2000

**Signature** Arlene March

Porter City Taxicab Commission  
2041 Winter Avenue  
Porter City, Franklin 33214

July 5, 2000

Ms. Cynthia Lea Maxon  
1201 S. Courthouse Road  
Porter City, Franklin 33214

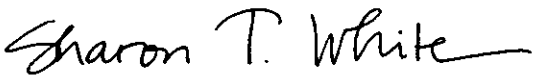
Mr. Marvin Shaw, Operations Manager  
Sun Cab Association, Inc.  
2100 Vidal Avenue  
Porter City, Franklin 33214

Dear Ms. Maxon and Mr. Shaw:

You are hereby notified that Arlene March has filed with Porter City Taxicab Commission a complaint regarding Sun Cab Association vehicle #206, which our records show is owned by Cynthia Maxon and operates under the trade name and colors of Sun Cab Association. Under the regulations of the PCTC, you must attempt informal resolution of this matter. If that is not successful, the passenger may choose to pursue mediation under the PCTC Mediation Program.

Failure to obey these procedures is a violation of Taxicab Commission regulations and may result in a hearing before the Commission's Panel on Adjudication. If found guilty, you may receive a **suspension** or **revocation** of your privilege to own or operate public vehicles in Porter City and/or the imposition of a fine up to \$500.

Sincerely,



Sharon T. White  
Taxicab Dispute Resolution Specialist

Enclosure

**SUN CAB ASSOCIATION**

**2100 Vidal Avenue  
Porter City, Franklin**

Sharon T. White  
Taxicab Dispute Resolution Specialist  
Porter City Taxicab Commission  
2041 Winter Avenue  
Porter City, Franklin 33214

July 11, 2000

**RE: Sun Cab #206**

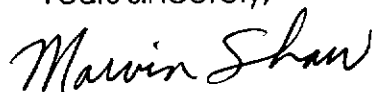
Dear Ms. White:

In response to your letter of July 5, I submit to you the following:

We tried our best to recover the back support from the alleged driver, who was driving the Taxicab illegally and without our permission or knowledge, without much success. However, we did confiscate the Tags of the Taxicab and handed them over to Inspector Hall.

At this time, due to extreme financial hardship, we can only offer a sum of \$200 as a donation towards the purchase of a back support. As you are aware, we try our best to run our business according to the rules and regulations set forth by the Taxicab Commission, but there are times when some incidents take place over which we do not have any controls. This, unfortunately, is one such mishap.

Yours sincerely,



Marvin Shaw  
Operations Manager

# FMIC

FIRST MADISON INSURANCE COMPANY  
3341 Denning Road  
Porter City, Franklin 33214

July 11, 2000

**VIA CERTIFIED MAIL**

Marvin Shaw  
Sun Cab Association  
2100 Vidal Avenue  
Porter City, Franklin 33214

**RE: Complaint of Arlene March to Porter City Taxicab Commission**

Dear Mr. Shaw:

Thank you for forwarding the complaint filed by Ms. March with the Porter City Taxicab Commission.

Our records reflect that the driver of the accident vehicle, Gary Betts, was not a covered driver under a policy of insurance you have with this company covering vehicle #206 owned by Cynthia Maxon. We cannot, therefore, provide coverage to you for this accident.

We suggest that you retain counsel to defend you in this case. We are sorry that we could not assist you in this matter.

Respectfully,



MICHAEL W. WOOD  
Claims Manager

cc: Porter City Taxicab Commission

NO. B 149254

Porter City Department of Consumer and Regulatory Affairs

CERTIFICATE OF OCCUPANCY

April 14, 1993

(date)

Permission is hereby granted to Sun Cab Association, Inc. to use the 1st floor(s) of the building located at the premises known as 2100 Vidal Avenue for the following purpose(s) Taxicab Office, Rent, Buy, Repair & Sell Cabs & Cars Related Auto Repairs & Auto Body Repairs.

EXPIRATION DATE: December 31, 2000 FEE \$134.08

Donald G. Murray, Acting Director

By

*D.G. Murray*

PORTER CITY TAXICAB COMMISSION PCTC  
 TAXICAB LICENSE  
 NUMBER 27991  
 VALID 01/01/00 to 12/31/00

MAXON, CYNTHIA LEA  
 1201 S. COURTHOUSE ROAD  
 PORTER CITY, FRANKLIN 33214

OWNER ID 486685385

ASSN/COMPANY NO:

SUN CAB ASSN 206

INSURANCE COMPANY

FIRST MADISON INS

VEHICLE IDENTIFICATION NO.

1G1BN69H0FY150134

YEAR	MAKE	MODEL	TAG NUMBER	COLOR
96	CHEV	4D	HPC 472	Silver

STATE OF FRANKLIN  
 AUTOMOBILE REGISTRATION CERTIFICATE

<u>HPC 472</u>	<u>180056</u>
Tag No.	Sticker No.

Title No.	Make	Year	Body	Wgt	Cl
<u>195431V</u>	<u>CHEV</u>	<u>96</u>	<u>TX</u>	<u>40</u>	<u>A</u>

Vehicle ID No.	Fee
<u>1G1BN69H0FY150134</u>	<u>98.00</u>

MAXON, CYNTHIA LEA  
 1201 South Courthouse Road  
 Porter City, Franklin 33214  
 Expires March 31, 2001  
 VALIDATED: BMVS  
 Department of Public Works

# **LIBRARY**

*March v. Betts*



## Franklin Code

### Title 400—Motor Vehicles and Traffic

#### Section 408: Operator deemed to be agent of owner

Whenever any motor vehicle shall be operated upon the public highways of Franklin by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall be deemed to be the agent of the owner of the vehicle. Proof of the ownership of the motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner.

## Marchetti v. Olyowski

Franklin Supreme Court (1980)

Annie Olyowski was injured on February 16, 1978, when the cab in which she was a passenger collided with another vehicle. She sued the driver, the former owner of the vehicle, and the taxicab association for personal injury.

She had met the driver, Anthony Nolan, a few days earlier when he was driving a Diamond Cab. On the day of the accident, Nolan had picked Ms. Olyowski up by pre-arrangement to drive her to Charlotte, Franklin for \$150. On that day, he was driving a vehicle showing the color scheme and trade name of American Cab Association. The cab was registered with the Public Utilities Commission in the name of Philip Marchetti. It showed him as the owner and insured under a general liability policy carried by the American Cab Association, of which Marchetti was a member.

A few days before the accident, Nolan had purchased the vehicle from Marchetti, but no one had notified American of the sale of the vehicle. Nolan registered it in his name but not as a taxicab.

American Cab Association does not own or operate taxicabs, operate a garage, advertise, or furnish telephone call service. The extent of its activity is to permit its members to use its trade name and color scheme and to obtain public liability insurance, coverage under which is indicated by a windshield sticker.

Nolan's negligence is not at issue in this appeal. Drivers of taxicabs have the duty to transport passengers and their property safely. *Johnson v. Sales* (Franklin Supreme Court, 1979). Nolan breached his duty of care when he ran a red light and collided with another car.

At the trial, the judge instructed the jury that, if it found against Nolan, it must also find against Marchetti and American. Marchetti and American appeal based on that instruction.

We first consider the propriety of the instruction with respect to American. We held in *Callas v. Independent Taxi Owners' Association* (Franklin Supreme Court, 1965) that a taxicab bearing the peculiar colors and trade name of a cab association is rebuttably presumed, when involved in an accident or other loss, to have been in the custody of, and engaged in the business of, that association. If the presumption is overcome by uncontradicted proof, the association cannot be found liable.

Here the uncontradicted evidence showed that Nolan was a total stranger to American, with no authority, express or implied, to operate the cab in the name or under the colors of the Association and whose use of the cab was without its knowledge or consent. Nor was there any evidence of reliance by the injured passenger upon the name or colors of the

defendant Association. Accordingly, the trial court's instruction was erroneous.

We are not dissuaded by *Rhone v. Try Me Cab Co.* (Franklin Supreme Court, 1970), where this court held the cab association was estopped to deny liability for damages negligently inflicted by the driver of a cab carrying its colors. The driver in that case was the agent of the owner, who was a member of the defendant cab association; and the plaintiff called the association for service, which responded by sending a cab bearing its insignia. The plaintiff relied, and had a right to rely, upon the Try Me Cab Company. Here Olyowski made her contract with Nolan when he was using a Diamond Cab and did not know he would appear later in a cab marked American Cab Association.

However, the court's instruction vis-à-vis Marchetti was correct. Without notifying American, he turned over to Nolan the taxicab bearing the colors of the Association of which Nolan was not a member and bearing also the insurance sticker issued in Marchetti's name. He made it possible for Nolan to operate the taxicab in an unauthorized manner. Under *Rhone*, he is estopped to deny liability.

Affirmed in part and reversed in part.

## Dovell v. Arundel Supply Corporation

Franklin Court of Appeal (1986)

Ann Dovell sued John Skouzes and Arundel Supply Corporation for damages arising from an injury suffered when she was struck by a truck while crossing a street. Skouzes was the driver-owner of the truck. Arundel was alleged to be vicariously liable for the actions of Skouzes. The trial court granted Arundel's motion for summary judgment on the basis that Skouzes, as a matter of law, was an independent contractor and dismissed the complaint against Arundel. This appeal followed.

John Skouzes owned two dump trucks. He drove one and hired a driver for the other. Skouzes kept the trucks at a garage he rented and was responsible for their maintenance. From 1980 until this accident in November 1982, he worked for Arundel, who had a daily right of first refusal of Skouzes' services. He could seek other work only if Arundel did not need him. The contract of employment was oral and could be terminated by either party. Arundel would load the truck with gravel and measure the load. A representative of Arundel would designate its recipient, leaving the choice of route up to the driver. Arundel required a certain number of deliveries to a particular location in a day. To prove delivery, a receipt would be obtained at the destination. Arundel paid Skouzes weekly on a ton-mile basis without any deductions. On a delivery, the accident occurred.

Franklin courts leave to the jury on these facts the question whether Skouzes was an inde-

pendent contractor or an employee. We look to five factors at least in the determination of the relationship of master and servant: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, and (5) whether the work is a part of the regular business of the employer. Standing alone, none of these indicia, excepting (4), seems controlling. The decisive test is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It is not essential that the alleged master actually exercise the authority to control and direct the action of the servant; it is his *right* to do so that is important. *Silver Auto Co. v. Magruder* (Franklin Court of Appeal, 1975).

In *Keitz v. National Paving and Contracting Co.* (Franklin Court of Appeal, 1965), where a truck was an integral and necessary part of the alleged master's business and subject to the same direction and control as his own trucks, the court held "there was sufficient evidence to require the submission to the jury." In *Grace v. Miller* (Franklin Court of Appeal, 1968), where the question was whether "coal hustlers" who stored coal at the place of a coal customer after its delivery by the company were independent contractors or employees, the court noted that the storage of coal was an essential part of appellant's business and subject to the control of the com-

pany. "Nothing could be more destructive of the goodwill of a business than improper service at the point of contact between the company and the customer."

The trial court erred in granting a motion for summary judgment. A jury determination is required. Material facts are in dispute. For example, while Skouzes independently owned the two trucks, he was not brought in to perform a function unrelated to Arundel's supply business as would be a plumber to repair a leaking faucet in Arundel's office. His function was directly related to and essential to the supplying of gravel by Arundel to Arundel's customers.

In the final analysis, however, it may not matter whether Skouzes is found to be an employee or an independent contractor. In this case, we find that he is an agent of Arundel, and Arundel may be vicariously liable on agency principles. See *Miller v. Pickering* (Franklin Supreme Court, 1961) (principal is liable for torts committed by his agent in the course and scope of the agency).

Reversed and remanded for further proceedings.

**Morris Properties v. Noble**  
Franklin Supreme Court (1995)

Morris Properties appeals the judgment in favor of tenant Noble for \$269.95 for the cost of a stereo tuner delivered to the landlord's apartment building but never delivered to Noble. In reviewing the findings by a trial court, we may reverse only if the findings are clearly erroneous and without evidentiary support, or if there was an error of law. The trial court found that, in February 1994, Noble ordered a stereo tuner from a store in Maine. It was shipped to his apartment in appellant's building and delivered on February 20, 1994. Paulette McLean, the receptionist, signed the receipt for and received the tuner and placed it on a shelf in a small room next to her desk where packages for tenants were kept. McLean routinely accepted packages on behalf of tenants. Access to the room was limited; McLean and the night receptionist had keys to the door and there were bars on the windows.

When McLean was replaced by the night receptionist, the package was on the shelf. Noble later informed McLean that he had never received his tuner. McLean had assumed that he had received it since the tuner was not on the shelf when she returned to work the next morning. Thereafter, McLean gave Noble the empty box in which the tuner had been packaged. The box had been found outside the building.

A bailment requires a delivery by the bailor and the acceptance by the bailee of the subject

matter of the bailment. The bailee does not acquire title to the property but merely holds it according to the terms of the bailment. A bailment is a form of contract and, thus, requires the mutual consent of the parties. If there is no express agreement, an implied in fact bailment can be found if it appears that such was the intent of the parties.

A plaintiff may establish a prima facie case for breach of the contract of bailment by showing the bailment and the loss of his/her property. Where a breach of the contract of bailment has occurred, the plaintiff may recover contract damages.

A prima facie case for breach of the contract of bailment also raises a presumption of negligence on the part of the bailee. When there is no evidence in rebuttal, the plaintiff may recover tort damages, such as compensatory damages.

A landlord may occupy the dual position of landlord and bailee, and the nature of the bailment will determine the proper standard of care. If the bailment is gratuitous, liability is limited to acts of gross negligence, willful acts, or fraud. When a bailment is for hire, the standard of care imposed on the bailee is that of ordinary care.

In this case, the landlord provided the locked room for packages received for tenants. A bailment for hire was created when McLean

placed Noble's package on the shelf. The landlord was required to exercise ordinary care, and proof by Noble of delivery and failure to produce the tuner established a prima facie case of negligence by the landlord.

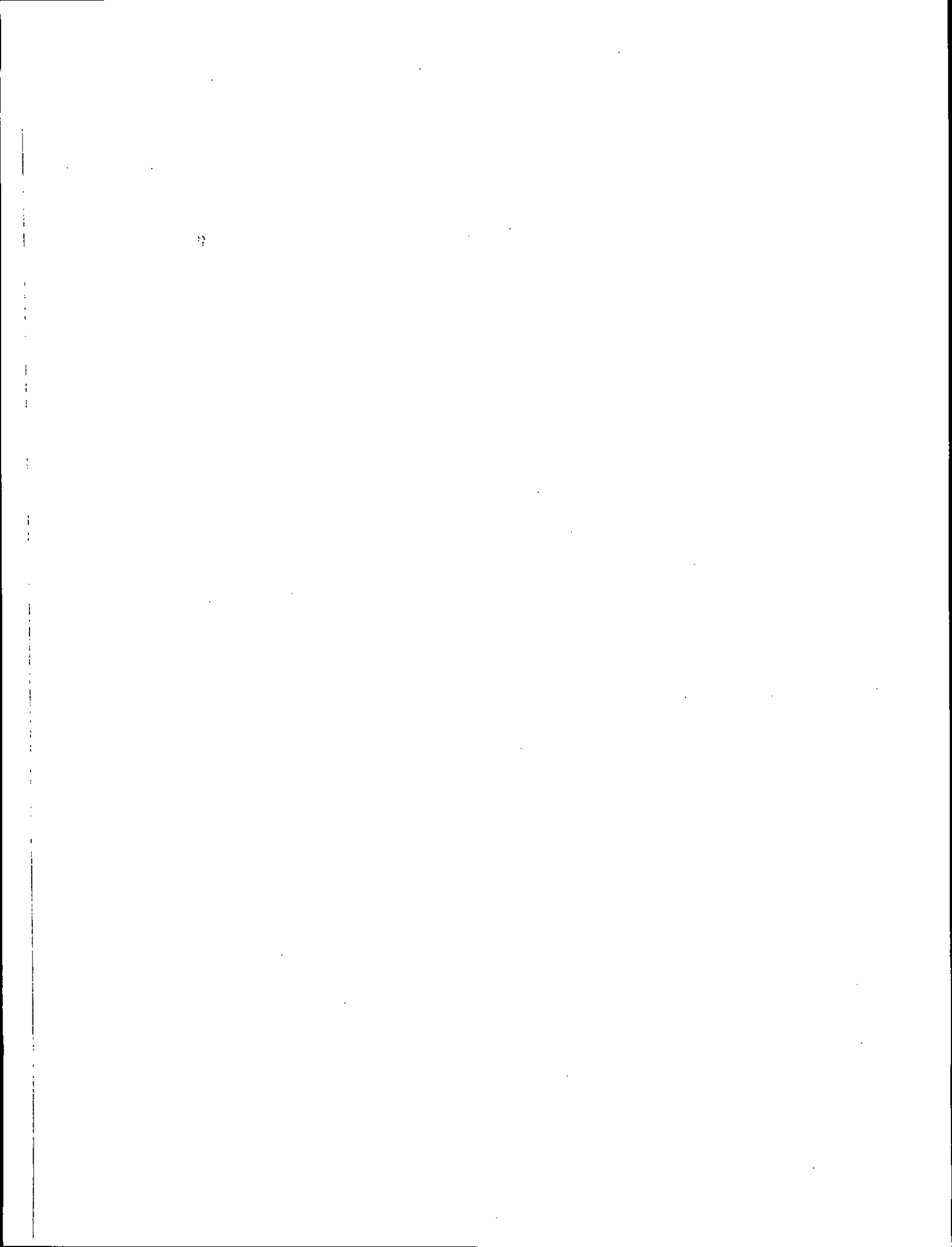
Finally, the trial judge did not err in finding that the night receptionist was negligent and imputing the negligence to the landlord. It was a question of fact as to whether the landlord's evidence of due care rebutted the inference of negligence arising from the prima facie case. The circumstantial evidence of negligence is supported in the record. See *Smith's Transfer & Storage Co.* (Franklin Supreme Court, 1987) (circumstantial evidence of negligence where uncontradicted testimony established that missing items were previously delivered).

Affirmed.



# **FILE**

*Pauling v. Del-Rey Wood Products Co.*



**Law Offices of Andrew J. Reed  
509 Dawkins Avenue  
Marina, Franklin 33405  
(555) 521-7108**

MEMORANDUM

**To:** Applicant  
**From:** Andrew Reed  
**Date:** July 25, 2000  
**Subject:** Letitia Pauling v. Del-Rey Wood Products Co.

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Our client Letitia Pauling worked for a small, local company called Del-Rey Wood Products for three years. She was recently fired. She came to see me complaining that she and her co-workers had regularly worked between 50 and 60 hours per week and that the company had never paid any of the workers time and a half for overtime.

I filed suit against Del-Rey alleging that Del-Rey violated the Fair Labor Standards Act (the "Act") by failing to pay time and a half after 40 hours a week. In its answer to the complaint, Del-Rey denies that it or its employees are covered by the Act. If there is no coverage, Del-Rey has no obligation to pay overtime, and Ms. Pauling has no claim.

Some of Ms. Pauling's co-workers who are still employed by Del-Rey have expressed interest in joining the lawsuit. There is certainly a basis in what Ms. Pauling told me to assume that the Act applies to Del-Rey's employees, but, since Del-Rey has denied it, we need to pin it down. Before I take this matter any further and possibly jeopardize the co-workers' relationships with Del-Rey, I want to send a set of interrogatories to find out whether the Act applies. There are two bases for establishing the application of the Act to employees: "enterprise coverage" and "individual coverage."

Here's what I'd like you to do:

1. Please draft for my review a set of six clear and sharply focused interrogatories designed to obtain information on whether there is any basis for asserting "individual coverage" of

the Del-Rey employees under the Fair Labor Standards Act. I'm working on the interrogatories for "enterprise coverage," and I've attached the three I've finished as examples. Your task is to focus on "individual coverage" and nothing else.

2. To help me understand why you are proposing each interrogatory, follow each one with a short statement of why you are proposing it and how, based on the law and the facts, it will help us determine whether "individual coverage" exists under the Act. I've included such statements with the three interrogatories I drafted to give you an idea of what I'm looking for.

Our word processing program will supply the correct format, introductory remarks, definitions and the like, so you need not concern yourself with such matters.

## Notes of Interview with Letitia Pauling

June 20, 2000

Letitia Pauling was referred to me by her cousin, Alfred Markum, whom I once represented successfully in a back wage suit against his employer.

- Pauling started working for Del-Rey Wood Products Co. here in Marina a little over 2 years ago — she can't remember actual date of employment.
- She worked as Del-Rey's shipping and receiving clerk — her job was to receive, store and maintain records on incoming materials and to ship finished goods per instructions from front office.
- She thinks the company is run by Delbert and Reynaldo Dragowitz — not sure if it's a corporation or what — front office people and bosses are all members of the Dragowitz family.
- She started at \$6.50 per hour — got 2 raises while she was there — her last wage was \$7.25 per hour. She was paid every week with a paycheck bearing a printed logo that said "D & R Enterprises — Recognized Around the World for Fine Furniture."
- Del-Rey's business is making parts for wood furniture, e.g., decorative legs for tables and chairs, fronts for desk drawers and things like that. The parts are mostly manufactured to drawings and specifications Del-Rey gets from D & R Furniture Manufacturing Co. which has a plant in the industrial park across town on the south side of Marina.
- Most of the goods that Pauling remembers taking in as receiving clerk were raw lumber that she stacked with a fork-lift — specialty woods such as cherry, walnut, maple, used for making parts — as far as she remembers, most of the wood came from a local lumber yard — she doesn't know where the timber came from or where the logs were cut into lumber.
- Once in a while, she'd receive other materials such as woodworking tools, saws, lathe parts, miscellaneous supplies and the like. She has no recollection where the materials came from, although she thinks she remembers about once a month receiving shipments of saw blades from an out-of-state supplier.
- The stockroom clerk would fill the orders for finished parts and box them up for shipment — Pauling's job was to handle the paper work and put the boxes on the trucks at the loading dock — mostly on Del-Rey's own flatbed truck for delivery across town to D & R Furniture's warehouse. That's where Del-Rey ships almost all of its production. Once in a while an

outside trucking company picked up a few orders for delivery to a customer in another part of the state — she remembers only one order shipped to an out-of-state customer, although she never paid close attention to the addresses, so there may have been more.

- Pauling isn't sure what the connection is, but she thinks the Dragowitz brothers also run D & R Furniture Mfg. Co. She thinks D & R Furniture makes high quality wood furniture and has about 300 employees. She knows that Delbert and Reynaldo spend a lot of their time over at the D & R Furniture plant. She has no idea where D & R Furniture gets its materials other than what Del-Rey ships to them or who D & R Furniture sells to or whether D & R Furniture ships any furniture out of state. All she knows about "D & R Enterprises" is that the logo appears on her paycheck. Maybe if we can lay hands on the financial statements for all three companies, they will tell us something about the intercompany relationships.
- Del-Rey only has about 20 workers in the shop — a couple of working foremen, a quality control inspector, a local pick-up and delivery truck driver (i.e., the one who drives Del-Rey's flatbed and delivers to D & R Furniture), a stockroom clerk, a shipping and receiving clerk, a janitor, a mechanic who keeps the machines working; the rest of the Del-Rey employees operate various woodworking machines making wood parts. Pauling doesn't know what the hourly wages are for the other employees but she believes she and the janitor were the lowest paid in the shop.
- Regular shop hours at Del-Rey were 7 a.m. to 3:30 p.m., with ½ hour for lunch, Monday through Friday, but it wasn't unusual for Pauling to work through her lunch period and grab a sandwich on the run; she'd usually work until 4:30 - 5 p.m. loading trucks every day; she also had to work 4 to 5 hours almost every Saturday and about one Sunday a month.
- She got paid straight time for all her hours, but the company never did pay time and a half for overtime — whenever she asked about overtime pay, one of the bosses would say something like, "It's not company policy to pay time and a half."
- Pauling says all the other shop workers are fed up with the long hours. Most of them would like to sue for back pay, but they're afraid to say anything or to report it to the government. She says that 7 or 8 of them want to come see me about suing for them. I told her to hold off on that until I've had a chance to look into it further.

**Law Offices of Andrew J. Reed**  
**509 Dawkins Avenue**  
**Marina, Franklin 33405**  
**(555) 521-7108**

MEMORANDUM

**To:** Applicant  
**From:** Andrew Reed  
**Date:** July 25, 2000  
**Subject:** Enterprise Coverage Interrogatories

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Here are the first three interrogatories I've drafted regarding "enterprise coverage." I'll write other ones later, but this ought to give you an idea of how I want you to go about drafting the interrogatories for the "individual coverage" issue.

INTERROGATORY NO. 1: State in dollars the gross annual volume of sales of or business done by Del-Rey Wood Products Co. for each of the past three years.

Reason for proposing: One of the components of enterprise coverage is showing annual dollar volume of \$500,000. If that dollar volume can be established vis-à-vis Del-Rey alone, we will have established the threshold statutory requirement under § 203(s)(1)(A)(ii).

INTERROGATORY NO. 2: State the names of all persons, corporations, partnerships, or other entities having an ownership interest in, or who is an officer, director, or shareholder of, Del-Rey Wood Products Co., D & R Furniture Manufacturing Co., and D & R Enterprises.

Reason for proposing: We need to know the relationships among the three companies to establish that the three entities are related through unified operations or common control, as suggested by the facts and required by § 203(r)(1).

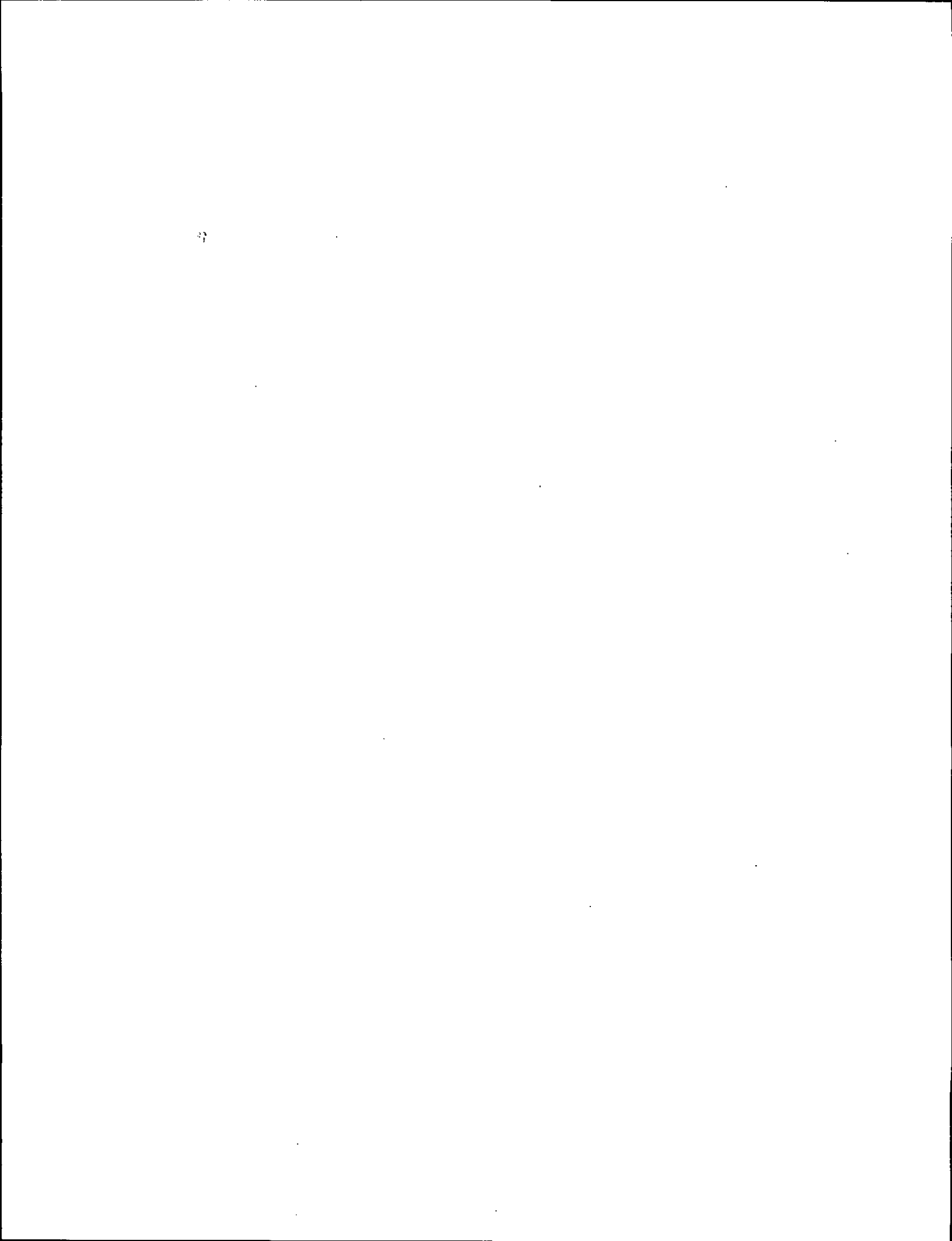
INTERROGATORY NO. 3: In each of the past three years, what has been the combined gross annual dollar volume of sales of or business done by Del-Rey Wood Products Co., D & R Furniture Manufacturing Co., and D & R Enterprises?

Reason for proposing: If these companies together do in fact constitute an "enterprise," their combined dollar volume is relevant to the \$500,000 threshold.

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# **LIBRARY**

*Pauling v. Del-Rey Wood Products Co.*



## WALKER ON DISCOVERY

### A Primer On Discovery Techniques

In civil litigation, depositions, interrogatories, requests for production of documents, and requests for admissions are primary discovery tools used by parties to lawsuits. The purpose of this text is to inform attorneys whose experience is limited or those who need a refresher on discovery techniques. Careful attention to the techniques will facilitate the process of gathering information at a relatively low cost.

\* \* \*

**Written Interrogatories:** Written interrogatories are, plainly and simply, a series of written requests for information submitted by one party to another. The recipient is required to respond in writing and under oath and to disclose all pertinent information known to it, reasonably available to it, and within its possession and control. Interrogatories may not be sent to non-parties, although they may request information known to the recipient about non-parties.

An interrogatory may be phrased as a question (e.g., "What goods does ABC, Inc. manufacture?") or as a declarative statement (e.g., "Describe the goods that ABC, Inc. manufactures."). In order to be effective and to avoid objections that they are vague or overbroad, interrogatories must be sharply focused and unambiguously worded.

For example, in an employment discrimination case, the plaintiff might want to obtain information on other employees who have charged the employer with discrimination and what documentary evidence there is of the charges. The following interrogatory would probably be subject to an objection for vagueness and overbreadth:

**INTERROGATORY NO. 1:** Please describe each document that contains information regarding the names and addresses of the employees of ABC, Inc. who have filed charges of employment discrimination with the EEOC.

A more focused inquiry will avoid the objection and be more likely to produce the information sought. For example:

**INTERROGATORY NO. 2:** What is the name and address of each employee who, within the past two years, has filed with the EEOC a charge of employment discrimination against ABC, Inc.?

Interrogatories may be sequential and may have subparts that seek information related to the main thrust of the interrogatory. For example:

INTERROGATORY NO. 3: Within the past two years, have any employees of ABC, Inc. filed against ABC, Inc. charges of employment discrimination with the EEOC?

INTERROGATORY NO. 4: If the answer to the preceding interrogatory is in the affirmative, please state the following with regard to each such employee of ABC, Inc.:

- a. The name, address, and telephone number of the employee;
- b. The name of the custodian of ABC, Inc.'s records regarding ABC, Inc.'s investigation of and response to each such charge filed with the EEOC.

Care must be taken, however, in using interrogatories with subparts. Because there is the potential that counsel might abuse the process by serving burdensome interrogatories, many courts, by local rule, limit the number of interrogatories a party may serve. Typically, the local rules treat each subpart of an interrogatory as a separate interrogatory for purposes of measuring the number of interrogatories served; e.g., Interrogatory No. 4, above, would be counted as two interrogatories.

Although interrogatories cannot be used to require the recipient to produce documents (i.e., make documents available), they can be used effectively to seek identification of relevant documents. For example:

INTERROGATORY NO. 5: Describe the computerized and/or manually prepared records that are used in your company to keep track of the racial, ethnic, and gender make-up of your work force.

Such interrogatories can be followed up later with written requests for production of documents.

The key to the productive use of interrogatories is for the proponent to think carefully about the specific underlying facts he or she wishes to elicit in order to support the legal elements of the claim and to draft straightforward, plainly worded inquiries. It is best to request the information in small doses. One can always send follow-up interrogatories if further explication is necessary. Convuluted or complex inquiries that encompass too many topics or too much subject matter are ordinarily a waste of time and will not draw useful answers. See, e.g., Interrogatory No. 1, above.

\* \* \*

## **Local Rules of the District Court for Ocala County**

### **Local Rule 33-1: Written Interrogatories**

Without leave of court or written stipulation, a party may serve upon any other party written interrogatories, not exceeding 20 in number including all discrete subparts to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted liberally, but shall require a showing of cause. Any memorandum in support of a motion for leave to propound additional interrogatories shall set forth the additional proposed interrogatories and the reasons for their use.

## Zorich v. Long Beach Fire Department

Franklin Court of Appeal (1997)

Jerome Zorich brought suit against his employer, Long Beach Fire Department (LBFD), seeking regular and overtime wages under the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. § 201, et seq. That Act requires employers to pay covered employees at least the established minimum wage and time and one-half their regular rates of pay for all hours worked in excess of 40 in a week.

The district court granted summary judgment in favor of LBFD, concluding that LBFD did not qualify as an "enterprise" covered by the FLSA. Under 29 U.S.C. § 203(s), an "enterprise" is covered by the Act if (1) it has covered employees in its workforce and (2) it has an annual gross volume of sales made or business done of not less than \$500,000. LBFD does not satisfy the \$500,000 test. Thus, the district court found that LBFD is not a covered enterprise and its employees are therefore not entitled to the benefits of the Act.

"Enterprise" coverage, however, is not the only basis upon which employees may be covered by the FLSA. Individual employees who are engaged in commerce or in the production of goods for commerce may be individually covered by the Act even if their employer is not a covered enterprise. The district court erred when it failed to consider whether Zorich was individually covered by the Act.

Zorich is currently employed as a paramedic by LBFD. The paramedics work four consecutive 24-hour shifts weekly. In each 24-hour period, a paramedic spends four hours on site at the station and 20 hours on call. Zorich filed a complaint alleging that his on-call time is compensable pursuant to the FLSA and that LBFD owes him additional regular and overtime pay for the time spent on call.

LBFD argues that in order for employees to fall within the protection of the FLSA, their employer must be a covered enterprise. Zorich, on the other hand, asserts that the FLSA covers employees by two independent means: 1) individually, if they are "engaged in commerce or in the production of goods for commerce," or 2) through their employer, if they are "employed in an enterprise engaged in commerce or in the production of goods for commerce." Zorich is correct.

The regulations governing the FLSA support Zorich's argument that individual employee coverage survived the amendment by which the concept of enterprise coverage was added to the Act:

Before the amendments of 1961 and 1966 to the Fair Labor Standards Act, general coverage of the Act depended on the traditional basis of engagement by individual employees "in commerce or in the production of goods for commerce." The amendments broadened coverage by extending it to other employees on an "enter-

prise" basis when "employed in an enterprise engaged in commerce or in the production of goods for commerce" as defined in subsections 203(r) and (s) of the Act. Employees covered on an individual basis remain so covered under the amended Act; the effect of the amendments was to extend coverage to those employees of covered enterprises who might not have been theretofore individually covered. (29 C.F.R. § 776.0 (1996).)

The FLSA provides two independent types of coverage. An employee who engages in interstate commerce is individually covered regardless of whether his employer qualifies as a covered enterprise.

We reverse and remand to the district court for its consideration of whether plaintiff is engaged in commerce or in the production of goods for commerce and, if so, whether he is due additional compensation under the Act.

**Excerpts from Fair Labor Standards Act**  
**29 U.S.C. § 203, et seq.**

**§ 203: Definitions**

\* \* \*

(b) **"Commerce"** means trade, commerce, transportation, or communication among the several States or between any State or any place outside thereof.

\* \* \*

(i) **"Goods"** means goods, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) **"Produced"** means produced, manufactured, mined, handled or in any other manner worked on in any State; and for purposes of this statute an employee shall be deemed to have been engaged in the production of goods if such employee was engaged in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

\* \* \*

(r)(1) **"Enterprise"** means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units.

(s)(1) **"Enterprise engaged in commerce or in the production of goods for commerce"** means an enterprise that —

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(A)(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000; . . .

\* \* \*

**§ 207: Maximum Hours**

(a)(1) Except as otherwise provided in this section, no employer shall employ any employee who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**Excerpts from  
Regulations on the General Coverage of the Wage and Hours  
Provisions of the Fair Labor Standards Act  
29 C.F.R. Part 776**

**§ 776.2 Employee basis of coverage.**

If employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the Act on the ground that the employer is not "engaged in commerce or in the production of goods for commerce."

**§ 776.3 Persons engaged in both covered and noncovered activities.**

The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. . . . Employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone. However, every employee whose engagement in covered activities is regular and recurring, even though small in amount, is covered by the Act.

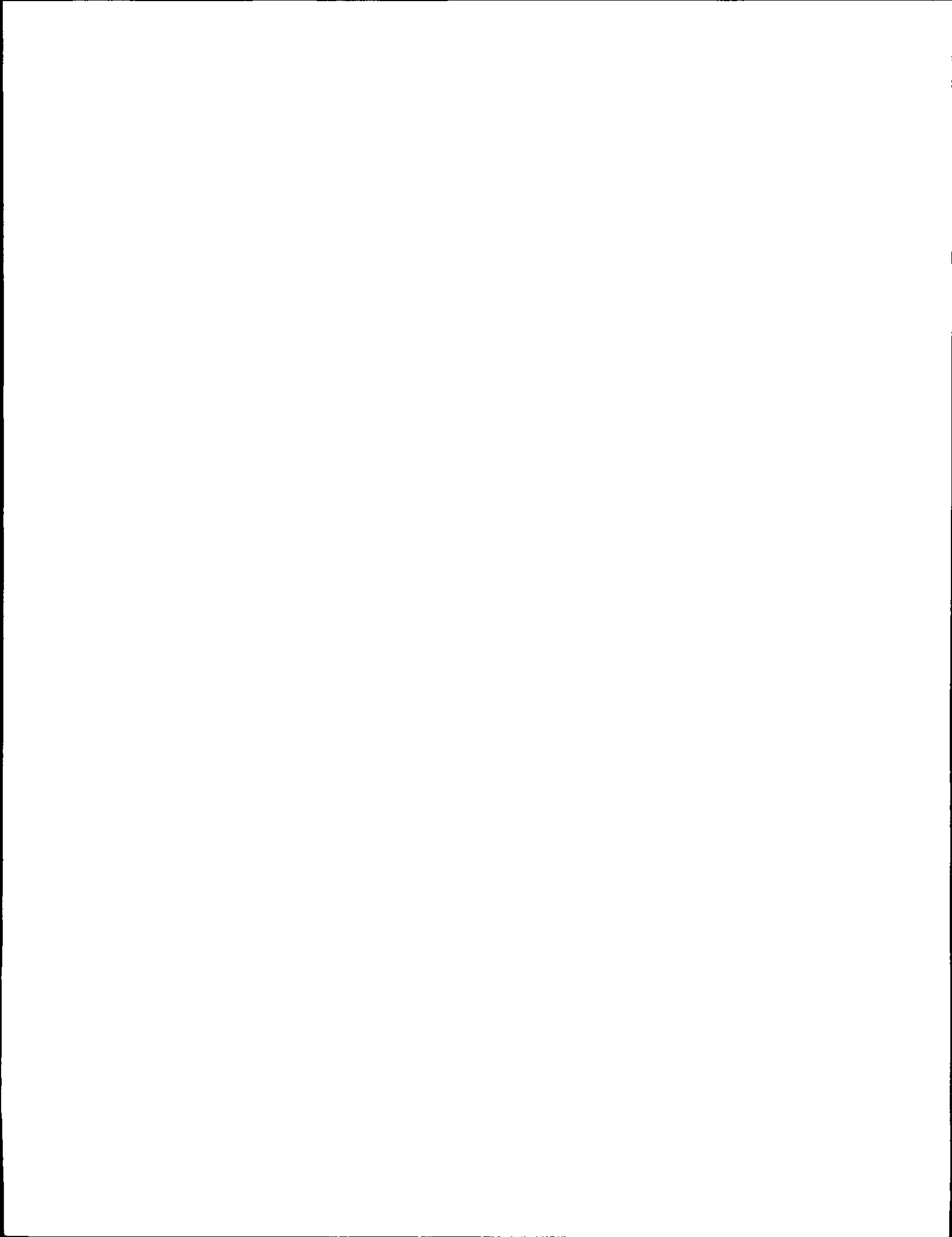
\* \* \*

**§ 776.10 Employees participating in the actual movement of commerce.**

Employees doing work involving or relating to the movement of persons or things (whether tangibles or intangibles and including information and intelligence) in commerce are covered by the Act. Under this principle, the Act applies to employees such as those in telephone, telegraph, television, radio, transportation, and shipping industries, since these industries serve as the actual instrumentalities and channels of interstate and foreign commerce. Similarly, employees of such industries as banking, insurance, newspaper publishing, and others which regularly utilize the channels of interstate commerce (such as telephones, the mails, wire and wireless communications and the like) in the course of their operations are generally covered by the Act. Likewise, employees whose work is an essential part of the stream of commerce, in whatever type of business they are employed, are covered by the Act. For example, employees of a warehouse whose activities are connected with the receipt or distribution of goods across state lines are covered. This does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage. But if the employee, as regular and recurrent part of his duties, uses such instrumentalities in obtaining or communicating information or in sending or receiving written

# **FILE**

*Franklin Asbestos Handling Regulations*



reports or messages, or orders for goods or services, he comes within the coverage of the Act.

\* \* \*

**§ 776.16 Employment in "producing, \* \* \* or in any other manner working on" goods.**

Employees employed in producing, manufacturing, handling or in any other manner working on goods (including parts or ingredients thereof) for interstate commerce are covered by the Act. This is true of employees doing such work as handling ingredients (scrap iron) of steel used in building ships which will move in commerce; transporting within a single state lumber to a mill where the products of the mill will be shipped out of state; transporting parts or ingredients of other types of goods or the finished goods themselves between processors, manufacturers, and storage places located in a single state, where the goods will leave the state in the same form or will be altered or incorporated into other goods and leave the state in some other form. Employees of independent employers who provide other employers with materials or articles which become parts or ingredients of goods produced by such other employers for commerce are covered. Thus, for example, employees of an independent employer that gathers and processes pine cones and sells them to an unrelated manufacturer of Christmas wreaths that incorporates the pine cones as components of the wreaths and ships the wreaths across state lines are covered.

**§ 776.17 Employment in a "closely related process or occupation directly essential to" production of goods.**

Employees whose work is closely related and directly essential to the production of goods for commerce are also covered by the Act. The terms "closely related" and "directly essential" are not susceptible of precise definition but they describe a situation where, under the particular circumstances, the process or occupation in which the employee is engaged bears a relationship to the production of goods for interstate commerce (1) which can reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense. Examples of such processes or occupations are bookkeepers, clerks, accountants, auditors, payroll clerks, draftsmen, inspectors, industrial safety personnel, labor relations, advertising, promotion and public relations activities, servicing, repairing and maintaining buildings, equipment and machinery.

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Office of the Attorney General  
State of Franklin  
Environmental Protection Division

Candace G. Meyer, Attorney General

**To:** Applicant  
**From:** Colin Dillard, Deputy Attorney General  
**Re:** Regulations Implementing the Asbestos Handling Act  
**Date:** July 27, 2000

Six months ago, the Franklin Legislature enacted the Asbestos Handling Act (AHA), which, among other things, requires the Franklin Department of Environmental Protection (DEP) to implement health and safety programs to train and certify workers who handle asbestos. DEP has asked us to review the proposed regulations it has drafted.

I anticipate the AHA statutory and regulatory scheme will be challenged on the ground that it is preempted by the federal Occupational Safety and Health Act (OSH Act) and the implementing federal regulations. Franklin has not adopted a State Plan under the OSH Act and has no intention of doing so.

Please prepare a memorandum for me that:

- 1) States the best case for why, in light of the absence of a State Plan, the statutory and regulatory scheme is not preempted in its entirety; and
- 2) Discusses whether each provision of Section 8 of the draft regulations can survive a preemption challenge.

**Franklin Environmental Protection Code**  
Title 6 - Asbestos Control  
Chapter 15. Asbestos Handling Act

**Section 1. Findings and Purpose.** The legislature of the State of Franklin finds that the predominant cause of asbestos becoming airborne is the performance of building renovation and demolition without adequate adherence to appropriate procedures for safeguarding the general public by persons who have not received adequate training in the handling of materials containing asbestos. The purposes of this subtitle are: 1) to safeguard the public health by requiring that renovation or demolition projects that disturb asbestos be conducted in accordance with procedures established pursuant to the provisions of this law; and 2) to ensure that workers who handle materials containing asbestos receive appropriate training designed to protect the public health.

\* \* \*

**Section 3. Unlawful Activities.**

(a) It shall be unlawful for any person to perform a renovation or demolition project involving asbestos unless that person has received approval from the Franklin Department of Environmental Protection of a written plan specifying all steps that will be taken to protect the public, including monitoring air quality in the area surrounding the renovation or demolition site and restricting access to the site by anyone other than certified workers.

(b) It shall be unlawful to employ any person to handle asbestos material in the course of performing work for compensation on an asbestos project unless such person is a holder of a current, valid asbestos handling certificate.

\* \* \*

**Section 5. Fees and Assessments.** The Franklin Department of Environmental Protection shall set reasonable fees and assessments to be used for the safe elimination of asbestos from buildings.

**Section 6. Permits.** No town or municipality shall issue a permit for a renovation or demolition project involving asbestos unless the applicant has established a plan pursuant to Section 3(a) and can show that each person working on the project holds a valid asbestos handling certificate pursuant to Section 3(b).

**Section 7. Regulations to be Issued by the Secretary of the Franklin Department of Environmental Protection.** In order to safeguard the health and safety of the public, including all persons who work at a renovation or demolition project involving asbestos, the Secretary of the Franklin Department of Environmental Protection shall establish criteria for: 1) certifying persons as eligible to receive an asbestos handling certificate; 2) certifying programs as approved safety and health programs; and 3) controlling asbestos during renovation or demolition projects. The Department shall implement an assessment procedure for funding the certification and training.

\* \* \*

# DRAFT

**Department of Environmental Protection**  
Chapter 4 - Regulations Regarding Asbestos Control  
Proposed Regulations Implementing Asbestos Handling Act  
May 26, 2000

**SUMMARY:** These Proposed Regulations implement the Asbestos Handling Act, codified in Chapter 15 of Title 6 of the Franklin Environmental Protection Code. The Proposed Regulations govern procedures for conducting renovation and demolition projects that disturb asbestos and for training and certification of asbestos handlers, asbestos supervisors and asbestos investigators.

**BACKGROUND:** See attached Report of the Research and Investigation Unit of the Department of Environmental Protection (DEP) on *The Dangers of Airborne Asbestos Created by Construction Work in the State of Franklin*.

\* \* \* \*

## **Section 8. Training and Certification of Asbestos Handlers.**

(a) Any employee seeking an asbestos handling certificate must complete a five-day, DEP-approved training course and pass a two-hour written examination.

(b) An approved DEP training course for asbestos handlers must cover the following specific topics:

- (1) the physical characteristics, including hazards and effects, of asbestos
- (2) worker protective equipment
- (3) state-of-the-art practices for asbestos abatement and remediation
- (4) procedures for collecting asbestos samples to minimize airborne fibers
- (5) personal hygiene pertaining to asbestos handling

(c) Any employee having an asbestos handling certificate must complete a one-day, DEP-approved biennial review course to renew the handler certificate.

(d) Upon receiving proof of completion of a DEP-approved training or review course for asbestos handlers and payment of \$100, DEP shall issue an asbestos handler's certificate.

(e) Each employer performing work on a project in which any employee must handle asbestos must provide to the DEP the names of all employees possessing an asbestos handler's certificate, along with an assessment of \$600 per year for each such employee.

\* \* \* \*

Department of Environmental Protection  
State of Franklin

**The Dangers of Airborne Asbestos Created by Construction Work  
in the State of Franklin**

John P. Ripka, Chief, Research and Investigation Unit

Asbestos, a family of inorganic fibrous mineral substances once thought to be "wonder materials," has been identified in recent years as a formidable health threat. Much attention has been given to workplace hazards created by asbestos, but only recently has the focus been broadened to encompass the public health hazards presented by the widespread presence of friable asbestos.

Asbestos is the name given to a group of minerals that occur naturally as masses of strong, flexible fibers that can be separated into thin threads and woven. Asbestos tends to break easily into a dust composed of tiny particles that can float in the air and stick to clothes. The fibers of this so-called "friable" asbestos may be easily inhaled or swallowed and can cause serious health problems.

Exposure to airborne asbestos fibers may induce several serious diseases: asbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death.

Widespread public concern about the hazards of asbestos has resulted in a significant annual decline in U.S. use of asbestos. In 1972, Franklin completely banned asbestos spraying in construction. Before the deadly hazards of asbestos were understood, however, more than half of the high-rise commercial buildings built in the state between 1958 and 1972 used asbestos as fireproofing material and, moreover, virtually every boiler room used the material as a thermal insulator. Franklin buildings contain an estimated 3.5 million tons of asbestos.

Since the early 1940s, millions of American workers have been exposed to asbestos dust. Health effects have been recognized in workers exposed in many trades and occupations. Even workers who have not worked directly with asbestos but whose jobs were located near contaminated areas have developed diseases associated with asbestos exposure.

Family members of workers heavily exposed to asbestos face an increased risk of developing

asbestos-related diseases. This risk is thought to result from exposure to asbestos dust brought into the home on the shoes, clothing, skin, and hair of workers. Asbestos is so widely used that the entire population has been exposed to some degree. To protect all citizens, proper safety precautions should always be taken by people working with asbestos.

Both the federal government and the state of Franklin have recognized that safety lies in speedy action, which each has taken. The federal Occupational Safety and Health Administration has promulgated regulations to minimize the threat to construction workers from asbestos exposure. To minimize the threat to the general public from asbestos removal, Franklin and its Department of Environmental Protection have established a program to ensure the safe elimination of asbestos from buildings for workers who handle asbestos.



# **LIBRARY**

*Franklin Asbestos Handling Regulations*



**United States Code  
Occupational Safety and Health Act**

**29 U.S.C. § 652 Definitions**

\* \* \* \*

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

\* \* \* \*

**29 U.S.C. § 667 State jurisdiction and plans**

**(a) Assertion of State standards in absence of applicable Federal standards.** Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no Federal standard is in effect.

**(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.** Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated shall submit a State plan for the development of such standards and their enforcement.

\* \* \* \*

**Code of Federal Regulations**

**CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION  
U.S. DEPARTMENT OF LABOR  
PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS  
SUBPART Z—TOXIC AND HAZARDOUS SUBSTANCES**

**29 C.F.R. § 1926 Asbestos.**

\* \* \* \*

(f) Exposure limit. The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 1.0 fiber per cubic centimeter of air (1 f/cc) as averaged over a sampling period of thirty (30) minutes.

(g) All employers of employees exposed to asbestos hazards shall comply with applicable protective provisions to protect their employees.

(h) Each employer who has a workplace or work operation where exposure monitoring is required shall perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed.

(i) The employer shall notify affected employees of the monitoring results that represent that employee's exposure as soon as possible following receipt of monitoring results.

(j) When a building owner or employer identifies previously installed asbestos-containing material, labels or signs shall be affixed or posted so that employees will be notified of the presence of asbestos-containing materials.

(k) Where vacuuming methods are used, filtered vacuuming equipment must be used. The equipment shall be used and emptied in a manner that minimizes the reentry of asbestos into the workplace.

(l) All employees performing work covered by this paragraph shall be trained in a training program that meets the requirements of this section.

(m) Employee Information and Training.

(i) The employer shall, at no cost to the employee, institute a training program for all employees who are likely to be exposed to asbestos and ensure their participation in the program.

(ii) Training shall be provided prior to or at the time of initial assignment and at least annually thereafter.

- (iii) Training shall include "hands-on" training and shall take at least eight (8) hours.
- (iv) The training program shall be conducted in a manner that the employee is able to understand. The employer shall ensure that each such employee is informed of the following:
  - (A) Methods of recognizing asbestos;
  - (B) The health effects associated with asbestos exposure;
  - (C) The relationship between smoking and asbestos in producing lung cancer;
  - (D) The nature of operations that could result in exposure to asbestos, the importance of necessary protective controls to minimize exposure, including, as applicable, engineering controls, work practices, respirators, housekeeping procedures, hygiene facilities, protective clothing, decontamination procedures, emergency procedures, and waste disposal procedures, and any necessary instruction in the use of these controls and procedures;
  - (E) The purpose, proper use, fitting instructions, and limitations of respirators;
  - (F) The appropriate work practices for performing the asbestos job;

\* \* \* \*

## Gade v. National Solid Wastes Management Association

United States Supreme Court (1992)

In 1988, the Illinois General Assembly enacted the Hazardous Waste Crane Operators Licensing Act. The purpose of the act is both to promote job safety and to protect life, limb and property. We consider whether such a dual impact statute, which protects both workers and the general public, is preempted by the federal Occupational Safety and Health Act of 1970 (OSH Act) and the standards promulgated thereunder.

The OSH Act authorizes the Secretary of Labor to promulgate occupational safety and health regulations. In the Superfund Amendments and Reauthorization Act of 1986, Congress directed the Secretary of Labor to promulgate regulations for the health and safety protection of employees engaged in hazardous waste operations, including routine training.

The Occupational Safety and Health Administration (OSHA) promulgated the required regulations, including detailed regulations on worker training requirements. Those who have satisfied the eight-hour training requirement receive a written certification; uncertified workers are prohibited from engaging in hazardous waste operations.

The Illinois licensing act at issue here is designated as an act "in relation to environmental protection," and its stated aim is to protect both employees and the general public. The licensing act requires a license applicant to provide a certified record of at least 40 hours

of training under an approved program conducted within Illinois, to pass a written examination, and to complete an annual refresher course. Employees who work without the proper license and employers who knowingly permit an unlicensed employee to work are subject to fines.

National Solid Wastes Management Association (Association) is a national trade association of businesses that dispose of waste material, including hazardous waste. The Association's members are subject to the OSH Act and OSHA regulations. For hazardous waste operations conducted in Illinois, certain of the workers employed by the Association's members are also required to obtain state licenses. Thus, for example, some of the Association's members must ensure that their employees receive not only the eight hours of field experience required for certification under the OSHA regulations, but also the 40 hours of training required for licensing under the state statutes.

The Association brought a declaratory judgment action against Mary Gade, the Director of the Illinois Environmental Protection Agency (IEPA), and sought to enjoin IEPA from enforcing the Illinois act, claiming that the act was preempted by the OSH Act and OSHA regulations. While finding that some provisions of the Illinois law were preempted by the OSH Act, the district court held that state laws that attempt to regulate workplace

safety and health while regulating other areas are not necessarily preempted. The United States Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. We granted certiorari.

Before addressing the scope of the OSH Act's preemption of dual impact state regulations, we consider the threshold question of whether the Act preempts nonconflicting state regulations at all. Whether a state action is preempted by federal law is a question of congressional intent. In the OSH Act, Congress endeavored "to assure so far as possible every working man and woman in the nation safe and healthful working conditions." Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce and thereby brought the federal government into a field that traditionally had been occupied by the states. Federal regulation of the workplace was not intended to be all encompassing, however. The Act does not prevent state regulation of any occupational safety or health issue "with respect to which no Federal standard is in effect." 29 U.S.C. § 667(a). In addition to reserving areas for state regulation, the Act gave the states the option of entirely assuming regulation in an area. 29 U.S.C. § 667(b). Illinois has not sought or received the Secretary's approval for its own state plan. 29 U.S.C. § 667(b) preempts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained approval for its own plan.

Absent explicit preemptive language, we have recognized at least two types of implied preemption: *field preemption*, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, and *conflict preemption*, where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

We hold that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act. Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and the only way a state may regulate an OSHA-regulated occupational safety and health issue is through an approved state plan. The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation; a state may develop an occupational safety and health program, but only if it displaces applicable federal regulations with an approved state plan.

Also, 29 U.S.C. § 667(a), which saves from preemption any state law regulating an occupational safety and health issue with respect to which no federal standard is in effect, implies that state laws regulating the same issue as federal laws are not saved, even if they merely supplement federal law.

In determining whether state law stands as an obstacle to the full implementation of a federal law, it is not enough to say that the ultimate goal of both federal and state law is the same. A state law is preempted if it interferes with the methods by which the federal statute was designed to reach that goal.

We now consider whether a state law that addresses public safety as well as occupational safety, a dual impact law, can be an "occupational safety and health standard" subject to preemption under the Act. The OSH Act does not lose its preemptive force merely because the state legislature articulates a purpose other than (or in addition to) workplace health and safety. In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law. Any state legislation that frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.

The key question is at what point the state regulation sufficiently interferes with federal regulation that it should be deemed preempted. In the absence of an approved state plan, the OSH Act preempts all state law that constitutes, in a direct, clear and substantial way, regulation of worker health and safety. State laws of general applicability that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be preempted. Although some laws of general applicability may have a direct and substantial effect on worker safety, they cannot fairly be character-

ized as occupational standards because they regulate workers as members of the general public. A law directed at workplace safety, however, is not saved from preemption simply because it has effects outside of the workplace.

Because the provisions of Illinois law have a direct and substantial effect on the federal scheme for regulation of hazardous waste, they are preempted. Affirmed.

**Chamber of Commerce v. Noter, Secretary of Franklin Department of  
Labor, et al.**

United States Court of Appeals for the Fifteenth Circuit (1995)

This is an appeal from a summary judgment in consolidated actions challenging the constitutionality of the Franklin Worker and Community Right-to-Know Act (Know Act), which requires the disclosure of substances that may pose workplace and environmental hazards. The district court held that some of the sections of the Know Act are preempted by the federal Occupational Safety and Health Act (OSH Act) and OSHA's Hazard Communication Regulations. All parties appeal. We affirm in part and reverse in part.

The legislative findings and declaration of purpose, included in the Know Act, provide that

The proliferation of hazardous substances in the environment poses a threat to the public health. Individuals have a right to know the risks they face so that they can make reasoned decisions and take informed action concerning their employment and their living conditions. Local health, fire, police, safety and other government officials require detailed information about the identity of hazardous substances in order to adequately plan for, and respond to, emergencies. It is in the public interest to establish a comprehensive program for the disclosure of information about hazardous substances in the workplace and the community and to provide a procedure for residents to gain access to this information.

The Know Act directs the Franklin Department of Environmental Protection (DEP) to develop an environmental hazardous substance list, which must contain

substances used, manufactured, stored, packaged, repackaged, or disposed of or released into the environment of the state which, in the department's determination, may be linked to the incidence of cancer and other diseases.

Whether a state law or regulation is preempted by a federal statute is a question of congressional intent. *Gade v. National Solid Wastes Management Association* (U.S. Supreme Court, 1992).

The Chamber of Commerce contends that 29 U.S.C. § 667 (a) and (b) should be read expansively to preempt all state statutes that relate to a safety or health issue for which a standard has been promulgated. It further contends that, since all provisions of the Know Act relate to issues that are regulated by the OSHA Hazard Communication Regulations, the Franklin statute is preempted in its entirety. We reject this broad reading.

The Supreme Court in *Gade (supra)* has acknowledged that a state law or regulation that has a "dual purpose" may escape complete preemption even though it might have an incidental effect upon the scheme of federal regulations. For example, a law or regulation the principal purpose of which is to train

employees in safety-affecting measures aimed at protecting the public from dangers arising from processes or materials handled in the workplace may escape complete preemption even though it has incidental effects on workplace safety. Thus, it may be necessary to parse the components of the state regulation into its preempted and non-preempted provisions.

Consideration of whether a state provision violates the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. A section is preempted only to the extent that congressional intent can be found expressly or by implication. The mere fact that a state law provision increases the regulatory burden on employers does not make the state law provision contrary to congressional intent. Portions of the Know Act, however, are preempted.

The first part of the Know Act directs the Franklin DEP and Department of Health to develop environmental and workplace hazardous substance lists. In these provisions, Franklin has opted for a different hazard identification procedure than that adopted in the federal Hazard Communication Regulations. The federal procedure depends primarily upon identification and communication of hazards by the original manufacturer or importer of the substance.

Franklin's development of its own list of hazardous substances through governmental agencies in all sectors of the economy will in no way inhibit the implementation of the

federal standard. The state lists are not an obstacle to the full implementation of the federal law because they do not "interfere with the methods" used in the Hazard Communication Regulations to achieve the goal of worker health and safety.

In addition, where, as here, a state statute has a dual purpose of promoting both the health and safety of the worker and the health and safety of the general population, the statute is preempted only if it has a "direct and substantial" effect on the federal system of regulation. Therefore, the sections of the Know Act regarding the development of lists by the agencies of the Franklin government are not preempted.

The second part of the Know Act requires employers to complete both environmental and workplace hazard surveys and to furnish the workplace surveys to state agencies concerned with the protection of employees and to state and local agencies concerned with the protection of the public at large. The requirement that they be furnished to both kinds of agencies suggests that these sections of the Act may have a broader purpose than the federal Hazard Communication Regulations. However, any hazardous substance listed as a workplace hazard and not listed as an environmental hazard is deemed to be a specific threat to workers. The sections of the surveys about workplace hazards have a direct and substantial effect on the promotion of occupational health and safety through hazard communication. The federal Hazard Communication Regulations preempt these sections because

they are in conflict with the methods chosen by the federal government to promote hazard communication. Similarly, the obligation of employers to keep a central file of workplace surveys is also preempted.

However, since the sections requiring reporting of environmental hazards (as opposed to workplace hazards) to agencies concerned with public health and safety are not a matter governed by the OSH Act and OSHA regulations, they are not preempted. Neither are the sections requiring employers to keep and make available environmental surveys. OSHA regulations govern occupational safety and health issues; they do not preempt state laws that regulate other concerns. OSHA regulations cannot have a preemptive effect beyond that field.

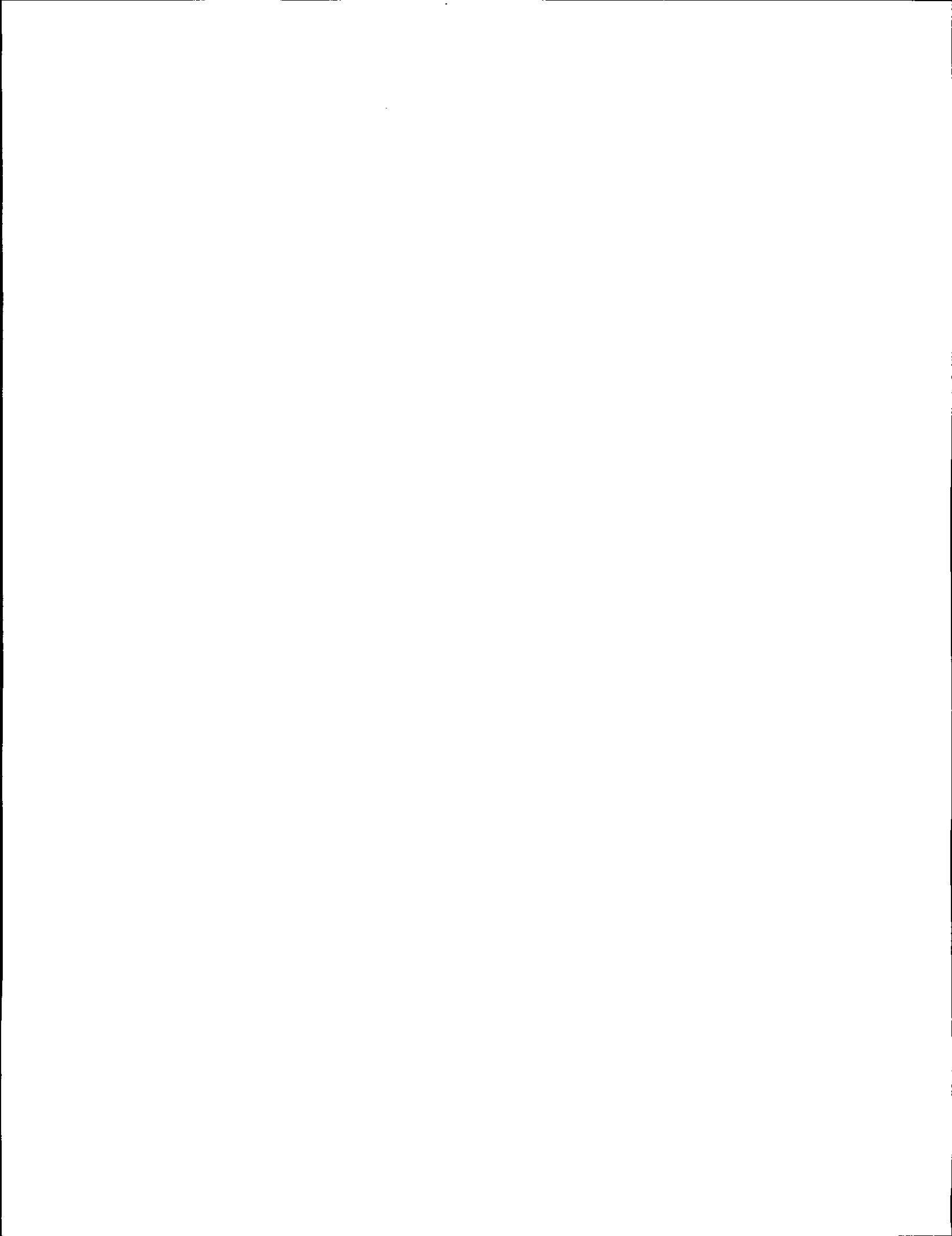
The Know Act provides that the governmental activity will be funded by assessments against all Franklin employers. The Chamber of Commerce argues that since this financing mechanism indicates that the Act is aimed solely at occupational safety and health, rather than at community health and safety in general, all provisions of the Act should be preempted. That contention is without merit. The funding provision is a logical means for accomplishing a broad community health and safety purpose. It does not interfere with compliance with the OSH Act or impose obstacles to the accomplishment of the OSH Act's purposes. *John Saint, Secretary of the Franklin Department of Labor v. Port Orey Co.* (15th Cir. 1994).

The judgment is affirmed in part, reversed in part, and the case remanded for proceedings consistent with this opinion.

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# **POINT SHEET**

*March v. Betts*



## March v. Betts

### DRAFTERS' POINT SHEET

In this performance test item, the supervising partner has taken on, as a *pro bono* matter, the representation of Arlene March, a quadriplegic. Ms. March hired a taxicab to take her home, and her fold-up wheelchair was placed in the trunk of the cab. An expensive custom-built back brace became detached and fell off into the trunk. Following a disagreement with Ms. March over the amount of the fare, the driver slammed the trunk shut and drove off in a huff, with the back brace still in the trunk. Efforts to recover the back brace have failed, the Sun Cab Association has denied liability, and Ms. March has filed a complaint with the Porter City Taxicab Commission ("Commission"). Ms. March has opted to submit the dispute to mediation pursuant to the rules of the Commission. The applicant is asked to draft a mediation statement as provided for in those rules.

The framework for the task appears in two of the File documents. The partner's memo to the applicant instructs the applicant to draft a *persuasive* mediation statement relying on three legal theories: a breach of the contract of bailment by the cab driver, the cab driver's negligence, and the vicarious liability of both Cynthia Maxon, the owner of the cab, and Sun Cab Association on the basis of *respondeat superior*. In the Commission's rules, the applicant is told that the mediation statement is to be in letter form and is to have two components: a description of the dispute, and the legal and factual reasons why there is liability.

Within that framework, the applicant is expected to utilize the factual materials in the File and the authorities in the Library to construct an argument for liability.

**1. In General:** The applicants must observe the following general format and content criteria:

- The mediation statement is to be in "letter format" as stated in the Commission's Procedures for Mediation;
- The statement must be written in persuasive style, i.e., arguing for the client's position, rather than in objective, on-the-one-hand/on-the-other-hand style; and
- The applicant should avoid inflammatory, combative language, evincing an understanding that the objective in mediation is to achieve a mutually acceptable settlement.

**2. Description of the Dispute:** This part of the mediation statement should be essentially a statement of the facts from Ms. March's perspective. Some applicants might choose to

be very brief in the "Description of the Dispute" section of the letter/statement and to incorporate the operative facts into the section where the applicant explains the reasons for liability (i.e., the argument). That is an acceptable approach as long as the gist of the dispute is described succinctly at the beginning. Either way, a complete description of the dispute can reasonably be expected to cover the following points:

- The precise circumstances of the loss of the back brace should be covered in some detail:
  - Ms. March is a quadriplegic who owns two wheelchairs. One of them, a manually propelled chair, is fitted with a detachable custom-made back brace. The brace is essential to alleviate pain she experiences when she is sitting.
  - On a Sunday a month ago, she and her caregiver hired a cab to transport them to Ms. March's home.
  - The cab driver placed the wheelchair and the back brace in the trunk of the cab.
  - When they got to Ms. March's home, she and the driver disagreed over the amount of the fare—she thought it should be \$8 but the driver wanted to charge her \$10.
  - Meanwhile, Ms. March's caregiver took the wheelchair out of the trunk but, before she could retrieve the back brace, the driver slammed the trunk shut and drove off in a huff.
- There should be a description of the cab and discussions regarding the owner, the Association and the driver:
  - The taxicab is a silver-colored 1996 Chevrolet, and, on the day in question, it was being driven by Gary Betts.
  - The cab, #206, bears the insignia and logo of the Sun Cab Association, which has been granted a permit to operate a taxicab office in Porter City.
  - The vehicle is licensed as a taxicab to Cynthia Maxon, who is also the registered owner of the vehicle.
  - Another indication of the connection with Sun Cab is that the taxicab license lists "Sun Cab Assn. 206" as the "ASSN/COMPANY NO."
  - Cynthia Maxon is a member of Sun Cab Association, which furnishes its members with pooled insurance coverage, use of the Association's unique

insignia and logo, and dispatch services.

- There should be some background discussion about Ms. March to emphasize her circumstances and her need for the brace:
  - She was injured in a hit-and-run accident five years ago, which left her paralyzed from the neck down.
  - She is unable to work, requires 24-hour care, and her only source of income is a monthly SSI grant of \$328.
  - The only way she can get around is by wheelchair, and the manually propelled chair, which is portable, is the one she must use when she goes places where there is no wheelchair access.
  - The back brace is designed to relieve the pain she experiences when she is sitting.
  - She received the wheelchair and back brace as part of her initial post-accident treatment at Porter City Rehabilitation Institute, but cannot get a replacement unless she pays for it.
  - A replacement brace will cost \$1,644, an amount she cannot possibly afford.
- There should be some discussion of her efforts to retrieve the back brace:
  - On Monday following the loss, Ms. March called a Mr. Abner of Sun Cab, who said he would check with the driver, Mr. Betts.
  - On the next day, Abner said that he and the driver had checked the trunk of the cab and had not found the brace.
  - Ms. March obtained an estimate of the replacement cost (\$1,644) and called Abner back. Abner told her that “the driver was let go,” asserted that Sun Cab was not responsible, and offered a settlement of \$100 and a refund of the disputed cab fare.

**3. The Reasons Why There Is Liability:** This is essentially the “argument” section of the mediation statement. The applicant should draw on the legal authorities in the Library and weave in the facts on each of the three theories suggested by the supervising partner.

- Breach of the contract of bailment by the cab driver: The applicant must look to the *Morris Properties* case for definitions of what constitutes a bailment for hire, as opposed to a gratuitous bailment, and what constitutes a breach of the contract of bailment:

- Deposit of the folded-up wheelchair in the trunk during a paid-for cab ride is unquestionably a for-hire transaction.
- A bailment is a contractual relationship that requires mutual consent and involves delivery by the bailor (putting the wheelchair in the trunk) and acceptance by the bailee (Betts' allowing it to be put there).
- The mutual consent can be implied from the circumstances of this case.
- The breach of the contract is established by showing the bailment and the loss.
- Thus, Betts breached the contract of bailment.
- The cab driver's negligence: The focus should be on the driver's duty of care and the breach thereof. Although some applicants might want to go through the usual litany of the elements of negligence (i.e., duty, breach, actual causation, proximate causation, damage), it is unnecessary in these circumstances.
  - In *Morris Properties*, the court held that a *prima facie* case of breach of a bailment contract raises a rebuttable presumption of negligence by the bailee.
    - There is no question that depositing the folded-up wheelchair in the trunk during a paid-for cab ride constitutes a bailment for hire of the wheelchair and its parts. In the case of a bailment for hire, the bailee has an ordinary duty of care to the bailor to protect the bailed property from loss.
    - There is no doubt that the back brace was lost.
    - Proof of the bailment and the loss, says *Morris*, is a *prima facie* case of breach of the contract of bailment, and, as such, raises the presumption of negligence by the bailee, here, Betts.
  - Thus, on that basis, Betts was negligent.
- Liability of Sun Cab Association and Cynthia Maxon on principles of *respondeat superior*:
  - Cynthia Maxon: The registration certificate clearly shows that Maxon is the owner of the cab that Betts drove. Beyond that, the facts as to the relationship between Betts and Maxon are sketchy.
    - Section 408 of the Franklin Code makes Betts the presumed agent of Maxon. The statute provides that the operator of a motor vehicle

- (Betts) with the consent of the owner (Maxon) is deemed to be the agent of the owner and that proof of ownership is *prima facie* evidence that Betts was operating the vehicle with Maxon's consent.
- Likewise, under the holding in *Marchetti*, Maxon will be estopped from denying that Betts was operating the cab with her consent. The vehicle was registered to her as a taxicab. It is a fair assumption from the known facts that Maxon turned the vehicle over to Betts and, given the fact that it bore the markings of a taxicab, it must be presumed that Maxon knew and intended that Betts would operate it as a taxicab.
  - There is no question under the facts that Ms. March's loss occurred within the course and scope of Betts' operating the vehicle as a taxi.
  - At least ostensibly, there are no facts suggesting that Betts was an independent contractor. Unlike the situation in the *Arundel Supply* case, Betts did not own the vehicle and the fairest inference is that he was operating it as the agent of Maxon.
  - Thus, whether it is couched in terms of agency or *respondeat superior*, Maxon is vicariously liable for the loss of the back brace on the basis that a principal is liable for the acts or omissions of his or her agent committed within the course and scope of the agency.
  - Sun Cab Association: There are ample facts to work with to establish a relationship with Sun Cab. There is some ambiguity about which way the facts tend, but on balance they lean in favor of establishing vicarious liability.
    - The taxicab license issued by the Commission indicates that Sun Cab is the "ASSN/COMPANY" under which the cab operates.
    - Unlike the situation in *Marchetti*, the driver here was not a "total stranger" to the Association, i.e., it can be fairly inferred, from the fact that Abner, the Sun Cab representative with whom Ms. March dealt, was able to get Betts to come in the next day and look for the back brace, that Sun Cab at least knew about Betts and had at least some control over him.
    - Another sign of Sun Cab's control over Betts is the fact that Abner

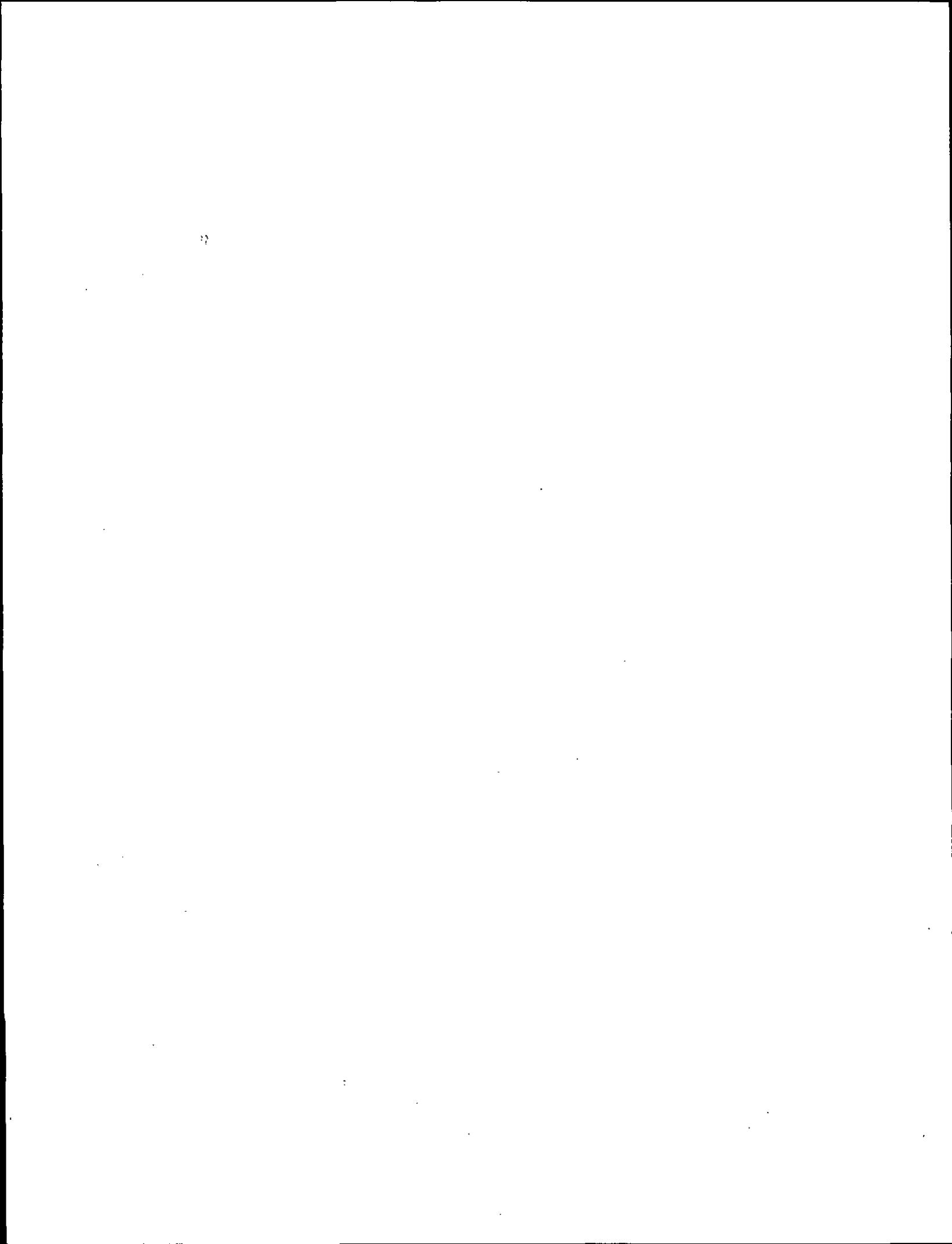
informed Ms. March that the “driver was let go,” implying that Sun Cab had the power to terminate Betts’ employment or other relationship with Sun Cab.

- Under the dictum in *Marchetti*, “a taxicab bearing the peculiar colors and trade name of a cab association is rebuttably presumed, when involved in an accident or other loss, to have been in the custody of, and engaged in the business of, that association.” The assertion of Marvin Shaw, the Sun Cab representative who wrote the letter to the Commission, that the driver was operating the cab “illegally and without our permission or knowledge,” is not supported by any evidence. Unless Sun Cab can overcome the presumption “by uncontradicted proof,” the presumption will prevail.
- Applying the facts to the independent contractor tests that the *Arundel Supply* case enumerates, the only ones as to which there are any relevant facts are “the power to discharge” and “whether the work is part of the regular business of the employer.” In both instances, the facts favor Ms. March. According to Abner, Sun Cab had the power to discharge Betts and, clearly, Betts was operating the cab in the “regular business” in which Sun Cab was engaged.
- Likewise, Sun Cab “confiscated the tags” on the Maxon/Betts cab, another sign of control.
- Although standing alone it would not be determinative of agency or employment status, the fact that Sun Cab tendered Ms. March’s claim to its insurance carrier is something of an admission that Sun Cab did not consider that Betts was merely an independent contractor.
- The loss occurred in the course and scope of Betts’ performance of his duties as a cab driver.
- Thus, on balance, the facts and the law tend toward finding Sun Cab vicariously liable on principles of *respondeat superior*.

4. **The Relief Sought:** According to the supervising partner’s interview memo, the applicant is not to deal with this part of the mediation letter.

# **POINT SHEET**

*Pauling v. Del-Rey Wood Products Co.*



## Pauling v. Del-Rey Wood Products Co.

### DRAFTERS' POINT SHEET

The task for the applicants in this performance test is to draft a set of six interrogatories and to give a brief explanation of how each one will serve the intended purpose.

The client, Letitia Pauling, is a fired worker who is suing her employer to recover three years of unpaid overtime wages under the Fair Labor Standards Act (FLSA or Act). That statute requires employers to pay covered employees time and a half for hours worked in excess of 40 a week. The facts, so far as they are known, are set forth in the attorney's notes of his discussion with Pauling.

In answer to the complaint, the employer, Del-Rey Wood Products Co. (Del-Rey), has denied that its employees are covered by the Act; if Del-Rey is correct, there can be no claim for back wages. Before proceeding further, Pauling's attorney wants to discover, by sending some written interrogatories, whether there is a basis for asserting coverage under the Act.

Under the FLSA, there are two independent bases for asserting coverage: (1) all employees of an employer are covered if the employer is a covered "enterprise" as that term is defined in the Act; (2) if not, then employees are covered on an "individual" basis if their job duties are such that they are "engaged in commerce or in the production of goods for commerce." The *Zorich* case makes the two bases of coverage very clear, and the applicants should have no trouble picking up the point.

In the Library, there is an excerpt from an imaginary treatise that instructs the applicants on how to draft interrogatories and gives them some hints on the variations. Also, the supervising attorney has drafted and set forth in a memo a few interrogatories relating to the "enterprise" basis of coverage along with remarks explaining his reasons for proposing them; that memo should serve as an additional template for the applicants.

There is a Local Rule of Court that limits parties to 20 interrogatories. The applicants are told to draft six interrogatories seeking information on the "individual" basis of coverage, the remaining interrogatories presumably being reserved for use by the supervising attorney in seeking information about "enterprise" coverage or in follow-up questions. There is plenty of material from which the applicants can craft six interrogatories.

The Library also contains excerpts from the FLSA and from the Regulations regarding the coverage provisions of the Act. The facts in the File and the authorities in the Library furnish the material from which the applicants are expected to fashion the interrogatories.

**1. Overview:** There are two major things the applicants must be able to do to receive a satisfactory grade on this test item:

- Draft clear, focused interrogatories eliciting information on the “individual” basis of coverage. Graders in the user jurisdictions can decide for themselves how heavily to weight format. Greater attention, however, should be given to the substance and clarity of the inquiries drafted by the applicants; and
- Using the facts and the authorities, explain how each of their proposed interrogatories helps determine whether “individual” coverage exists.

The organization of the applicants’ answers and the specific areas for inquiry are suggested by the headings of the excerpts from the Regulations. An applicant who uses the headings as the focus of the interrogatories and the text following each heading as the grist for the factual inquiry will find the task easier.

2. **Areas of Inquiry:** The following discussion encompasses all the possible points that might be covered by the applicants. Graders will have to determine which are the “must-cover” points, but applicants can receive “passing” or even excellent grades without touching upon all of these points.

- **Individual Coverage:** The inquiries that might disclose individual coverage should focus on the excerpts from Part 776 of the Regulations:
  - § 776.10—Employees participating in the actual movement of commerce:
    - Nature of the inquiry: Whether there are any employees at Del-Rey who regularly use the telephones or the mails in communicating with out-of-state customers or suppliers.
      - Pauling tells us that there is a “front office” staffed by “members of the Dragowitz family.” An interrogatory might ask Del-Rey to identify those people and state their job duties. A follow-up interrogatory might probe the extent to which those individuals use the phones, mails, e-mails, faxes, etc.
      - There is a suggestion in the notes of the interview with Pauling that some supplies or equipment, e.g., saw blades, come directly to Del-Rey from out of state. That appears to be *de minimis*, although it seems to have been “regular and recurrent,” and further inquiry might lead to the discovery of someone within the family of companies who regularly orders and arranges by mail or phone for the shipment of

such things.

- Pauling says she remembers having shipped something to an out-of-state customer once. It is probably an isolated incident, but it might be worth following up on.
- Pauling says D & R Furniture manufactures furniture and has a warehouse or some type of storage facility. The logo on Pauling's paycheck says, "Recognized Around the World for Fine Furniture," suggesting that the furniture is shipped to places outside of Franklin. If there are warehouse employees employed there and their "activities are connected with the receipt or distribution of goods across state lines," they would be "employees participating in the actual movement of commerce" within the meaning of § 776.10. Indirectly, that will help establish individual coverage for Del-Rey employees on the assumption that the goods manufactured at Del-Rey eventually end up in commerce.
- It might be worthwhile to follow up on the source of the lumber. Although it is purchased from a local lumber yard, it might "have been moved in or produced for commerce" within the meaning of § 203(s)(1)(A)(i) and Reg. § 776.16.
- Reasons for proposing these inquiries: It is possible that inquiries along these lines will help establish individual coverage for Pauling or her co-workers because such inquiries might disclose that Del-Rey employees handle goods that are in the stream of commerce, at least regularly and recurrently enough.
- § 776.16—Employment in "producing, \* \* \* or in any other manner working on" goods:
  - Nature of the inquiry: Whether there are any employees either at Del-Rey or at D & R Furniture who regularly work on goods that become parts or ingredients of goods that are shipped in commerce.
    - This is probably the best area for inquiry to establish individual coverage for the Del-Rey employees. An

interrogatory should ask Del-Rey to list the name and job duties of each employee. Follow-up interrogatories should focus on whether and the extent to which D & R Furniture regularly ships furniture in commerce.

- The wood parts manufactured by Del-Rey in all probability are incorporated into the furniture manufactured by D & R Furniture. If, as Pauling says, D & R Furniture has 300 employees, it would seem likely that D & R is a significant furniture manufacturer and ships across state lines, as the logo on the paycheck suggests. If so, all the Del-Rey shop employees, except perhaps the repair mechanic (see *infra*), will be individually covered on the basis that they are producing goods for commerce.
- Thus, the interrogatories should focus on whether D & R Furniture regularly ships finished furniture or furniture parts in commerce and whether the parts manufactured by Del-Rey employees are shipped directly in commerce and/or incorporated into furniture or parts that are shipped in commerce.
- Reasons for proposing these inquiries: This will clearly establish both individual coverage and one of the tests for enterprise coverage. If the parts manufactured at Del-Rey and shipped to D & R Furniture are incorporated into the furniture manufactured by D & R Furniture, then the employees of Del-Rey, including Pauling, are engaged in “producing goods for commerce” as the phrase is used in § 776.16 as well as in 29 U.S.C. § 203(s)(1)(A)(i).
- § 776.17—Employment in a “closely related process or occupation directly essential to” production of goods:
  - Nature of the inquiry: Whether there are any peripheral Del-Rey employees, such as those described in § 776.17, who are engaged in occupations that are closely related and directly essential to the production of goods for commerce.

- The facts tell us that there is a repair mechanic working at Del-Rey. Although that employee probably does not work directly in the production of the furniture parts manufactured at Del-Rey, his work is closely related and directly essential in the sense that his services are necessary to keep the production machines working.
- The most productive interrogatory in this area would be one that asks Del-Rey to list the name and job title of each of its employees and to describe the job duties of each, thus identifying any other peripheral employees.
- Reasons for proposing these inquiries: Inquiry into this area might help identify peripheral employees such as the mechanic and establish that they are individually covered if, in turn, the Del-Rey parts are incorporated as ingredients of furniture manufactured at D & R Furniture.

Graders should not concern themselves with possible substantive objections that might later be lodged by counsel for Del-Rey, e.g., that the interrogatories call for confidential/proprietary information, that they are overbroad because they ask for information regarding entities that are not parties, etc. Graders should focus on whether the applicants have targeted the right areas and drafted intelligible inquiries.



# **POINT SHEET**

*Franklin Asbestos Handling Regulations*



**Franklin Asbestos Handling Regulations**  
**DRAFTERS' POINT SHEET**

In this performance test item, the applicant is cast in the role of a lawyer in the Office of the Attorney General. The Franklin Department of Environmental Protection (DEP) has asked the Attorney General to opine whether the Franklin Asbestos Handling Act (AHA) and the proposed regulations implementing the AHA are preempted by the federal Occupational Safety and Health Act (OSH Act).

The File contains the relevant provisions of the AHA, a draft of the proposed regulations, and a recent report of the DEP on the dangers of airborne asbestos. The Library contains excerpts from the OSH Act and the federal OSHA regulations, and two cases dealing with the subject.

The task is for the applicant to prepare a two-part memorandum: 1) arguing that the AHA and the proposed DEP regulations as a whole are not preempted; and 2) discussing whether each of the particular provisions of the proposed regulations can survive a preemption challenge. The contending principles are whether the DEP regulations intrude upon the OSH Act's domain of workplace safety regulations or whether they can be justified in whole or in part as regulations aimed at non-workplace, public safety measures.

1. **Overview:** The applicants are not required to follow any particular format, except that the work product ought to end up looking like an office memorandum. It should consist of two separate parts, the first part dealing with the overall preemption issue and the second with the individual provisions of the proposed regulations, testing each provision against the preemption principles articulated in the cases. The following points are all the ones the drafters believe are raised in the test item. Applicants need not cover them all to receive "passing" or even very good scores.

2. **Overall Preemption:** Here, the applicants should set out the general grounds of federal preemption and examine the AHA and the proposed DEP regulations in light of the "dual impact" holding of the *Gade* case.

- In *Gade*, the Supreme Court states that, unless Congress has explicitly preempted state activity in a particular area of legislation, a state may act unless the two types of implied preemption preclude it: field preemption and conflict preemption.
  - Congress did not explicitly preempt all state activity in the area of safety and health regulation.
  - Congress did, however, intend to preempt *occupational* safety and health

regulation insofar as it pertains to employee workplace safety, unless:

- The state regulation purports to establish a protective measure as to which there is no federal “standard” and the state regulation does not burden commerce; or
- The state has chosen to retain jurisdiction by submitting and obtaining approval of its own “state plan.”
  - It is clear from the facts that Franklin does not have or intend to submit a state plan.
- In matters relating to employee workplace safety and health, there is no “field” preemption but there will be “conflict” preemption when a state attempts to regulate employee workplace safety and health in a way that conflicts with or even purports to supplement an existing federal standard.  
*See Gade.*
- However, it is possible to avoid total preemption if the state action under scrutiny has a “dual impact,” e.g., is aimed both at workplace regulation and public safety.
  - The preamble to the AHA states that, “The purposes of this subtitle are: 1) to safeguard the public health by requiring that renovation or demolition projects that disturb asbestos be conducted in accordance with procedures established pursuant to this law; and 2) to ensure that workers who handle materials containing asbestos receive appropriate training designed to protect the public health.”
    - This section contains something of an ambiguity in that it says that one of the two purposes is “to ensure that . . . workers . . . receive appropriate training,” thus giving it a “dual impact” character.
  - The “Background” section of the proposed regulations refers to the DEP’s investigative report as the impetus for the regulations. The focus of that report is on the public health hazards associated with the handling of friable asbestos (i.e., asbestos-containing materials that, when dry, can be crumbled by hand) and the need for training of workers who handle the materials.
    - Again, the proposed regulations partake of a “dual impact” because they involve both workers (the subject of the federal OSH Act regulations) and public health (not covered by the OSH Act).

- In the final analysis, the AHA probably avoids complete preemption because of its dual impact character.
  - As the *Gade* court says, the key question is at what point the state regulation sufficiently interferes with the federal regulation that it should be preempted.
    - Merely labeling a statute as having a dual impact will not avoid preemption.
      - The AHA and the proposed regulations are arguably preempted because they deal with an area where the federal OSH Act and the OSHA regulations have established a “standard,” i.e., asbestos handling in the workplace.
    - But, according to *Gade*, a statute of general application will not be preempted, even though it has a direct effect on worker safety, if the focus is on workers as members of the general public rather than as employees working in a regulated workplace.
  - The conclusion the applicants should reach is that the AHA and the proposed regulations are not completely preempted because they are not aimed principally at protecting workers but, rather, at training and certifying them in work methods designed to protect the public.

3. **Whether each of the particular provisions of the proposed regulations can survive a preemption challenge:** Having concluded that the proposed regulations are not completely preempted, the applicants must turn to the teaching of the *Noter* case: that certain parts might be preempted if they have a “direct and substantial effect on the federal system of regulation.”

- The task here is to test each of the provisions of the proposed regulations against the guidelines articulated in *Noter*, i.e.:
  - Whether the particular provision is preempted because it interferes with the federal regulations or the methods chosen by the federal regulations to implement the OSH Act;
  - Whether any particular provision relates so much to a workplace safety standard that it *per se* falls within the ambit of the OSHA regulations and is therefore preempted; or
  - Whether it is not at all a workplace safety measure within the ambit of the OSH Act and is, for that reason, not preempted.

- The Individual Provisions:

- The DEP requirement for employee certification: The purpose of the DEP regulations is to implement the requirement of the AHA that persons employed to work in occupations involving the handling of friable asbestos in asbestos-containing renovation and demolition projects be certified in asbestos handling technology.
  - The OSHA regulations do not require certification of employees handling asbestos in the workplace. Arguably, therefore, because OSHA has established a “standard” that does not require certification, the OSHA regulations preempt the DEP regulations.
  - However, the threshold certification requirement under the AHA is designed basically to ensure public health and safety as opposed to employee workplace safety.
    - As such, it deals with an area not within the ambit of the OSH Act.
  - Resolution: Because of the disparate purpose of the AHA certification requirement, it is not preempted by the OSH Act. As the court said in *Gade*, even though this dual impact law might have a direct effect on worker safety, it is not preempted as an occupational standard because it regulates workers as members of the general public.
- DEP Reg. § 8(a)—Five-day training course and two-hour exam: Both the proposed DEP regulations and the existing OSHA regulations require *employees* to undergo asbestos training. Under the OSHA regulations, it is the employer’s responsibility to “institute a training program . . . and ensure [employee] participation.” Under the DEP regulations, it is the employee’s obligation to “complete a five-day, DEP-approved training course.”
  - Both sets of regulations are aimed at *employees* who handle asbestos in their occupations and places of employment.
    - It is a distinction without a difference that, under the OSHA regulations, the employer must initiate the program while, under the DEP regulations, it is the employee’s responsibility to take the course.

- The DEP regulations require each employee to take a five-day training course and to pass a two-hour written exam.
  - By way of contrast, the OSHA regulations provide for a course of “at least eight (8) hours” and do not require passage of an exam.
- Resolution: It is probable that this part of the DEP regulation is preempted to the extent that it requires a five-day course and a two-hour test, i.e.:
  - Although its ultimate aim is to train employees in methods of protecting the public, it is nonetheless a workplace regulation in an area where the federal OSHA regulations have an existing standard and the two are in conflict. It can be argued that DEP’s five-day requirement is not in conflict because the OSHA regulations say “at least” eight hours, but the disparity is so great that the two cannot be reconciled.
  - See *Gade*, which holds that a state regulation is preempted if it tries to regulate the same “issue” as the federal regulation, even if it purports only to supplement the federal issue.
    - Thus, this requirement is preempted either because it is inextricably related to a workplace regulation and is therefore in the sole domain of federal OSHA or because it interferes with the method chosen by the federal regulation to implement the OSH Act.
- DEP Reg. § 8 (b)—Required content of the training course: Both sets of regulations specify the areas in which the employees shall be trained. The corresponding provisions regarding *worker* protection, as to which federal OSHA has exclusive jurisdiction (e.g., respiratory protection, personal protective equipment, hazards and effects of asbestos), are largely identical. There appears to be no conflict and no reason to assert preemption.
  - To the extent that the DEP regulations impose additional requirements, those additional requirements appear to be aimed at protection of the *public* (e.g., asbestos abatement and

remediation, collection of samples) and are not within the ambit of the OSH Act.

- However, it can be argued that if the five-day training course is preempted (as argued *supra*), then all components of it, including the course content, are also preempted.
- Resolution: On balance, however, this part of the DEP regulations would probably not be preempted.
  - See *Noter*, where it holds that preemption only occurs in a dual purpose statute where there is a direct and substantial effect on the federal system of regulation.
- DEP Reg. § 8 (c)—Periodic review course: Both sets of regulations require that employees undergo a periodic review course. The DEP regulations require a one-day *biennial* review course in *each* of the specified subjects. The OSHA regulations require it annually and, by implication, for eight hours (the equivalent of one day).
  - Although there is no apparent conflict, the OSHA regulation prevails because it has established a standard relating to a workplace activity, over which the OSH Act has exclusive jurisdiction.
  - It can be argued, however, that as to the additional, non-workplace training requirements (*supra*), federal OSHA has no jurisdiction and, therefore, the DEP biennial review requirement is not preempted.
  - Resolution: This part of the DEP regulations is probably preempted as to the mutually required training topics because they are workplace issues and federal OSHA regulations have established a standard. As to the training topics related to public safety issues, however, the biennial review requirements are not preempted.
- DEP Reg. § 8(d)—The requirement for payment of \$100 upon completion of the training course: Here, there is a direct conflict. The DEP regulations require payment of \$100 for issuance of an asbestos handler's certificate. The OSHA regulations require that the training be at no cost to the employee.
  - It is unclear from the DEP regulations whether the employer or the

employee must pay the \$100, but it is fair to assume that, because having a certificate is a condition of employment in an asbestos handling occupation, the burden falls on the employee.

- Resolution: This provision of the DEP regulations is almost certainly preempted because it is in direct conflict with the OSHA regulation and interferes with the method chosen by federal OSHA to implement the OSH Act.
- DEP Reg. § 8 (e)—The employer's reporting requirement and the \$600 assessment: The OSHA regulations are silent on this subject. Because the DEP requirements for employee certification are designed to implement a public safety measure and not to advance workplace safety, the annual assessment does not intrude upon an area where federal OSHA has jurisdiction. As the court observed in *Noter*, "The funding requirement is a logical means for accomplishing a broad community health and safety purpose. It does not interfere with compliance with the OSH Act or impose obstacles to the accomplishment of the OSH Act's purposes."
  - Resolution: This part of the DEP regulation is probably not preempted.

# NOTES

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