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Civil Procedure I
The University of Oklahoma College of Law
Course 5203-600
Fall 2015

Professor Kit Johnson

FINAL EXAMINATION: PART TWO

Notes and Instructions

1. The duration of Part Two of this exam is two and one-half hours.
2. The first half-hour of the exam period is a reading period only. This is your time to carefully read the question(s) and organize your thoughts about how to respond. **You may not begin typing or entering into bluebooks any response during these first 30 minutes**. You may, however, make notes on this exam sheet or scratch paper, and you are encouraged to outline during this time.
3. Part Two is an open-book exam. You may use any printed material including, but not limited to, books, commercial outlines, group outlines, and your own notes. You cannot use electronic or interactive resources during the exam, including, but not limited to, the internet and your cell phone.
4. There is no word, page, or line limit on responses.
5. Do not turn the page until instructed to begin.
6. You will not receive credit unless you return this booklet at the end of the period with your exam number written above.
7. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
8. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems within the scope of the course's subject matter. It is upon these bases that you will be graded.
9. During the exam: You may not consult with anyone – necessary communications with the College of Law staff being the exception. You may not view, attempt to view, or use information obtained from viewing other student examinations or from viewing materials other than your own.
10. After the exam: You may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam, and you must take reasonable precautions to prevent disclosure of exam information to the same.
11. Base your exam answer on the general state of U.S. law, including all rules, procedures, statutes, and cases discussed in class.
12. Keep in mind: The weight given to each part is specified, but not all issues within each part will be given equal weight. Thus, it may be entirely appropriate for one issue to be dispensed with considerable brevity, while another might require very detailed analysis. You should divide your time according to which issues require the most discussion and analysis.
13. Organization counts.
14. **Bluebooks**: Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please put answers to each section in a separate blue book and label the blue books accordingly. Please write in pen using blue or black ink.
15. **Computers**: Please clearly label your answers to each section, starting a new "question" in ExamSoft for each subpart.
16. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
17. Good luck.

Tuff Teknik is a Swedish company that makes parts essential for satellites, including antennas, transceivers, rocket motors, fuel tanks, solar panels and batteries. Marini Mech is a U.S. company that builds satellites and equips them with needed computer hardware and software.

In 2011, Tuff Teknik and Marini Mech entered into a joint venture for the production of Quad-Queue satellites for European telecom giant Deep Datum. Under the deal, Tuff Teknik would send its parts to Marini Mech. Marini Mech would then assemble the Quad-Queue satellites, program them, and send the final product to Deep Datum. Pursuant to the terms of their joint venture, Tuff Teknik and Marini Mech were to split the net proceeds.

After working together for three years, Tuff Teknik became convinced that Marini Mech was presenting inflated bills, cheating Tuff Teknik out of its full share of the proceeds by collecting for nonexistent expenses.

Tuff Teknik's general counsel decided to consult a lawyer in the U.S. to discuss the company's rights. Colleagues recommended Larry Lamore, and the Tuff Teknik bigwigs flew stateside to meet with him.

Lamore recommended filing a civil claim against Marini Mech under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging a violation of 18 U.S.C. § 1962(c), which requires: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. Racketeering is defined by 18 U.S.C. § 1961 to include, among a long list of transgressions, mail fraud. Lamore emphasized that "civil RICO," as its called, would be the company's best bet because it allows for the recovery of treble damages, meaning an award that is three times the amount that would fully compensate Tuff Teknik for all harm caused by Marini Mech.

Lamore noted that other causes of action were possible, including common law or equitable claims of unjust enrichment, breach of fiduciary duty, and constructive trust. But Lamore recommended against filing any of those claims as an initial matter. He suggested holding onto them as leverage or using them to punish Marini Mech if things got ugly in court. There was no rush to show all of Tuff Teknik's cards at once, he explained.

On January 1, 2015, Tuff Teknik filed suit against Marini Mech in federal court. The complaint contained only one cause of action. In relevant part, the complaint provided:

CLAIM 1
18 U.S.C. § 1962

12. Defendant Marini Mech sent plaintiff fraudulently inflated copies of purchase orders, thereby receiving



FIG. 1: An artist's rendering of the Quad-Queue satellite developed by Tuff Teknik and Marini Mech for Deep Datum.

Photo: [ESA, Orbital Test Satellite - artist's impression, CC BY-SA 4.0](#), via Wikimedia Commons

reimbursements from the joint venture, and, by implication, plaintiff, in excess of its actual costs.

13. Defendant sent the fraudulent copies of the purchase orders by mail, thereby engaging in mail fraud, which is a racketeering activity.

Marini Mech moved to dismiss Tuff Teknik's complaint for failure to state a claim. Judge Jimmy Jagerson, to whom the case had been assigned, denied the motion.

Thereafter, Tuff Teknik sought to amend its complaint to add a new claim for breach of fiduciary duty, arguing that Marini Mech had a legal duty to act in Tuff Teknik's best interests because of the relationship created by their joint-venture agreement and that seeking to shortchange Tuff Teknik violated that duty. Marini Mech opposed amendment, noting that the statute of limitations for any fiduciary duty cause of action had run during the pendency of the motion to dismiss. Judge Jagerson denied the motion to amend.

Tuff Teknik soon noticed a deposition of Marini Mech. Marini Mech filed a motion for a protective order, arguing that it would be impossible to depose a business. Judge Jagerson granted Marini Mech's motion for a protective order.

Near the close of discovery, Tuff Teknik noticed the deposition of Eduardo Eggley, an accountant retained by Marini Mech to offer expert testimony about the purchase orders sent by Marini Mech to Tuff Teknik. Tuff Teknik also propounded a request for production of "any and all materials, documents, or communications shared between Marini Mech and Eduardo Eggley for the purpose of rendering an expert opinion on the Tuff Teknik purchase orders." When Marini Mech objected to the request for production and the noticed deposition, Tuff Teknik moved to compel. Marini Mech responded with a request for a protective order. Judge Jagerson granted this motion for a protective order as well.

After the close of discovery, Marini Mech filed a motion for summary judgment, arguing Tuff Teknik had failed to establish a "pattern" of racketeering activity. The brief noted that, at the close of discovery, there were only two purchase orders about which there was any dispute between Marini Mech and Tuff Teknik as to validity. Without conceding the issue of the validity of those purchase orders, Marini Mech argued that simply sending two purchase orders by mail did not amount to a "pattern" under RICO.

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18 U.S.C. § 1341—Elements of Mail Fraud

"There are two elements in mail fraud: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Schmuck v. United States*, 489 U.S. 705, 721 n. 10 (1989); see also *Pereira v. United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud under . . . § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."); Laura A. Eilers & Harvey B. Silikovitz, *Mail and Wire Fraud*, 31 AM. CRIM. L. REV. 703, 704 (1994) (cases cited).

FIG. 2: A segment of the U.S. Attorney's Resource Manual on mail fraud.

Marini Mech cited *Printure v. Waratel*, 758 F.3d 1254 (5th Cir. 2014), which stated: “Two isolated acts of racketeering activity do not constitute a pattern.”

Tuff Teknik responded with the affidavit of its CEO, Stella Stomare. Stomare acceded to Marini Mech’s point that there were now only two purchase orders in dispute. She averred, however, that both were clearly fraudulent. And she additionally averred that executives at Marini Mech had made numerous phone calls and sent e-mails about those purchase orders, indicating the existence of a pattern. Tuff Teknik’s motion cited *Aloidia v. Tribop*, 760 F.3d 701 (11th Cir. 2014), which stated: “a pattern of racketeering activity must involve two or more predicate acts where there is *continuity* (continuing racketeering activity) plus *relationship* (connection) between the acts.”

Judge Jagerson denied the motion for summary judgment. In denying the motion, Judge Jagerson wrote: “There is no case in this circuit discussing whether two acts are sufficient to establish a pattern of racketing activity. While we have cases from other circuits that address this issue, they point in different directions. Thus, summary judgment is not appropriate because we cannot say that this is undisputed as a matter of law.”

Marini Mech petitioned the court to certify the denial of summary judgment for interlocutory appeal. Judge Jagerson denied the motion.

The case went to trial. After testimony from executives at both Tuff Teknik and Marini Mech, the case went to the jury. The jury found in favor of Marini Mech.

After entry of judgment in favor of Marini Mech, Tuff Teknik met again with Larry Lamore.

“Look, I know that you’re disappointed not to have won against Marini Mech, but we can still sue Mech’s CEO Charles Carmichael,” Larry said. “It really seemed like he was the mastermind behind the racketeering plan. He should be independently liable to y’all on the basis of fraud. So, let’s file a new suit against him.”

Tuff Teknik executives have begun to wonder whether they should continue to place their confidence in Larry Lamore. He came highly recommended, but he didn’t manage to win against Marini Mech the first time around. They’re now looking for a second opinion, and they’ve come to the law offices of KJ and Associates. You’ve been assigned to work with Tuff Teknik.

You meet with Stella Stomare. She tells you the story as relayed above. She pauses, then looks you in the eye.

“I want you to give me a thorough review of our case against Marini Mech,” she says. “What’s your take on Judge Jagerson’s rulings? What about Larry Lamore – did he do a good job for us? Are there any things you would’ve done differently? And can we pursue a new lawsuit against Charles Carmichael?”

You express concern that you do not have the complete records from the trial proceedings. “I understand that,” Stomare tells you, “and I can get all those files to you later. For right now, I’m looking for your impressions on the litigation just based on what I’ve told you.”

You're excited – if you do a good job, you may just find yourself in charge of a terrific new client. And one that's involved in satellites? That's just awesome. You daydream of clever ways to tell your friends: *My new case is truly out of this world!*

But better not get ahead of yourself. Time to buckle down and do the analysis.

QUESTION

How would you assess the issues raised by Stella Stomare?

In evaluating the legal issues that arise from the above facts, organize your response as follows, clearly labeling the subparts:

Subpart A: Discuss any issues concerning Marini Mech's motion to dismiss.

Subpart B: Discuss any issues concerning Tuff Teknik's motion to amend.

Subpart C: Discuss any issues concerning Marini Mech's first motion for a protective order.

Subpart D: Discuss any issues concerning Marini Mech's second motion for a protective order.

Subpart E: Discuss any issues concerning Marini Mech's motion for summary judgment.

Subpart F: Discuss any issues concerning Marini Mech's motion for certification of interlocutory appeal.

Subpart G: Discuss any issues concerning a new suit against Charles Carmichael.

Subpart H: If there is anything else you wish to discuss, which does not belong in any of subparts A through G, please put it under this Subpart H.

Keep in mind the subparts will not be given equal weight. The subpart structure is provided for organizational purposes only. It may be entirely appropriate for one subpart to be answered with considerable brevity, while other subparts might require very detailed analysis. Pace yourself appropriately, and plan ahead to put information where it belongs.

Finally, avoid needless repetition. Do not repeat the exact same analysis with substituted parties. You may incorporate analysis by reference to another portion of your exam answer to the extent appropriate.

Some suggested abbreviations for your answer:

CC: Charles Carmichael (MM's CEO)

DD: Deep Datum

EE: Eduardo Eggle

JJ: Judge Jimmy Jagerson

LL: Larry Lamore

MM: Marini Mech

QQ: Quad-Queue

SS: Stella Stomare (Tuff Teknik's CEO)

TT: Tuff Teknik

END OF EXAMINATION