

Part

2

Write your exam
number here:

Civil Procedure I: Fall 2019
The University of Oklahoma College of Law
Kit Johnson, Associate Professor of Law
FINAL EXAMINATION: PART TWO

General Notes and Instructions:

1. Do not turn the page until instructed.
2. Failure to follow these instructions, including without limitation instructions 3 through 7 and 12 through 14, are academic misconduct issues, and violations will be treated as such even if inadvertent.
3. All exam materials (including this booklet) must be turned in at the conclusion of the exam period, with your exam ID number written in the upper right box on this page. **You will not receive any credit unless you return this booklet with your exam number written above.**
4. Do not disassemble this booklet, remove the staple, or tear pages.
5. You may not waive anonymity. Use only your exam ID number on your response.
6. During the exam: You may not consult with anyone—necessary communications with the administrators/proctors being the exception. You may not view or attempt to view materials other than your own. Do nothing that would distract other students.
7. After the exam: Communicate nothing about the exam, including even vague impressions or characterizations, to any member of the class who has not yet taken it.
8. Food and drink are permitted during final exams, but only on the following conditions: (a) Drinks must be open and drinkable before the exam starts. No popping cans or opening soda bottles during the examination period; (b) Food cannot smell. No sandwiches, condiments, or odors stronger than a cup of unflavored coffee permitted; (c) Food cannot be noisy. No chips, carrots, or hard granola bars are permitted. In addition, food in wrappers must be unwrapped before the exam begins. For example, if you bring a package of M&Ms into the examination, the candy should be removed from the wrapper and poured onto a paper towel for eating during the examination. Please chew with your mouth closed.
9. Minimize your own noise (toe tapping, pen clicking, etc.).
10. Minimize your smells (no perfume, cologne, perfumed lotions, etc.).

Do not turn any page until instructed.

**When instructed, flip this exam booklet over
To look at the back page of this examination
booklet for additional instructions.**

In January 2019, Meri Maisel received an unexpected phone call. This is what the caller said: “Hi. I’m Donald Donasta, calling from the Sweetmarket Sweepstakes. I’m calling to inform you that you’ve won a \$500,000 cash prize from a random drawing of supermarket customers in your area. Congratulations! In order to secure this prize, you’ll first have to pay a small 1% tax to the federal government. I’m not asking for your money—you should never give your financial information over the phone to anyone who doesn’t work for the federal government! Instead, I’m going to refer you to Eliza Eliasond over at the Federal Fraud Protection Agency or FFPA. You just let her know that you’re a winner from www.sweetmarketsweepstakes.com. She’ll work with you on the taxes. You can find her number and learn more about sweepstakes, taxes, and fraud prevention at www.ffpa.com. Again, congratulations!”



Fig. 1: The Sweetmarket Sweepstakes website was festooned with brightly colored photos of produce.

Photo: [Pike Place Market no. 8735](#) by [Eric E. Johnson](#)

After hanging up with Donasta, Maisel checked out the two websites Donasta mentioned, called Eliasond, and ultimately paid the \$5,000 tax over the phone using her credit card. Maisel never received her \$500,000 prize.

In February 2019, Maisel filed a grievance regarding the Sweetmarket Sweepstakes with the Federal Trade Commission (FTC), which Maisel learned is an actual federal agency (unlike the so-called FFPA).

Having received numerous similar statements from other victims of the Sweetmarket Sweepstakes scam, the FTC took steps to shut it down. The FTC tracked down a Donald Dints and an Eliza Esther who the FTC concluded were the individuals posing as Donald Donasta and Eliza Eliasond.

In March 2019, the FTC filed a civil suit against Dints and Esther in federal district court, seeking an injunction pursuant to 15 U.S.C. § 99 to shut down their two websites: www.sweetmarketsweepstakes.com and www.ffpa.com. Section 99 injunctions requiring finding that a person is using interstate wires—including websites, fax communications, and/or telephone communications—to perpetrate “deception by words or conduct as to fact or as to law.” In their complaint, the FTC alleged that the two websites operated by Dints and Esther were deceptive.



Fig 2. The official seal of the Federal Trade Commission, whose mission includes stopping deceptive practices in the marketplace by conducting investigations and pursuing civil suits against companies and individuals who violate the law.

Neither Dints nor Esther responded to the FTC's complaint despite being personally served with a copy of the summons and complaint. A default judgment was entered in favor of the FTC and the websites were taken down.

Maisel had been following the FTC's lawsuit. She was pleased to hear that the two websites were no longer operating, but she felt like Dints and Esther escaped justice. They needed to be punished. And she needed to be compensated.

In June 2019, Meri Maisel filed her own suit against Dints and Esther in federal district court. Her case landed in the courtroom of Judge Jimmy Jagerson.

Maisel's complaint contained a single claim grounded in the statute based, state law, tort cause of action of tortious receipt, which, in Arizona, provides a private right of action against an individual or entity who uses "deception by words or conduct as to fact or as to law" to receive monies. Her complaint detailed the January 2019 conversations she had with Donasta/Dints and Eliasond/Esther, her perusal of their two websites, and her lost "tax." Her complaint also included the following paragraphs:

CLAIM 1
Tortious Receipt
Ariz. Rev. Stat. § 2-1441

34. When Defendant Dints called Plaintiff in January 2019 and told Plaintiff that she had won the Sweetmarket Sweepstakes, he was deceiving Plaintiff in an effort to receive monies (\$5,000).
36. When Defendant Esther spoke to Plaintiff in January 2019 about the Sweetmarket Sweepstakes and the Federal Fraud Protection Agency, she was deceiving Plaintiff in an effort to receive monies (\$5,000).
37. Defendant Dints and/or Defendant Esther created the websites of www.sweetmarketsweepstakes.com and www.ffpa.com in an effort to deceive Plaintiff and in order to receive monies (\$5,000).

Dints and Esther responded to Maisel's complaint by filing a motion to dismiss for failure to state a claim. Judge Jagerson denied the defendants' motion.

Thereafter, Maisel filed a motion for partial summary judgment on the issue of deception, arguing the judgment in the FTC lawsuit was conclusive on that issue. She sought to limit the case to the sole contested issue of damages. Judge Jagerson denied the motion.

Maisel thereafter propounded a request for production seeking "any and all documents, paper or electronic, related to website domain name purchases, website hosting, and the running of websites by either or both of Dints and Esther including, without limitation, texts, letters, e-mails, credit card statements, and billing statements." Dints and Esther objected. The parties met and conferred, and Maisel offered to narrow her request to

documents related to www.sweetmarketsweepstakes.com and www.ffpa.com. The defendants still objected to the request. Maisel filed a motion to compel, which Dints and Esther opposed. Judge Jagerson denied the motion.

After the close of discovery, Dints and Esther filed a motion for summary judgment. Dints and Esther provided no evidence in support of their motion. They simply argued that Maisel did not have evidence to prove they were Donald Donasta and Eliza Eliasond.

Maisel responded to the motion by pointing to the following allegations in her complaint:

1. Defendant Donald Dints posed as "Donald Donasta" in a phone call with Plaintiff in January 2019.
2. Defendant Eliza Esther posed as "Eliza Eliasond" in a phone call with Plaintiff in January 2019.

Maisel also provided an affidavit from FBI agent Alex Atherston, who was the lead investigator in the FTC's action against Dints and Esther. Atherston's affidavit set out the investigative steps he took which led him to the conclusion that Dints and Esther were Donasta and Eliasond. Judge Jimmy Jagerson denied the motion.

After Judge Jagerson denied their motion, Dints and Esther stopped participating in the litigation. Apparently, the FTC's Criminal Liaison Unit was working with a state attorney general to bring criminal charges against Dints and Esther. The two got wind of the operation and fled the country. Maisel was awarded a default judgment, but Dints and Esther left behind no assets from which she could collect.

QUESTIONS

Provide an answer and supporting legal analysis for the following:

Question 1: Did Judge Jagerson correctly deny the motion to dismiss Maisel's complaint?

Question 2: Did Judge Jagerson correctly deny Maisel's motion for partial summary judgment?

Question 3: Did Judge Jagerson correctly deny Maisel's motion to compel?

Question 4: Did Judge Jagerson correctly deny the motion for summary judgment filed by Dints and Esther?

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

Finally, avoid needless repetition. You may incorporate analysis by reference to another portion of your exam answer to the extent appropriate.

Some suggested abbreviations for your answer:

AA: Alex Atherston

JJ: Judge Jimmy Jagerson

DD: Donald Donasta/Donald Dints

MM: Meri Maisel

EE: Eliza Eliasond/Eliza Esther

SS: Sweetmarket Sweepstakes

FFPA: Federal Fraud Protection Agency

FTC: Federal Trade Commission

END OF EXAMINATION

Specific Instructions for Part 2 (Essay):

11. The total duration of this portion of the exam is one-and-a-half hours (90 minutes).
12. The first 30 minutes of this portion of the exam is a reading period. **You may not begin typing or entering into bluebooks any response during this first half hour.** This is your time to carefully read the questions and organize your thoughts about how to respond. During the reading period you may: make notes on this exam sheet and/or scratch paper; reference notes and materials and make notes thereon; outline your response on scratch paper (which I encourage). Marks or notes made during the reading period will not be evaluated or counted for your grade.
13. At the end of the thirty-minute reading period, you may begin recording your exam response in your bluebook or ExamSoft.
14. This is an open-book exam. You may use any paper-based notes and books you like. No electronic or interactive resources may be used or referenced. You may use a computer (including a keyboard-configured tablet) to write your exam, provided it is running the required exam-taking software and is used pursuant to applicable policies. But you may not reference files stored thereon during the exam sessions. You may wear a regular watch. Otherwise, any touching, using, accessing, wearing, viewing, or listening to any electronic device is prohibited. No smart watches. No phones.
15. Note that only your response recorded in the proper place (ExamSoft or bluebooks) will be graded.
16. 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.
17. Base your answer on the general state of U.S. law, including statutes and cases discussed in class.
18. Organization counts.
19. Keep in mind: Not all questions will be given equal weight. It may be appropriate for one issue to be dispensed with brevity, while another might require detailed analysis. Divide your time according to those issues that require the most discussion and analysis.
20. **Bluebooks:** Make sure your handwriting is legible. Skip lines and write on only on one side of the page in blue or black ink. Please put answers to each question in a separate blue book.
21. **Computers:** Please clearly label your answers to each question.

Wait. Do not begin the exam until instructed.