THE MPT™

MULTISTATE PERFORMANCE TEST

July 2009 MPTs and Point Sheets

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July 2009 MPTs and Point Sheets

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Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and point sheets from the July 2009 MPT. Each test includes two items; jurisdictions that use the MPT select either one or both items for their applicants to complete. The instructions for the test appear on page v. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT point sheets describe the factual and legal points encompassed within the lawyering tasks 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 problems contemplated by the drafters. Point sheets are not official grading guides and are not intended to be "model answers." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheets. User jurisdictions are free to modify the point sheets. Grading of the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Description of the MPT

The MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. Applicants are expected to spend 90 minutes completing each MPT item administered.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner

likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring applicants to perform one of a variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test form contains the following 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. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. 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 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 they all were new to you. You should assume that the 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. If you are taking this examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. 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 the 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

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

BENSON & DEGRANDI
Attorneys at Law
120 Garfield Avenue
Franklin City, Franklin 33536

MEMORANDUM

From: Robert Benson

To: Applicant

Date: July 28, 2009

Re: *Jackson v. Franklin Sports Gazette, Inc.*

Our client, the *Franklin Sports Gazette*, has been sued by Richard "Action" Jackson, star third baseman for Franklin City's major league baseball team, the Franklin Blue Sox. The complaint alleges infringement of Jackson's right of publicity under Franklin's recently enacted right of publicity statute. I interviewed Jerry Webster, managing editor of the *Gazette*, and Sandi Allen, its vice president of marketing, and also compiled some background information on Jackson and the team. I have summarized my interview and research in the attached memorandum.

Given that the new Franklin right of publicity statute has not been tested in the courts, this will be a case of first impression. However, there has been considerable case law developed under the prior, and now preempted, common law right of publicity, which may or may not still be relevant precedent.

Please prepare a memorandum analyzing whether Jackson has a cause of action under the right of publicity statute and whether we have any legal arguments to oppose that cause of action under the statute and the relevant case law. You need not include a separate statement of facts, nor address any issue of damages. Rather, analyze Jackson's claims and our defenses, incorporating the relevant facts into your legal analysis and assessing our likelihood of success on each such basis. Draft the points of your analysis in separate sections using descriptive headings. Be sure to explain your conclusions.

BENSON & DEGRANDI
Attorneys at Law

MEMORANDUM

From: Robert Benson

To: Applicant

Date: July 28, 2009

Re: *Jackson v. Franklin Sports Gazette*—INTERVIEW AND RESEARCH SUMMARY

These notes summarize salient facts from my interview of the *Franklin Sports Gazette*'s managing editor, Jerry Webster, and its vice president of marketing, Sandi Allen, as well as background research on the Franklin Blue Sox.

The *Franklin Sports Gazette* is a weekly tabloid published in Franklin City and distributed throughout the state, dealing with Franklin's sports teams and events, including Franklin City's major league baseball team, the Franklin Blue Sox. The *Gazette* reports on Blue Sox games and team news, and is known for its incisive writing and action photography. The *Gazette* is sold by subscription and on newsstands.

Richard "Action" Jackson is the star third baseman of the Blue Sox, the only major league team for which he has played during his 12-year career. Jackson is a much-beloved fixture in the Franklin City sports scene, and is noted for his charitable endeavors and community service. It sometimes appears that the majority of fans at Blue Sox games are wearing apparel with Jackson's name, nickname, or unique double-zero number, "00," and Jackson has earned millions of dollars merchandising his name and likeness for products and services. He is reported to be among the top ten endorsement earners in baseball.

Five seasons ago, the *Gazette* published an account of a regular season Blue Sox game in which Jackson scored on a close play at home plate. The Blue Sox lost the game, which was wholly unmemorable in an unmemorable season—they finished in fifth place, last in the division. The story was accompanied by a photograph of Jackson sliding into home plate (the "Photo"). The Photo showed the opposing team's catcher's feet, and Jackson's back as he slid with one arm

thrown up in the air. A spray of dirt from the slide obscured most of Jackson's body and uniform number, allowing only the second zero to be partially visible. No part of Jackson's face could be seen. The Photo won a third place award from the Franklin City Photographers' Association "Best Sports Photo of the Year" competition. Jackson is Caucasian, and a check of the relevant Blue Sox rosters shows that, at the time, the Blue Sox had three other players (two of whom are also Caucasian) who wore uniform numbers ending in zero—today, they have five other players with such numbers (all Caucasian). The Blue Sox have not changed the design of the team uniforms in 25 years, and their uniform design is one of the few in the major leagues which does not include the player's name on the back.

One month ago, the *Gazette* ran a print advertisement in the *Franklin City Journal*, a daily newspaper, soliciting subscriptions. The ad reproduced the Photo over text and a subscription coupon. Allen chose to use the Photo in the ad, with Webster's approval, for the reasons given in the attached memorandum, which also includes her draft of the ad. The ad was published with the text unchanged from the draft.

In the week following the ad's appearance, the *Gazette*'s new subscriptions, which resulted directly from the ad (as shown by use of the coupon in the ad), increased by 18% over new subscriptions during the previous week.

Two days ago, Jackson served a complaint on the *Gazette*, alleging that it had violated Jackson's right of publicity under Franklin's statute and had damaged him by depriving him of the license fee he would have reaped from this use of his image and of his ability to license the use of his image to other sports publications.

FRANKLIN SPORTS GAZETTE

Memorandum

From: Sandi Allen

To: Jerry Webster

Date: June 15, 2009

Re: Subscription ad

We want to liven up the print ad we run every Monday in the *Franklin City Journal*; the old ads, which are text only, are too staid. We've got this award-winning photo of Action Jackson from a few years ago, which conveys excitement, action, and the kind of sports coverage we stand for. Using the photo together with new text copy will, I think, result in a significant increase in subscriptions to the *Gazette*. The draft of the ad is attached. OK?

OK JW 6-15-09

[DRAFT ADVERTISEMENT]

[PHOTO WILL BE REPRODUCED HERE]

GET IN WITH THE ACTION!!!!!

SUBSCRIBE NOW TO THE ***FRANKLIN SPORTS GAZETTE***!

Look at all you get:

Great stories!
Coverage of every Franklin team!!
And award-winning photos like this that put you right in the middle of the action!!!

Use this coupon for our special offer: 26 weeks of the *Gazette* for only $24.99!

[COUPON WILL BE INSERTED HERE]

LIBRARY

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

FRANKLIN RIGHT OF PUBLICITY STATUTE

§ 62 RIGHT OF PUBLICITY—Use of Another's Persona in Advertising or Soliciting without Prior Consent

(a) Cause of Action. Any person who knowingly uses another's . . . photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

(b) Definitions. As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

> (1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

* * * *

(d) Affirmative Defense. For purposes of this section, a use of a . . . photograph, or likeness, in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subsection (a).

* * * *

(g) Preemption of Common Law Rights. This section preempts all common law causes of action which are the equivalent of that set forth in subsection (a).

EXCERPTS FROM LEGISLATIVE HISTORY

Franklin State Assembly, Committee on the Arts and Media, Report No. 94-176 (2008), pp. 4–5, on F.A. Bill No. 94-222 (Franklin Right of Publicity Act of 2008)

The common law of Franklin has recognized an individual's "right of publicity" for many decades. Starting in the 1950s, Franklin's courts recognized that an individual has both a property right and a personal right in the use of his or her "persona" for commercial purposes.

It is important to note that the right of publicity differs from, and protects entirely different rights than, a copyright. A copyright protects the rights of reproduction, distribution of copies to the public, the making of derivative works, public performance, and public display in an original work of authorship. Thus, for example, the copyright owner of a photograph may prevent others from reproducing the photograph without authorization. But the right of publicity protects the interests of an individual in the exploitation of his or her persona—the personal attributes of the individual that have economic value, which have nothing to do with original works of authorship. Thus, for example, even if authorization to use a copyrighted photograph is obtained from the copyright owner, commercial uses of that photograph which exploit the persona of the photograph's subject could infringe upon the subject's right of publicity. It is also important to note that the right of publicity is exclusively a matter of state law—unlike copyright, which is exclusively within federal jurisdiction. There is no federal right of publicity.

As developed by Franklin's courts, the elements of a common law cause of action for appropriation of the right of publicity are (1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury. Even after 50 years of development, the boundaries of Franklin's common law right of publicity are necessarily ill-defined, as the courts can deal only with the specific facts of individual cases that come before them. Given the expansion of our "celebrity culture," the opportunities for individuals to exploit this right have increased exponentially in recent years. Accordingly, the Committee concludes that there is a need to codify this increasingly important economic right.

While the Committee agrees with, and the proposed legislation codifies, the basic elements of the cause of action as understood at common law, the Committee is of the view that some of the common law cases went too far in upholding individual claims, while others did not go far enough. The Committee therefore intends that the legislation set forth the full extent of the right, thus preempting the common law cause of action in this area. Obviously, to the degree that prior common law decisions accord with the legislation's provisions, they continue to constitute good precedent which the courts may use for guidance in applying the legislation.

The legislation would achieve several goals in clarifying the law:

* * * *

- The case law has, in a few opinions, dealt with the specificity with which an individual needs to be identifiable when his or her photographic image is used without consent. It is important that a single standard be used for such analysis. Accordingly, the legislation includes a subsection which explicitly sets forth the requirements for that identification.

- There has been some uncertainty as to whether news reporting organizations were liable for infringement of the right of publicity when they included an individual's picture or other indices of persona in ancillary uses. It is the Committee's view that the important right of freedom of the press, found in both the Franklin Constitution and the First Amendment to the United States Constitution, must supersede any individual claims based on "any news, public affairs, or sports broadcast or account, or any political campaign." Hence, the legislation includes an express exemption for such uses of an individual's persona.

* * * *

The legislation is hereby favorably reported to the Assembly.

Holt v. JuicyCo, Inc., and Janig, Inc.

Franklin Supreme Court (2001)

The right of publicity, which exists at common law in Franklin, has been defined as the protection of an individual's persona against unauthorized commercial use. Since we recognized this right some 50 years ago, there has been an increasing number of cases dealing with it, reflecting the similarly increasing economic importance of the right.

The issue in this case is whether an individual's persona, as reflected in certain aspects of his visual image, is identifiable in an audiovisual work—and thus actionable if the other elements of the common law cause of action are met—even if his face and other more common identifying features are unseen.

Ken Holt, a Franklin resident, is a noted downhill skier, participating on the World Cup Ski Tour. He has a devoted fan following, due in large part to his dashing good looks and winning personality. As is the custom in downhill skiing races, when he is competing, Holt is completely covered up: he wears a body-clinging "slick" suit, boots, gloves, and a helmet with a tinted faceplate. In competition, Holt always wears a distinctive and unique gold-colored suit with purple stripes, adorned with patches from his sponsors. His name is emblazoned in large gold letters on his purple helmet. And, as do all competitors, he wears a bib with his assigned number for that particular competition, so that he may be distinguished from other competitors.

JuicyCo manufactures a sports drink called PowerGold, which ostensibly aids in maintaining energy during athletic activity. JuicyCo markets PowerGold nationwide to consumers. Janig is its advertising agency.

In 1999, Janig produced a television commercial for PowerGold, using a video clip of a two-man race between Holt and another skier, for which it acquired the rights by license from the broadcast network that covered the race and owned the copyright in the clip (the network had obtained no rights from Holt, nor did it need to, as its coverage was newsworthy and authorized by the World Cup Ski Tour). Neither Janig nor JuicyCo sought permission from Holt or the other skier to use their images in the commercial. Janig used digital technology to modify aspects of Holt's appearance in the video clip: it deleted the patches on his suit, deleted his bib number, deleted the name "HOLT" from the helmet, and inserted the PowerGold logo on his helmet and chest. Voice-over narration was added describing the attributes of PowerGold.

Holt brought this action for violation of his common law right of publicity, claiming that his likeness was used for commercial purposes without his consent. He claimed that the use implied his endorsement of PowerGold, depriving him of endorsement fees from JuicyCo and precluding his endorsing competing sports drinks.

JuicyCo and Janig argued that there was no way to identify the skier in the commercial as Holt, given that his face, name, bib number, and sponsors' patches were not visible. JuicyCo and Janig moved to dismiss for failure to state a cause of action.

In considering a motion to dismiss for failure to state a claim, a court must accept the complaint's well-pleaded allegations as true and construe them in a light most favorable to the plaintiff. Dismissal of the complaint is proper if it appears certain that, under applicable law, the plaintiff is not entitled to relief under any facts which could be proved in support of the claim.

The district court dismissed the action on the grounds that Holt was not identifiable in the video clip, holding that he was unrecognizable as his face was not visible and his name, sponsors' patches, and bib number were deleted. The court of appeal affirmed. If the courts below were correct that, as a matter of law, the plaintiff was not identifiable, then in no sense has his right of publicity been violated.

We agree with the district court that Holt's likeness—in the sense of his facial features—is itself unrecognizable. But the question is not simply whether one can recognize an individual's features, but whether one can *identify* the specific individual from the use made of his image.

We hold that the lower courts' conclusion that the skier could not be *identifiable* as Holt is erroneous as a matter of law, in that it wholly fails to attribute proper significance to the distinctive appearance of Holt's suit and its potential, as a factual matter, to allow the public to identify Holt as the skier in the commercial. The suit's color scheme and design are unique to Holt, and their depiction could easily lead a trier of fact to conclude that it was Holt, and not another wearing that suit, appearing in the commercial and endorsing PowerGold. Whether it did or not is a factual, not a legal, question that will have to be decided at trial.

Reversed and remanded.

Brant v. Franklin Diamond Exchange, Ltd.

Franklin Court of Appeal (2003)

Barbara Brant was the star of the Franklin University intercollegiate diving team that won the national collegiate championships in 1995. She was the only diver in the championships to score a perfect "10" in a dive from the 10-meter board. She has retired from competitive diving and now lives in Franklin City, where she practices law.

The Franklin Diamond Exchange (the "Exchange") is a jewelry store in Franklin City. In 2002, it obtained the rights to reproduce a photograph of Brant's perfect dive from the copyright owner of the picture. The photograph shows Brant from the waist to the toes entering the water on the completion of her dive. Her head and torso, to her waist, have entered the water and are not visible. The picture does show her legs and the bottom of her bathing suit, which was a generic one-piece suit, of the same color, design, and cut as was required to be worn by all female divers who participated in the championships. Other than that part of Brant's body, the picture shows nothing but the surface of the swimming pool—there is no way to identify the venue, time, or event depicted. The Exchange used the photograph in an advertisement in the *Franklin City Journal* over the headline "Make a Splash! Give Her a Diamond!" with illustrations of four different diamond bracelets, their prices, and the name, address, and phone number of the Exchange.

Brant saw the advertisement and brought this action against the Exchange for violation of her common law right of publicity. The Exchange admitted that the photograph depicted Brant, but moved to dismiss for failure to state a cause of action. The Exchange argued that Brant's likeness was not identifiable from the photograph, and hence her right of publicity could not have been infringed. Brant opposed the motion, citing *Holt v. JuicyCo, Inc., and Janig, Inc.* (Fr. Sup. Ct. 2001) as authority for the proposition that one's face or similar identifying features need not be visible if the individual whose right of publicity is allegedly violated is nevertheless identifiable from the depiction used. The district court agreed and, after trial, awarded Brant $150,000 in damages. The Exchange appealed, alleging that the district court erred as a matter of law. For the reasons given below, we agree and reverse, with instructions to dismiss the complaint.

In *Holt*, the skier whose picture was used in a commercial advertisement was identifiable because of his unique uniform which,

though somewhat altered digitally, nevertheless remained basically the same and clearly visible in the depiction. Thus, the public to whom the advertisement was aimed could easily identify the figure depicted as Holt and no other skier.

Brant argues that, following *Holt*, there are two elements that can be used to identify the individual depicted in the picture as herself—her legs and the visible portion of her bathing suit. We disagree. *Holt* is inapposite and distinguishable on the facts before us. It strains credibility here to argue that Brant's legs, which have no unique scars, marks, tattoos, or other identifying features, are identifiable by the public compared to any other diver's legs. The only other visible element in the picture is her bathing suit from the waist down. But that suit was identical in color, design, and cut to those worn by every other diver in the meet.

In sum, even though the Exchange does not contest that it is Brant who appears in the photograph, there is no way that the public could conclude that this was a picture of Brant as opposed to any other diver. Neither her likeness nor any other identifying attribute was present in the photograph. Thus, there is no possibility that Brant could prove facts which support her claim under the law. Her right of publicity was not infringed.

The judgment of the district court is reversed, and the case remanded with instructions to dismiss the complaint for failure to state a cause of action.

Miller v. FSM Enterprises, Inc.

Franklin Court of Appeal (1988)

Jan Miller, a resident of Franklin City, is a world-class figure skater, an Olympic champion now on the professional tour. FSM Enterprises, Inc., is the publisher of *Figure Skating!* Magazine ("FSM"), a national monthly which is devoted to the sport. In the course of its normal news coverage of the sport, FSM ran a story on Miller's appearance at the World Professional Figure Skating Championships in January 1987, and included a photograph of Miller seemingly frozen in midair in one of her jumps off the ice (the "Photo").

In February 1987, FSM placed an advertisement soliciting subscriptions in several national sports magazines, all of which were distributed in Franklin. The advertisement included the Photo over text extolling the quality of FSM's coverage of the sport of figure skating. There was no mention of Miller's name in the text. Miller sued, alleging that the use of her image in that advertisement violated her common law right of publicity.

The defendant moved to dismiss for failure to state a cause of action, claiming that the use was for newsworthy purposes. The district court denied the motion, holding that the advertisement soliciting subscriptions was not for such purposes, but was rather for a commercial use wholly detached from news coverage. After a bench trial, the district court found that Miller's right of publicity had been infringed, and awarded damages of $250,000. This appeal followed, and we are called upon to decide an issue of first impression: the use of an individual's image in an advertisement by and for a news medium under Franklin's common law right of publicity.

The elements of a common law cause of action for violation of the right of publicity are (1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury.

The right is not without limitations, however. One of the most important is an exemption for news reporting. The guarantees of freedom of the press in the Franklin and United States Constitutions are such that no individual can complain of legitimate news reporting which reproduces any aspect of his or her persona—name, image, or the like. Thus, wisely, we think, Miller makes no complaint about the use of her image in the issue of FSM that reported on her participa-

tion in the skating championships, and explicitly agrees that the use of the Photo there was for a legitimate news report. She does, however, argue that the use in the advertisement soliciting subscriptions is a different matter, and one that is actionable.

Miller argues that this case is no different from *Jancovic v. Franklin City Journal, Inc.* (Fr. Sup. Ct. 1984). Jancovic was a star goalie for the Franklin City Foxes, a minor league hockey team. The Foxes had a rabid following in Franklin City, and had won the championship of their league. The *Journal* printed a special section devoted to the championship series, which featured many photographs of the team, including one of Jancovic making an acrobatic save of a shot by the opposition. The *Journal* then reprinted that photograph as a large poster, with no text on it whatsoever, and sold the poster to retail stores which then sold it to the public. Jancovic claimed that his common law right of publicity was violated by the *Journal*'s poster sales. The Franklin Supreme Court agreed.

The Court held that, notwithstanding that the poster was manufactured and sold by an entity which functioned as a news organization, the poster as sold to the public had no relationship whatsoever to that function. Hence, the use did not qualify for the common law exemption for news reporting.

We think that this case is distinguishable from *Jancovic*, and that the use of Miller's image in the Photo when reproduced in the advertisement did not violate her right of publicity. In *Jancovic,* there could be no relationship in the mind of the consumer between the poster and the newspaper, and more particularly the news dissemination function of the newspaper. No part of the news story about Jancovic or his team—not even a caption for the photograph—was reproduced on the poster. Indeed, the purchasers would not have known that the newspaper had anything to do with the sale of the poster. The poster could just as easily have been manufactured and sold by a business selling sports memorabilia, and if it had been, there would have been no doubt that Jancovic's right of publicity had been violated.

But here, the use of Miller's image was incidental to the advertising of FSM in relationship to its news reporting function. The use illustrated the way in which Miller had earlier been properly and fairly depicted by the magazine in a legitimate news account. It informed the public as to the nature and quality of FSM's news reporting. Certainly, FSM's republication of Miller's picture was, in motivation, sheer advertising and solicitation. But that alone is not determinative of whether her right of publicity was violated. We think that the common law must accord

exempt status to incidental advertising of the news medium itself. Certainly, that aspect of the exemption is limited—it can apply only when there can be no inference of endorsement by the individual depicted. So long as the Photo was used only to illustrate the quality and content of the periodical in which it originally appeared, and nothing more, Miller's rights were not violated. We might have concluded otherwise if the advertisement had somehow tied her explicitly to the solicitation for subscriptions (as, for example, by featuring her name in its headline or text) and thus implied an endorsement, for that implied endorsement would have met the requirement that the use of the persona be for the defendant's commercial advantage, beyond a reference to its newsworthy value. But such is not the case here.

Reversed and remanded with instructions to dismiss the complaint.

WEISS, J., dissenting:

I dissent. Miller is in part in the business of endorsing products, and this use implies her endorsement of the defendant's magazine. As the majority notes, if her name had been used in connection with the solicitation, there would have been no question that an endorsement was implied and her right of publicity violated. That her name was not used does not to my mind mean, as the majority would have it, that no endorsement was implied—a picture is, as we all know, worth a thousand words. The question of the use is one of degree, and here the use of her image seems to me to be trading on her persona for a purely commercial use as opposed to one that is intended to inform. I would affirm.

FILE

MPT-2: *In re City of Bluewater*

OFFICE OF THE CITY ATTORNEY
CITY OF BLUEWATER
1900 Phoenix Place
Bluewater, Franklin 33070

MEMORANDUM

To: Applicant
From: Amy Gonzalez, City Attorney
Date: July 28, 2009
Re: Water Dispute

The City of Bluewater is in the process of annexing a 500-acre tract of land located here in Bluewater County adjacent to the existing city limits. Annexation is the process by which land is brought into the City and made subject to its taxing and service authority. The tract is the site for the future Acadia Estates subdivision. Once the tract is annexed into the City and the subdivision is built, the City intends to provide water, sewer, fire, and other municipal services to the subdivision pursuant to the City's standard Service Plan and collect revenue for those services. The revenue will be important to our city finances.

However, we have just received a demand letter from the attorneys for Turquoise Water Supply Corporation (TWS) threatening to sue the City if the City proceeds with its plan to provide water and sewer services to the subdivision. TWS is a retail provider of water and sewer services in neighboring El Dorado County pursuant to a Certificate of Convenience and Necessity (CCN) issued by the Franklin Public Service Commission. It, too, wants to expand its revenue base.

TWS asserts that it has the exclusive right to provide water and sewer services to the subdivision under 7 U.S.C. § 1926(b), a federal statute that protects rural water and sewer suppliers that borrow money from the federal government to finance the costs of constructing their water and sewer facilities. TWS further asserts that the City is barred by state law from providing water and sewer services to the subdivision. If TWS were to litigate these issues and prevail, the City would still be able to annex Acadia Estates, but it would be prohibited from providing water and sewer services to the subdivision.

This issue has not been litigated in Franklin federal district court, but I have attached two cases—one from a federal district court in Columbia and one from the Fifteenth Circuit Court of

Appeals—which may be helpful in evaluating and responding to TWS's contentions. Our legal assistant has assembled some background information, also attached.

Please draft a letter responding to TWS's attorneys' demand letter. We need to

- address each of TWS's contentions, and
- persuasively set forth our position that the City has the exclusive right to provide water and sewer services to the Acadia Estates subdivision.

Do not prepare a separate statement of facts. You should thoroughly analyze and integrate both the facts and the applicable legal principles in making your arguments.

OFFICE OF THE CITY ATTORNEY
CITY OF BLUEWATER
1900 Phoenix Place
Bluewater, Franklin 33070

MEMORANDUM

To: Amy Gonzalez
From: Rhonda Hostetler, Legal Assistant
Date: July 27, 2009
Re: Preliminary Research—Dispute with Turquoise Water Supply Corporation

The following is a summary of my preliminary research findings regarding Turquoise Water Supply Corporation (TWS):

- TWS is a private, nonprofit water supply corporation formed in 1985 to "develop and provide an adequate rural water supply to serve and meet the needs of rural residents," pursuant to Franklin Code § 1324.

- Since its inception, TWS has provided water and sewer services to certain rural areas of neighboring El Dorado County pursuant to a Certificate of Convenience and Necessity obtained in 1987 from the Franklin Public Service Commission.

- In 1990, TWS obtained federal loans and grants under 7 U.S.C. § 1926(a) to finance improvements of its water system. Using part of those federal loans, TWS constructed a water plant, a sewage treatment plant, and related facilities capable of providing water and sewer services to approximately 150 homes in a rural pocket of El Dorado County called Ironwood (located five miles away from the site of Acadia Estates).

- In 1996, TWS installed a six-inch-diameter water line along Franklin Highway 45, about three miles from the Acadia Estates tract, and began serving an additional 100 homes along that corridor.

- As a result of these expansions over time, TWS currently provides water and sewer services to approximately 250 rural residents and a handful of small commercial enterprises.

- The current outstanding balance on TWS's 40-year federal loans is approximately $1.4 million.

I've also spoken with engineer Angie Halloway in the City's Public Works Division and Greg Carrigan in the City's Planning Division and confirmed the following:

- When completed, the Acadia Estates subdivision will require water and sewer capacity sufficient to serve the planned development, including water lines that are at least 12 inches in diameter.

- The City has existing water lines and a sewage treatment plant less than a quarter mile from the proposed site of the subdivision. Within a few months of annexation, the City will be able to construct a 12-inch-diameter water line from its existing water facilities as well as the necessary sewer lines to serve the Acadia Estates tract using funds borrowed from the federal government for water and sewer improvements, pursuant to 7 U.S.C. § 1926(a).

- The City's federal loans were taken out in 1997 and 2003 and are for the standard 40-year term. The estimated outstanding balance is at least $4 million.

- TWS's nearest water and sewer facilities are located approximately three miles from the proposed Acadia Estates subdivision. To serve the subdivision, TWS would have to construct significant additional infrastructure, including a water well, one or more water storage tanks, and related water distribution facilities, as well as a sewage treatment plant to handle the residential wastewater generated by the subdivision. The design and construction of such facilities would likely take a minimum of two years to complete.

Bowman & Bowman
Attorneys at Law
3200 Allen Parkway
Cypress, Franklin 33027

July 24, 2009

Amy Gonzalez, City Attorney's Office
1900 Phoenix Place
Bluewater, Franklin 33070

Re: Turquoise Water Supply—Acadia Estates

Dear Ms. Gonzalez:

We are writing on behalf of our client, Turquoise Water Supply Corporation, to inform you of TWS's exclusive right to provide water and sewer services to the proposed Acadia Estates subdivision. We have learned that the City intends to provide water and sewer services to the subdivision. The City has no right under state or federal law to serve the subdivision. TWS holds a Certificate of Convenience and Necessity ("CCN") and thus has the exclusive right to serve the quadrant of El Dorado County near the proposed Acadia Estates subdivision. On July 20, 2009, TWS filed an application with the Franklin Public Service Commission to expand its service area to include Acadia Estates, pursuant to Franklin Code § 457. Once the application is granted, TWS's service area will include Acadia Estates. We understand that the City intends to annex the Acadia Estates tract. Please be advised that even if the City proceeds with the proposed annexation, TWS will nonetheless have the federally protected right, pursuant to 7 U.S.C. § 1926(b), to provide water and sewer services to the Acadia Estates subdivision through its existing water line along Highway 45 and through an expansion of its sewage treatment facilities, which is already under way and scheduled to be completed by January 2011. *See Glenpool Utility Auth. v. Creek County Rural Water Dist.* (10th Cir. 1988).

In addition, the City is precluded under state law from serving the tract. *See* Franklin Code §§ 450(b) & 675. TWS demands that the City modify its proposed Service Plan for the Acadia Estates tract to exclude water and sewer services, as such services will be provided by TWS. If the City refuses to comply, TWS will pursue all available legal remedies, including the filing of a federal lawsuit.

Sincerely,

Henry Bowman

Henry Bowman, Esq.

BLUEWATER TRIBUNE

The voice of rural Franklin

July 14, 2009

500-Home Planned Community to Become Newest Addition to City of Bluewater

A.C. Homes, a well-established real estate developer in Franklin, is asking the City of Bluewater to annex a 500-acre tract of land just outside the city limits. The requested annexation will encompass a large planned residential development called Acadia Estates.

When completed, the Acadia Estates subdivision could offer as many as 500 single-family homes, two or more condominium and/or apartment complexes, and related commercial development. Acadia Estates will include a traditional grocery-store-anchored retail center, as well as a "town square" comprising small specialty stores. The planned community will include strategically located space for recreational activities and amenities, connecting bike and walking paths, and office space for residents who work at home.

"This planned development will create a fully integrated community where people can live, work, and play," said Andrew Christianson, founder and president of A.C. Homes.

Christianson declined to comment on the development's projected costs, but said homes would range in price from $200,000 to $500,000.

If approved, Acadia Estates would be A.C. Homes's first development in Bluewater County. Christianson said that he is still working with city officials to hammer out the details of the various phases of development entailed in constructing a planned community of this size. The city council will consider granting consent to the annexation of the 500 acres of land comprising Acadia Estates in early October. A.C. Homes is also in discussions with the Bluewater Independent School District about the possibility of building a school within the development.

Christianson said construction of the necessary water and sewer infrastructure could begin as early as January 2010 and be completed by April 2010, with home construction anticipated to commence shortly thereafter and be completed by December of that year, although the precise timing will depend on how quickly the necessary development agreements and construction-drawing approvals can be obtained.

DRAFT SERVICE PLAN FOR ANNEXED AREA

Annexation Case No. A2009, City of Bluewater, Franklin

ACREAGE TO BE ANNEXED: 500 acres [legal description omitted]

DATE OF ADOPTION OF ANNEXATION ORDINANCE: _____

SERVICES TO BE PROVIDED UPON ANNEXATION:

Municipal services to the acreage described above shall be furnished by or on behalf of the City of Bluewater, Franklin (the City), at the following levels and in accordance with the following schedule:

A. Police & Fire Services

The City will provide police and fire protection, as well as ambulance service, to the newly annexed tract at the same or a similar level of service now being provided to other areas of the City with similar topography, land use, and population.

B. Water Service

The proposed area of annexation does not have a certificate of convenience and necessity (CCN), and once the area is annexed, the City can serve it in the future. The area will be provided with water service within three months of the effective date of annexation.

C. Sewer Service

Once the area is annexed, the City will have the right to provide sewer service to the proposed area of annexation. Sewer service will be provided to the area within three months of the effective date of annexation.

D. Maintenance of Water and Sewer Facilities

Any and all water or sewer facilities owned or maintained by the City at the time of the proposed annexation shall continue to be maintained by the City. Any and all water or wastewater facilities which may be acquired subsequent to the annexation of the proposed area shall be maintained by the City to the extent of its ownership. The City Council believes that, with minor extensions to its existing water and sewer systems, the City can adequately accommodate the projected water and sewer needs in the area proposed to be annexed.

* * *

LIBRARY

MPT-2: *In re City of Bluewater*

UNITED STATES CODE

CONSOLIDATED FARM AND RURAL DEVELOPMENT ACT

7 United States Code § 1921 *et seq.*

* * * *

7 U.S.C. § 1926 Water and Waste Facility Loans and Grants

(a) The Secretary [of Agriculture] is authorized to make or insure loans to associations, including corporations not operated for profit . . . and public and quasi-public agencies, to provide for the . . . development, use, and control of water and the installation or improvement of drainage or waste disposal facilities . . . for serving farmers, ranchers, farm tenants, farm laborers, and rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes.

(b) The service provided or made available through any association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body . . . during the term of such loan . . . .

FRANKLIN CODE

Chapter 19. Water Utilities

§ 450. Certificate of Convenience and Necessity Required

(a) A water supply corporation may not render retail water or sewer service directly or indirectly to the public without first having obtained from the Franklin Public Service Commission a Certificate of Convenience and Necessity demonstrating that present or future public convenience and necessity require or will require such service.

(b) A person or entity may not construct facilities to provide water or sewer service or otherwise provide such service to an area for which a water supply corporation already holds a Certificate of Convenience and Necessity absent the certificate holder's written consent.

* * * *

§ 453. Requirement to Provide Continuous and Adequate Service

Any water supply corporation that possesses a Certificate of Convenience and Necessity must provide continuous and adequate service to every customer whose use is within the certificated area.

* * * *

§ 457. Amendments to Certificate of Convenience and Necessity

The holder of a Certificate of Convenience and Necessity may, by written application, seek authorization from the Franklin Public Service Commission to expand or modify the service area covered by the existing Certificate of Convenience and Necessity. In determining whether to amend a Certificate of Convenience and Necessity, the Commission shall ensure that the applicant possesses the capability to provide continuous and adequate service.

* * * *

§ 675. Provision of Water and Sewer Services Outside of City Limits

Any city that owns or operates a water supply or sewer system may extend the system into, and furnish water and sewer services to any person within, any territory adjacent to the city, and may install within that territory necessary equipment, provided, however, that the extension of a water supply or sewer system shall not enter into any territory served by the holder of a Certificate of Convenience and Necessity unless such certificate holder requests the extension of water or sewer services from the city.

Fountain Water Supply, Inc., v. City of Orangevale

United States District Court, Northern District of Columbia (2003)

Fountain Water Supply, Inc. (Fountain), is a nonprofit rural water association that provides retail water service to rural customers. It furnishes service in an area that is 18 miles by 36 miles surrounding the City of Orangevale (City). The City is a municipality that also operates a water supply system and supplies water to customers inside its city limits.

Fountain sued the City alleging violation of 7 U.S.C. § 1926(b). Section 1926(b) prevents municipalities from curtailing the service area of rural water service providers who are indebted to the United States. Fountain claims that the City has encroached on its service area by providing water to customers located approximately 1.5 miles outside of the City's limits.

The City has filed a motion for summary judgment, contending that under Columbia law, Fountain does not have the legal right to serve the four customers in the disputed area because it never secured an exclusive "service area" pursuant to Columbia law. The City further disputes the extent to which Fountain was providing or making available water services in the disputed area.

The questions before the court are (1) whether Fountain is entitled to the protections of § 1926(b), and (2) whether the City's conduct in providing water and sewer services to four customers within Fountain's service area violates or potentially violates the protections afforded to Fountain by the statute.

Although the answer to the first question involves primarily interpretation of federal statutes, the answer to the second question involves an interplay between federal law and state law. The court addresses first the question of whether Fountain is entitled to whatever protections § 1926(b) affords under the circumstances.

One portion of the Consolidated Farm and Rural Development Act (the "Act") authorizes the United States Secretary of Agriculture to make or insure loans to rural water associations to provide water service and other essential community facilities to farmers and other rural residents. 7 U.S.C. § 1926(a). The specific provision of § 1926 in question here is subsection (b), which protects a borrowing association, and consequently the federal government as a secured party on loans to the association, from

municipal curtailment of the association's service area, which is the association's financial base. This provision not only encourages rural water development, but also provides the federal government greater security for its loans by ensuring that the borrower's financial base will not be lost to another provider.

To prevail on a claim that a municipality or other entity has violated § 1926(b), a rural water association must establish that (1) it is an "association" within the meaning of the Act, (2) it has a qualifying outstanding federal loan obligation, and (3) it has provided service or made service available in the disputed area. The parties do not dispute that Fountain is an "association" within the meaning of the Act. As of July 1, 1992, it had a qualifying outstanding federal loan in the amount of $2,030,000. Thus, the issue on appeal is whether Fountain has provided service or made service available in the disputed area.

The statute does not specifically define the terms "provided" and "made available." Therefore, the Court must look to state law governing the way in which a water association provides service to potential customers to determine whether a qualifying association has provided service or made service available to the disputed area. Making service available has two components: (1) the legal right under state law to serve an area; and (2) the physical ability to serve an area, which is also known as the "pipes-in-the-ground" test. The state-law and pipes-in-the-ground tests are not independent tests, but prongs of a single test for "made service available."

a. Legal authority to serve

Columbia law requires a water service provider to obtain written authorization from the Columbia Public Service Commission prior to constructing or operating a water distribution system in a particular area. Columbia Water Code § 287.02.

The City concedes that Fountain sought and obtained the necessary approvals from the Columbia Public Service Commission to serve the area in dispute. However, the City asserts that it nonetheless has the exclusive right to serve customers within two miles of its city limits pursuant to Columbia Government Code § 357A, which provides that "water services shall not be provided within two miles of a city by a rural water district." That may well be. However, Fountain is not a rural water district but rather a rural water association. For public policy reasons, the Columbia legislature deemed that this rule should not apply to rural water

associations. Thus § 357A is inapplicable to the case at hand.

b. Physical ability to serve

Turning to the "pipes-in-the-ground" test, the court finds that genuine issues of material fact preclude summary judgment on the question of encroachment upon Fountain's protected service area. Although the record includes maps of where Fountain's and the City's respective water lines run, the court finds the information provided by the maps and other exhibits does not remove all doubts about whether Fountain was physically able to provide service when the City began serving the four customers in the disputed area.

Accordingly, the City's motion for summary judgment is denied, and this matter will proceed to trial on the issues stated above.

Klein Water Company v. City of Stewart

United States Court of Appeals for the Fifteenth Circuit (2005)

Klein Water Company is a Columbia non-profit water supply corporation. Klein provides rural water service to a portion of Dodge County, Columbia, and is regulated by the Columbia Public Service Commission. Klein is financed, in part, by federal loans made pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* The City of Stewart (City) is a municipality that owns and operates its own water distribution system and sewage treatment plant. The City provides water to businesses and residences in and around its incorporated and annexed boundaries and also has a series of federal loans under 7 U.S.C. § 1926(a).

Klein unsuccessfully sought declaratory and injunctive relief against the City, alleging that the City had extended water distribution facilities over a portion of Klein's territory in violation of 7 U.S.C. § 1926(b). In some instances, Klein alleged, the City had annexed the areas in which it had begun providing water service into its City limits, and in other instances, it had simply begun providing water service to customers outside of the City limits and within Klein's service area.

On appeal, Klein contends that (1) § 1926(b) provides no statutory protection to municipalities and protects only rural water associations against encroachment by municipalities, and (2) application of a "pipes-in-the-ground" test is contrary to law and to the purpose of § 1926(b) where a rural water association has a defined territorial boundary.

We first review the district court's holding that Klein does not qualify for § 1926(b) protection. Section 1926(b) was enacted to encourage rural water development by protecting associations' customer bases and thereby safeguarding the financial viability of rural associations and the repayment of federal loans.

To prevail, Klein must show that it is entitled to § 1926(b) protection by establishing that (1) it is an "association" within the meaning of the Act, (2) it has a qualifying outstanding federal loan obligation, and (3) it has provided service or made service available in the disputed area. The district court held that both Klein and the City were "associations" for purposes of the Act, and that both parties had qualifying loans. The court held, however, that, unlike the City,

Klein had not provided service or made service available in the disputed areas, and thus was not entitled to § 1926(b) protection.

Section 1926(a) indicates that the term "associations" includes "corporations not operated for profit . . . and public and quasi-public agencies . . . ." Congress intended that municipalities be viewed as "associations" for purposes of the Consolidated Farm and Rural Development Act. A city is a public agency. Further, as an entity created for the purpose of providing a public water supply to a designated geographic area, Klein is an "association" under the Act.

Neither party challenges the district court's finding that both parties have qualifying federal loans. Therefore, the central issue in determining whether Klein is entitled to § 1926(b) protection is whether it has provided service or has made service available within the disputed territories. The district court, in construing the term "made available," rejected Klein's argument that having a precisely drawn service area suffices to fulfill the third requirement for statutory protection. Rather, the court concluded that an association makes service available prior to the time a municipality begins providing service to a disputed area when it actually has water lines adjacent to or within the area at issue before municipal service begins. The court found that Klein had not provided service or made service available under this test and therefore did not satisfy the third prerequisite for § 1926(b) protection, whereas the evidence established that the City had satisfied this test. On appeal, the parties agree that Klein has not actually provided water service in the disputed areas.

We look to the state law governing the way in which a water district must provide service to potential customers to determine whether Klein has provided service or made service available in the disputed areas. Under Columbia law, a water supply corporation must obtain written authorization from the Columbia Public Service Commission prior to constructing or operating a water distribution system in a particular area. Columbia Water Code § 287.02. Klein admits that it has not obtained written authorization from the Columbia Public Service Commission to construct facilities or to serve customers within portions of the disputed areas, and has had no requests for service from potential customers in the areas at issue. In our view, these concessions distinguish this case from other cases in which courts have upheld water districts' rights to § 1926(b) protection from municipal encroachment based on the fact that the water districts were actually and actively

providing service, or clearly had made service available.

In *Glenpool Utility Authority v. Creek County Rural Water District* (10th Cir. 1988), the Tenth Circuit addressed the issue of whether a municipality had the exclusive right to provide water service to a newly annexed territory. There, the rural water association had been incorporated to provide water service within specific territorial limits, including an area known as Eden South, and had obtained a federal loan to construct its rural water system. The City subsequently annexed new territory into its city limits, including the area of Eden South. The City was aware at the time of annexation that the rural water district claimed the exclusive right to serve Eden South and that it was, in fact, providing water service there.

In *Glenpool*, the district court found that the rural water association had a water line that ran within 50 feet of the Eden South property and that any prospective user within the rural water association's territory could receive water service from the association simply by applying for service. Because the association would then be obligated to provide the service, the district court found that it could and would provide water service to Eden South within a reasonable time of an application for such service.

On appeal, the Tenth Circuit concluded that the association had "made service available" to the disputed area by virtue of its lines adjacent to the property and its responsibilities to applicants within its territory. The court further held that § 1926(b) prohibited the City from using annexation of Eden South as a "springboard" for providing water service to the area and thereby curtailing or limiting the service made available by the association.

Glenpool teaches that the question of whether an association has made service available is resolved by answering whether the facilities exist on, or in proximity to, the location to be served. If an association does not already provide service, to be eligible for § 1926(b) protection the association must either (1) have existing water lines within or adjacent to the property claimed to be protected by § 1926(b) prior to the time an allegedly encroaching competitor begins providing service, or (2) be able to provide such service within a reasonable period of time.

Based on the location of Klein's distribution lines, which are located more than a mile from the disputed areas, there is no question that it had not made service available prior to the time that the City began providing service to the disputed properties. Nor has Klein demonstrated that it could make ser-

vice available within a reasonable amount of time. Further, uncontroverted evidence demonstrates that (1) Klein had no facilities in the disputed areas or adjacent to the disputed areas (the nearest Klein facilities range from 1.2 to 1.4 miles away), (2) Klein did not have the financial wherewithal to extend its existing facilities to the disputed areas, and (3) even with sufficient funding it would take at least 12 months for Klein to construct the water lines necessary to serve residents in the disputed areas who were in need of water service at the time that the City began providing such service. The City, on the other hand, could meet residents' needs immediately.

Klein is unable to show that it has provided service or made service available in the disputed areas, and is therefore not entitled to the § 1926(b) protection which might otherwise have been available. The City was entitled to provide service to residents in the disputed areas.

In sum, an association's ability to serve is predicated on the existence of facilities within or adjacent to a disputed property. By its clear terms, § 1926(b) does not provide an automatic, exclusive right to serve, but rather provides protection only if certain conditions are met. Among those conditions is that an association has at least made service available or is capable of making service available within a reasonable period of time. In this case, Klein has not established its authorization to serve the disputed properties or its ability to provide the service. Not having facilities available, and not having requested authority from the Columbia Public Service Commission to construct such facilities, Klein has shown that its availability of service is merely speculative.

Affirmed.

POINT SHEET

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

Jackson v. Franklin Sports Gazette, Inc.

DRAFTERS' POINT SHEET

In this performance test item, applicants' law firm represents the *Franklin Sports Gazette*, a weekly tabloid sports newspaper. The *Gazette* has been sued by Richard "Action" Jackson, star third baseman of the Franklin Blue Sox, Franklin City's major league baseball team, for violation of his right of publicity under the recently enacted Franklin right of publicity statute.

The *Gazette* had, five years earlier, run a photograph of Jackson sliding into home plate ("the Photo") as part of its coverage of a Blue Sox game. In the Photo, Jackson's back was to the camera, his face and most of his body were obscured, and only the last digit of his uniform number was visible.

On June 15, 2009, the *Gazette*'s vice president of marketing sent a memo to its managing editor suggesting that the *Gazette* run a new advertisement in the *Franklin City Journal*, a daily newspaper, soliciting subscriptions. The advertisement showed the Photo over the headline "GET IN WITH THE ACTION!" and text that referred to the *Gazette*'s coverage as including "award-winning photos like this that put you right in the middle of the action!!!" After the advertisement ran in the paper as drafted, Jackson sued the *Gazette*.

The *Gazette* seeks the law firm's assistance in defending against the suit. Applicants' task is to draft an objective memorandum analyzing whether there is a cause of action under Franklin's right of publicity statute, identifying the *Gazette*'s possible legal arguments to oppose such a cause of action, and assessing the likelihood of success.

The File contains 1) the instructional memorandum, 2) a memorandum from the partner summarizing background research and interviews with the *Gazette*'s managing editor and vice president of marketing, 3) the memorandum from the vice president of marketing to the managing editor suggesting the advertisement, and 4) the advertisement itself. The Library contains 1) the Franklin right of publicity statute, 2) excerpts from its legislative history, and 3) three cases bearing on the subject.

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the user jurisdictions.

I. FORMAT AND OVERVIEW

The assignment is to prepare a memorandum analyzing whether there is a cause of action under the recently enacted Franklin right of publicity statute. The analysis should be objective, noting the arguments on both sides of the issues presented and assessing the likelihood of success on each issue.

Jackson v. Franklin Sports Gazette, Inc., then poses two specific questions and one overarching legal issue for applicants:

1) Was Jackson identifiable in the Photo? If not, there is no possibility he could prove facts supporting one of the necessary conditions for a cause of action for violation of his right of publicity—the requirement that the individual's *persona* be used.
2) Even if he was identifiable in the Photo, is the use of the Photo by the *Gazette* excused under the statute's exemption for news reporting?
3) The answers to these questions must be informed by the degree to which the prior common law decisions are relevant and precedential under Franklin's new right of publicity statute.

No introduction or formal statement of facts is necessary, but applicants should incorporate the relevant facts into their analyses, using descriptive headings to separate the issues; those headings presented below are illustrative examples only, and not prescribed headings that applicants must use.

Applicants would likely review the elements of a cause of action under the right of publicity statute: 1) use of the plaintiff's persona, 2) appropriation of the persona for commercial or other advantage, 3) lack of consent, and 4) resulting injury. With respect to the second element, there is no doubt that the *Gazette* used the Photo for its commercial advantage. Likewise, elements 3 and 4 are not in dispute. The key issue is whether the first element has been met.

It is expected that applicants will conclude that there is a good, although not absolutely certain, argument that Jackson is not identifiable in the Photo. Thus, it is not possible to prove facts which meet the statutory requirement of identifiability necessary for a cause of action. On this issue, there is a strong argument that the existing common law precedents supporting the

Gazette's position remain good law, notwithstanding the preemption provision of the statute, as the decisions comport with the statute and its legislative history. In addition, there is a weaker, but plausible, argument that the use of the Photo comes within the news reporting exception of the statute. On this issue, the argument that the common law precedents remain good law, while plausible, is weak, given the language of the statute and legislative history.

II. DISCUSSION

A. Was Jackson identifiable?

The statute requires that the individual depicted in a photograph be "readily identifiable." § 62(b). It defines that term as meaning that a viewer can "reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use." § 62(b)(1). Applicants should note that the common law right of publicity required that the plaintiff's persona be appropriated and argue that this is a standard similar to the standard in the statute. The legislative history of the statute indicates that prior common law decisions that accord with the new statutory provisions remain good precedent. This would indicate that the prior common law decisions on identifiability—*Holt v. JuicyCo, Inc., and Janig, Inc.,* and *Brant v. Franklin Diamond Exchange*—are still good law, as each appears to apply the equivalent of the new statutory standard, albeit not in so many words.

What features or attributes make an individual "identifiable"?

Jackson's face and most of his body are not visible in the Photo. Applicants should note that *Holt* teaches that facial representation is not necessary—there, the distinctive and unique garb of the athlete was sufficient to identify him in the minds of the public. On the other hand, *Brant* teaches that such "secondary" identification can only go so far—when an individual is depicted without any distinctive identifying features whatsoever, the right of publicity is not violated, for the public cannot identify the individual depicted as the individual making the claim. Accordingly, applicants must analyze whether Jackson is "identifiable" from any non-facial features in the Photo, such that a viewer could, in the words of the statute, "reasonably determine" that it is Jackson being depicted in the Photo.

Is Jackson "identifiable" from any non-facial features in the Photo?

Applicants should address the question whether there is any aspect of Jackson's depiction in the Photo that would allow the public to know that it is he, and not another player, being

depicted. Applicants should state that a successful motion to dismiss requires that Jackson is *not* identifiable from the Photo. Applicants should apply the following analysis in concluding that Jackson's claim is unlikely to succeed:

- No part of Jackson's face or body can be identified.
- One possible identification that could be made is based on Jackson's uniform. But the uniform design has not changed in 25 years, and, by definition, a "uniform" is uniform—it is the same for all players on the team. Thus, the Photo could depict any player on the team. Applicants should support this analysis by referring to and analogizing with the use of a common swimsuit design by all competitors in *Brant*.
- Applicants should distinguish *Holt* by noting that the plaintiff there was "identifiable" by the *unique* aspects of his clothing (his gold racing suit), and argue that no similarly unique attributes are present here.
- Another possible identification that could be made is based on the partial visibility of Jackson's uniform number—the last zero in his double-zero number. But, at the time the Photo was taken, three other Blue Sox players had numbers ending in zero, and, at the time of the lawsuit, five other players did. Hence, the picture could have been of any one of four to six different individuals.
- The uniform number analysis requires further refinement—as parts of Jackson's unclothed body (one arm, his neck) are visible in the Photo, were those teammates whose numbers ended in zero of the same ethnic background as Jackson? As Jackson is Caucasian, if all the other teammates whose numbers ended in zero were non-Caucasian, that might be enough to find Jackson identifiable in the Photo. But the facts tell us that a sufficient number were also Caucasian (two of the three when the Photo was taken, and all five at the time of the lawsuit) as to preclude the possibility that Jackson could be reasonably identifiable in the Photo.

Is Jackson "identifiable" from the text of the advertisement?

- Applicants may note that Jackson may argue that the text of the advertisement, by its repeated use of the word "action," identifies the individual in the Photo as Jackson by using his nickname. This, it could be argued, is a secondary identifying feature like the distinctive outfit worn by the plaintiff in *Holt*. In response, applicants might observe that the statute's definition of what makes a person identifiable in a photograph is based solely on

visual elements in the photograph itself. Hence, the use of "action" in the text does not affect the identifiability of the individual depicted in the Photo.

- Applicants might also note that Jackson could argue that the repeated use of the word "action" in the text of the advertisement and the reference to him in the memorandum from Sandi Allen to Jerry Webster show an intent to identify Jackson as the individual in the photograph, and therefore violate his right of publicity. The counterargument would be that use of "action" in the ad and the memo (with one exception, discussed below) was as a common noun, not the proper noun of Jackson's nickname: 1) if the headline in the ad had referred to Jackson, it would have said, "GET IN WITH ACTION," not "GET IN WITH *THE* ACTION" (emphasis added); 2) the memo referred to the Photo conveying "excitement, *action*, and the kind of sports coverage we stand for" (emphasis added), using the common noun "action" (with no initial capital letter) rather than the proper noun (with an initial capital letter); and 3) the text of the ad, referring to "put[ting] you right in the middle of the *action*" (emphasis added), also used the common noun, not Jackson's nickname. Hence, applicants could conclude that the public would understand the use in the ad in the sense of the common noun "action," and not as identifying Jackson himself.
- Finally, perceptive applicants will note that the memo's identification of the individual in the Photo as Action Jackson simply indicates the *Gazette*'s knowledge that the Photo depicts Jackson and not another player, and does not go to the question of the identifiability by the public of Jackson in the ad. Although the statute imposes liability on one who "knowingly uses" an individual's persona, a second requirement is that the individual be identifiable. As the court stated in *Brant*, that knowledge, and even its admission, does not make the individual "identifiable" by the public in the use itself.

In sum, applicants should conclude that there is a good argument, albeit not a certainty, that, under the statute and relevant and still-valid precedent, Jackson is not identifiable in the Photo and, as a result, he does not have a cause of action for violation of his right of publicity.

B. Was the use for news reporting?

Applicants should proceed in their analysis to note that, even if Jackson were "identifiable" in the Photo, the use could still be exempt because of the affirmative defense for "news

reporting" in the statute, § 62(d). As there seems to be prior common law precedent which would exempt the *Gazette*'s use in the subscription solicitation, applicants should first address whether the statute has changed the common law standard; if it has, the prior supporting case law no longer serves as precedent.

Did the statute change the common law standard of what constitutes news reporting?

Both the common law right and the new statutory right contain an exception for news reporting. *See* § 62(d); *Miller v. FSM Enterprises, Inc.* (Fr. Ct. App. 1988). As the common law developed, to be exempt the use had to be somehow related to news dissemination:

- In *Jancovic v. Franklin City Journal, Inc.* (discussed in *Miller*), a news photograph that was reproduced as a poster and sold as such by the newspaper, but without any reference to its news function, was held to violate the individual's common law right of publicity. The court held that it made no difference that the poster came from a news organization, as the lack of reference to the organization or its news activities removed the use from the exemption.
- Applicants should distinguish *Jancovic* on the grounds that the *Gazette*'s use did indeed refer to its news reporting activities. The text of the advertisement made direct reference to the activities and type of news coverage the *Gazette* provides ("great stories," "coverage of every Franklin team," "award-winning photos").
- Applicants will also note that a common law precedent, *Miller*, supports exemption for exactly the sort of use made here by the *Gazette*. In *Miller*, a magazine used a news photograph for a subscription solicitation, much like the use here. The court held (over dissent) that the relation of the photograph to the news function of the magazine was sufficient to qualify for the exemption, as the use was an example of the magazine's news coverage.
- Is *Miller* still good law under the statute? The statute grants an affirmative defense for use "in connection with any news, public affairs, or sports *broadcast or account*" (emphasis added). While this obviously applies to stories and news accounts, it is unclear as to whether it would extend to solicitations for subscriptions as was the case in *Miller*—could the solicitation, which illustrates the type of "news or sports accounts"

the publication covers, itself be described as a "news . . . or sports . . . account"? Arguing against applying the *Miller* common law precedent is the plain language of the statute, which refers only to "account[s]" (in contrast, in *Miller*, the court was not construing statutory language but analyzing the issue in the context of whether the use of the plaintiff's image fell within the term "news reporting" under the common law). The legislative history could also be seen as, at best, ambiguous: 1) it notes that there was "uncertainty" as to whether uses "ancillary" to news reporting incurred liability, and 2) it emphasizes the "broadcast or account" language of the new statute. Hence, applicants should note the potential argument that the subscription solicitation furthers the goal of supporting news reporting by making the public aware of the *Gazette*'s coverage of issues of public interest, and thus the *Miller* rationale should be followed as good precedent, while also noting the weakness of the argument.

- The case for a valid affirmative defense could be seen as a toss-up at best. The statute speaks of the use of a photograph "in connection with any . . . sports broadcast or account." Is this language sufficiently broad to cover the advertisement? Is the term so ambiguous as to make resort to the legislative history necessary? Perceptive applicants will state that, while one could argue that the use of the Photo in the solicitation as an example of the *Gazette*'s content was intended to make the public aware of the *Gazette*'s coverage, one might just as easily argue that the statutory language is clear and includes only "account[s]" and not advertisements for the news medium itself.

If the statute adopted the common law standard for affirmative defense as set forth in *Miller*, did the *Gazette*'s specific use of the Photo meet that standard?

- Applicants should also note that the *Miller* precedent itself is not clear-cut and does not necessarily favor the *Gazette*. The *Miller* court opined that, if the use could be seen as an implied endorsement of the commercial purpose of the magazine, then the relation of the subscription solicitation to the news aspects would disappear and the use would violate the individual's right of publicity. The court gave as an example of such an impermissible implied endorsement the use of the individual's name in the text of the solicitation.

- The *Gazette*'s advertisement did use Jackson's nickname ("Action") in both its headline and text, but, it could be argued, not as referring to the individual but rather to the common usage of the word "action," as previously noted. Hence, it could be argued, the use of the word would not be seen as an endorsement by Jackson. Again, applicants should note that the facts are ambiguous and this point could go against the *Gazette*.
- Perceptive applicants might conclude that the question could ultimately be whether it is the *Gazette*'s intent or the public's perception that determines the answer to whether an endorsement was implied.

Applicants should conclude that, while there is an argument to be made that Jackson's claim is not viable because the subscription solicitation falls within the statute's affirmative defense for "news reporting," that result is not certain, and good arguments could be made the other way that could defeat reliance on the "news reporting" affirmative defense.

POINT SHEET

MPT-2: *In re City of Bluewater*

In re City of Bluewater

DRAFTERS' POINT SHEET

In this performance test item, applicants are employed by the City Attorney's Office for the City of Bluewater, Franklin. The City has received a demand letter from the attorneys for Turquoise Water Supply Corporation (TWS), the provider of water and sewer services to rural residents in a neighboring county, asserting that TWS is entitled to provide water and sewer services to a 500-acre tract of land adjacent to Bluewater's existing city limits, which the City is in the process of annexing. Annexation is the process by which land is brought into the City and made subject to its taxing and service authority, thereby providing additional tax revenue for the City. The tract of land in dispute is the future site of the 500-home Acadia Estates subdivision, which is slated to be constructed over the next 18 months. Applicants' task is to prepare a persuasive letter responding to TWS's attorneys' contentions that TWS qualifies as a federally indebted "association" whose water and sewer service area is entitled to protection against municipal curtailment, pursuant to 7 U.S.C. § 1926(b) of the Consolidated Farm and Rural Development Act.

The File consists of the instructional memo from the supervising attorney, a memorandum of preliminary research findings, TWS's demand letter, a newspaper article, and the City's proposed Service Plan for the Acadia Estates subdivision. The Library contains excerpts from the Consolidated Farm and Rural Development Act (the Act), excerpts from the Franklin Code, and two cases bearing on the subject.

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover all of them to receive passing or even excellent grades. Grading is entirely within the discretion of the user jurisdictions.

I. Overview

The task is to write a persuasive letter to TWS's attorneys responding to the assertions made in TWS's demand letter, specifically the claim that TWS has the exclusive right to provide water and sewer services to the proposed Acadia Estates subdivision. Applicants should base their arguments on the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*, and the state statutes that govern a water supplier's right to serve a particular geographic area (Franklin Code Ch. 19 §§ 450(b) and 675).

Applicants are expected to exhibit a good deal of judgment in what the response letter says and how it says it, as there are no formatting instructions provided except that they are to respond to TWS's attorneys' arguments and argue that the City has the exclusive right to provide service to Acadia Estates. Applicants are instructed not to prepare a separate statement of facts. Their answers should be in the form of a letter to opposing counsel, using fairly formal language but not relying on legal jargon. They must "analyze and integrate" the facts and legal principles in formulating their arguments. This instruction from the supervising attorney is intended to require applicants to integrate the facts and the law, not merely recite them.

II. The Statutes and Cases

The following points, which applicants should extract and use in formulating their arguments, emerge from the federal and state statutory provisions and the cases in the Library:

- The Consolidated Farm and Rural Development Act (the Act), 7 U.S.C. § 1921 *et seq.*, authorizes the Secretary of Agriculture to make or insure loans to nonprofit associations to provide water service and other related essential community facilities to farmers and other rural residents. 7 U.S.C. § 1926(a).
- The Act further protects a borrowing association, and consequently the United States government as a secured party on loans to the association, from municipal curtailment of the association's service area, which is the association's financial base.
    - Specifically, 7 U.S.C. § 1926(b) provides in relevant part:

      > The service provided or made available through any association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body . . . during the term of such loan.

- Because the Act does not specifically define the terms "provided" and "made available," courts must look to the state law governing the way in which a qualifying association provides water service to potential customers to determine whether that entity has provided service or made service available to the disputed area.
    - Making service available has two components: (1) the legal right under state law to serve an area; and (2) the physical ability to serve an area, which is also known as the "pipes-in-the-ground" test. The state-law and pipes-in-the-ground tests are not independent tests, but prongs of a single test for "made service available." *Fountain Water Supply, Inc. v. City of Orangevale* (N. Dist. of Columbia 2003).

- **Legal Right:** In Franklin, a water supply corporation must hold a Certificate of Convenience and Necessity (CCN) issued by the Franklin Public Service Commission in order to have the legal right to provide water and sewer services to a particular geographic area. Franklin Code Ch. 19 § 450. Once granted, the CCN imposes an obligation upon the holder to provide "continuous and adequate service to every customer" within the certificated area. *Id*. § 453.
    - A CCN may be amended by written application approved by the Commission, upon a finding by the Commission that the applicant "possesses the capability to provide continuous and adequate service." *Id.* § 457.
    - While a city need not obtain a CCN to provide service outside its boundaries, it is prohibited from providing service to an area for which a water supply corporation already holds a CCN, absent the certificate holder's written consent. *Id.* § 675.
- **Physical Ability to Serve ("pipes in the ground"):** Whether an association has made service available is also contingent on the existence of facilities in, or in proximity to, the location to be served. *Klein Water Co. v. City of Stewart* (15th Cir. 2005). If an association does not already have service in existence, the association must either have existing water lines within or adjacent to the property claimed to be protected by § 1926(b) prior to the time an allegedly encroaching association begins providing service, or be able to provide such service within a reasonable period of time, in order to be eligible for protection. *Id.*

III. Arguments to Be Addressed in Response Letter

In its demand letter, TWS contends that it is entitled to protection under 7 U.S.C. § 1926(b) and that, in any event, under state law (specifically, Franklin Code Ch. 19 §§ 450(b) & 675) the City is prohibited from providing water and sewer services to the subdivision. Each contention will be addressed in turn.

A. TWS's Federal Argument under 7 U.S.C. § 1926(b)

- In order to prevail on its claim that the City's plan to provide water and sewer services to Acadia Estates violates § 1926(b), TWS must establish the following: (1) it is an "association" within the meaning of the Act, (2) it has a qualifying outstanding federal loan obligation, and (3) it has provided service or made service available in the disputed area. *Fountain; Klein*.

(1) "Association" Requirement

- Here, as in *Fountain Water Supply*, it appears that TWS is an "association" within the meaning of the Act because it is a nonprofit water supply corporation organized to provide rural water and sewer services pursuant to Franklin Code § 1324 (cited in Preliminary Research Memorandum).

- However, the City also qualifies as an "association" under § 1926(b) because § 1926(b), by its terms, applies not only to private nonprofit corporations such as TWS but also to "public and quasi-public agencies" such as the City. *See Klein.*

- Moreover, the "association" requirement is just the first of three prerequisites for entitlement to § 1926(b) protection.

(2) Federal Indebtedness Requirement

- TWS is currently indebted to the federal government for loans taken out in 1990, to the tune of $1.4 million. (Preliminary Research Memorandum.)

- However, the City is also federally indebted by virtue of having obtained federal loans in 1997 and 2003 to finance water and sewer improvements. The amount of the City's present indebtedness is estimated to be at least $4 million and thus, under *Klein,* the City qualifies for § 1926(b) protection as well. (Preliminary Research Memorandum.)

(3) "Made Service Available" Requirement

- The core issue is whether TWS and/or the City have provided service or made service available in the disputed area.
- As set forth above, the Act does not define the terms "provided" and "made available." However, the cases provide considerable guidance on this issue and identify a two-prong test for determining whether service has been "provided" or "made available": (1) the legal right under state law to serve an area, and (2) the physical ability to serve an area ("pipes in the ground"). *Fountain*; *Klein*.

(a) State-Law Prong

- Although TWS contends that it has the right under Franklin law to provide service to the Acadia Estates subdivision, in fact it does not have that right at this time. Its application under Franklin Code Ch. 19 § 457 to expand the territory covered by its CCN to include Acadia Estates is pending before the Franklin Public Service Commission. (Demand letter.) Thus, TWS's present legal right to provide water and sewer services is limited to those portions of El Dorado County covered by its existing CCN. No portion of its existing CCN extends into Bluewater County.

    - Moreover, it is questionable whether TWS will even be able to secure the requested CCN amendment, notwithstanding its attorneys' posturing to the contrary in the demand letter, because amendment of a CCN is contingent upon being able to provide "continuous and adequate service." Franklin Code Ch. 19 § 457. As discussed below, it appears that TWS is not able to provide such service to Acadia Estates, nor will it be able to do so within a reasonable amount of time.

    - Thus, like the water association in *Klein*, TWS has not obtained the necessary state agency authorization to provide service to the disputed area.

- The City, in contrast, has the present legal right to provide service to the tract pursuant to Franklin Code Ch. 19 § 675, which authorizes a city that owns or operates a water supply or sewer system to "extend the system into, and furnish water and sewer services to any person within, any territory adjacent to the city," provided that the territory is not already served by the holder of a CCN.

    - The Acadia Estates tract is located "adjacent to" Bluewater's existing city limits and the tract is not being served by any CCN holder.

    - Note, however, that there is no Franklin equivalent of the Columbia statute that precludes rural water districts from providing water service within a

two-mile zone of a city. *Cf. Fountain* (discussing Columbia Government Code § 357A).

- Any attempt by an applicant to apply the Columbia two-mile-zone statute to the Acadia Estates dispute, or to assert the existence of an analogous Franklin statute, would be misguided.

- Thus, applying the state-law component of the "made service available" requirement to the facts presented in this item, the City is the only party that actually has a present right to serve the tract.

- Furthermore, even if TWS were to secure an amendment to its CCN before the City completes its annexation of the Acadia Estates tract, this alone would not be dispositive because whether an association has "made service available" involves *both* whether an association has the legal right to provide such service, as determined by applicable state law, *and* whether service is physically available by virtue of the association having water lines ("pipes in the ground") adjacent to the disputed property. *Fountain*.

(b) "Pipes-in-the-Ground" Prong

- The "pipes-in-the-ground" requirement involves an assessment of whether an association has the *physical* ability to actually supply water to a disputed area. *Fountain.*
- Whether an association has made service available depends on the existence of facilities in, or in proximity to, the location to be served. "If an association does not already provide service, to be eligible for § 1926(b) protection the association must either (1) have existing water lines within or adjacent to the property claimed to be protected by § 1926(b) prior to the time an allegedly encroaching competitor begins providing service, or (2) be able to provide such service within a reasonable period of time." *Klein* (citing *Glenpool Utility Auth. v. Creek County Rural Water Dist.* (10th Cir. 1988)).

- Important considerations are whether the federally indebted association is already providing water service to the disputed tract and whether the association has had any requests for service from potential customers in the area at issue. *Klein.*
- Here, as in *Klein*, TWS cannot overcome any of these hurdles. Its nearest existing facilities are located three miles from the proposed Acadia Estates subdivision and are inadequate to meet the needs of the subdivision.
    - TWS currently provides water and sewer services to only 250 residential customers in rural El Dorado County and a handful of commercial enterprises. Thus, its existing service area is only one-half the size of the future 500-home Acadia Estates subdivision.
        - Furthermore, TWS's existing six-inch-diameter water line along Highway 45 is inadequate to meet the needs of the subdivision, which requires water lines that are at least 12 inches in diameter. (Preliminary Research Memorandum.)

- Thus, unlike the association in the *Glenpool* case cited in the TWS demand letter (and distinguished by the court in *Klein*), TWS cannot argue that it has adequate water lines adjacent to the disputed area or that it is currently providing service to customers in the disputed area.
- Further, similar to the association in *Klein*, TWS has not received any requests for service from any potential customers in the disputed area.
- Finally, TWS cannot provide service within a reasonable amount of time.
    - According to the *Bluewater Tribune* article, construction of the necessary water and sewer infrastructure for Acadia Estates is slated to begin as early as January 2010 and to be completed by April 2010, with home construction to commence shortly thereafter and be completed by December of that year.
    - The City's technical personnel estimate that it would take a minimum of two years for TWS to design and construct the improvements and expansions needed to serve Acadia Estates, assuming TWS has sufficient funds to do so (which is questionable, since

TWS has had to borrow money from the federal government to finance prior expansions). (Preliminary Research Memorandum.)

- TWS's own attorneys concede that it would take 18 months (until January 2011) for TWS to construct the new sewage treatment plant needed to serve the subdivision. (Demand letter.)
- Even giving TWS the benefit of the doubt and assuming the accuracy of its own 18-month time frame, this would mean that TWS would not be capable of providing the necessary water and sewer infrastructure to Acadia Estates until a month after the subdivision is anticipated to be fully constructed.
- Thus, it is clear that TWS would not be able to provide service within the proposed development schedule, which contemplates completion of water and sewer lines by April 2010.

- Thus, like the association in *Klein*, TWS is unable to show that it has provided service or made service available in the disputed area, and it is therefore not entitled to the § 1926(b) protection that might otherwise have been available.
- In contrast, the City can provide service within a reasonable period of time and thus satisfy the "pipes-in-the-ground" test.
    - According to the information provided by the City's Planning and Public Works Divisions, the City has existing water and sewer facilities less than a quarter mile from the proposed site of the subdivision. (Preliminary Research Memorandum.)

    - The City's Service Plan further indicates that with "minor extensions to its existing water and sewer system," the City can accommodate the projected needs of the subdivision and make services available within three months after annexing the tract. This would allow development of the subdivision to proceed on schedule, with home construction being completed by approximately December 2010. (Draft Service Plan; *see also Bluewater Tribune* article.)

B. TWS's State-Law Arguments under Franklin Code Ch. 19 §§ 450(b) and 675

- TWS's demand letter cites Ch. 19 §§ 450(b) and 675 of the Franklin Code for the proposition that the City is prohibited under state law from providing water and sewer services to the Acadia Estates subdivision.
- Section § 450(b) prohibits the provision of water and sewer services as well as the construction of facilities for such services to areas already covered by another entity's existing CCN, absent the certificate holder's written consent.
- Similarly, § 675 prevents a city from serving adjacent areas outside of city limits that are serviced by a CCN holder unless the CCN holder requests the extension of water or sewer services from the city.
- TWS's state-law arguments rest on the presumption that TWS will, in fact, be granted an amendment to its CCN.
- For the reasons set forth above, namely TWS's inability to provide continuous and adequate service to the Acadia Estates subdivision as required by § 457, these arguments must fail.

IV. Conclusion

By its clear terms, § 1926(b) does not provide an automatic, exclusive right to serve, but rather provides protection only if certain conditions are met. *Klein.* Among those conditions is that an association has made service available or is capable of making service available within a reasonable period of time. *Id.* In this case, as in *Klein,* TWS has not established a legal right under state law to serve Acadia Estates or the ability to actually provide service now or within a reasonable amount of time. Not having facilities available, and not having obtained the necessary CCN amendment to serve the Acadia Estates subdivision, TWS is not entitled to protection under federal or state law. Indeed, TWS may well be precluded by those very same statutes from attempting to interfere with the City's plans to serve the subdivision.

NOTES