

## MEE Question 2

Businesses in the United States make billions of dollars in payments each day by electronic funds transfers (also known as “wire transfers”). Banks allow their business customers to initiate payment orders for wire transfers by electronic means. To ensure that these electronic payment orders actually originate from their customers, and not from thieves, banks use a variety of security devices including passwords and data encryption. Despite these efforts, thieves sometimes circumvent banks’ security methods and cause banks to make unauthorized transfers from business customers’ bank accounts to the thieves’ accounts.

To combat this type of fraud, State A recently passed a law requiring all banks that offer funds transfer services to State A businesses to use biometric identification (e.g., fingerprints or retinal scans) to verify payment orders above \$10,000. Although experts dispute whether biometric identification is significantly better than other security techniques, the State A legislature decided to require it after heavy lobbying from a State A–based manufacturer of biometric identification equipment.

A large bank, incorporated and headquartered in State B, provides banking services to businesses in every U.S. state, including State A. Implementation of biometric identification for this bank’s business customers in State A would require the bank to reprogram its entire U.S. electronic banking system at a cost of \$50 million. The bank’s own security experts do not believe that biometric identification is a particularly reliable security system. Thus, instead of complying with State A’s new law, the bank informed its business customers in State A that it would no longer allow them to make electronically initiated funds transfers. Many of the bank’s business customers responded by shifting their business to other banks. The bank estimates that, as a result, it has lost profits in State A of \$2 million.

There is no federal statute that governs the terms on which a bank may offer funds transfer services to its business customers or the security measures that banks must implement in connection with such services. The matter is governed entirely by state law.

The bank’s lawyers have drafted a complaint against State A and against State A’s Superintendent of Banking in her official capacity. The complaint alleges all the facts stated above and asserts that the State A statute requiring biometric identification as applied to the bank violates the U.S. Constitution. The complaint seeks \$2 million in damages from State A as compensation for the bank’s lost profits. The complaint also seeks an injunction against the Superintendent of Banking to prevent her from taking any action to enforce the allegedly unconstitutional State A statute.

1. Can the bank maintain a suit in federal court against State A for damages? Explain.
2. Can the bank maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the State A statute? Explain.
3. Is the State A statute unconstitutional? Explain.

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2) Please type your answer to MEE 2 below

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

*(Essay)*

===== Start of Answer #2 (811 words) =====

**The issue is whether the bank can maintain a suit in federal court against State A for damages.**

The 11th Amendment to the US constitution provides that states are immune from lawsuits against them by citizens of other states for damages. This is called Sovereign Immunity. Generally, a State must waive its sovereign immunity and consent to being sued in order to be brought to court. A corporation is considered a person. A corporation is considered to be a citizen of the place where it is domiciled. A corporation's domicile is in its state of incorporation or where it is headquartered. Its headquarters are where its nerve center is located.

Here, bank would be considered domiciled in State B because there is where the facts say it is incorporated and where its headquarters are. Additionally, there are no facts here stating that the state has waived its sovereign immunity. There is nothing indicating there is a state statute that State A has passed that will allow itself to be sued, or that it has specifically consented to being sued by the bank in State B. Therefore, because the state is immune from suit, the bank cannot maintain a suit in federal court against State A for damages.

**The issue is whether the bank can maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the State A statute.**

Individuals may sue state officials in their official capacities to enjoin them from taking certain actions. They may not sue them in their official capacities for damages resulting from discretionary decision making inherent in the job.

Here, the bank is suing State A's Superintendent of banking in her official capacity so that she cannot implement the statute requiring biometric identification. Because they are suing for an injunction to keep her from carrying out an official duty, this is an appropriate suit.

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The issue is whether the court has subject matter jurisdiction to hear the case. Subject matter jurisdiction can be provided by federal question jurisdiction. Federal question jurisdiction arises whenever there is an issue of law arising under the federal laws of the United States. The issue must be pleaded in the plaintiff's complaint for federal question to apply.

Here, the Bank alleged in its complaint that the statute violates the U.S. Constitution. Thus, the issue is a federal question because it is based on the U.S. Constitution and it was properly pleaded in the complaint. Therefore, a federal court would have subject matter jurisdiction over the complaint.

Therefore, the bank could properly maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the statute.

**The issue is whether the State A statute is unconstitutional**

The dormant commerce clause provides that where there is no federal regulation of governing a matter, the state may regulate. However, a state is not permitted to discriminate or place an undue burden on interstate commerce. The exceptions to

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discrimination include: 1) it is an important governmental interest that cannot be achieved by alternative, nondiscriminatory means; 2) the state is a market participant; 3) the activity is one traditionally carried out by the government; or 4) there is congressional consent. Where there is an undue burden, the court will balance the concerns of the state with the impact that it has on interstate commerce to determine whether the legislation is appropriate.

Here, The law does not appear to be discriminatory, as it applies to all banks that offer funds transfer services in the state. However, the fact that it is costing an out of state bank \$2 million in lost profits shows or would cost them \$50 million to implement the system shows that there is a substantial burden on interstate commerce. Those are significant sums of money that the bank must pay. The question then is whether this is an undue burden. The risk of the thieves circumventing security is small, as the facts state that sometimes thieves circumvent the banks security measures. Thus, it does not appear that the problem of theft is incredibly pervasive. Additionally, it would appear that there would be relatively few payment orders that would qualify for the biometrics, as it is only used on sums greater than \$10,000, which likely doesn't make up most of the bank transactions. On the other hand, bank in State B stands to have to pay \$50 million if it wants to continue doing business in State A, or face the loss of \$2 million in

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