

**Spring 2011 Civil Procedure
Final Exam
Professor Kimberly Kirkland**

Instructions—please read carefully.

PLEASE USE THE EXAM NUMBER THAT IS ON FILE WITH THE REGISTRAR'S OFFICE

Due by 4:00 p.m. in the Registrar's office, Tuesday, May 3, 2011.

1. Format:

- Your answer must be typed. Type on only one side of each page.
- You are limited to a **total** of seven typewritten pages for your answer to all four questions. I anticipate that most students will need two pages each to answer questions One, Two, and Three and one page to answer question Four.
- Your answer should be **double-spaced**. Use 8 1/2" x 11" paper. Use 1 1/2 inch left margins. All other margins should be 1 inch. Use 12 point (or larger) Times New Roman font.
- Put your **exam number** on the top of each typewritten page you turn in. Place a page number on the bottom of each page you turn in. The page numbers may be handwritten.

2. Honor Code Issues:

- You are NOT permitted to **discuss your exam answer, or questions you have about the exam, with anyone other than the Registrar until all students have completed the exam. If you do your score for the exam will be 0, and I will pursue honor code charges.**
- You may use an outline you prepared, your textbook, and your rulebook to help you answer the questions. You may use any commercial study aids that you find useful to help you to understand the material. You shall not do any legal research to help you answer questions. Do not read or consult any judicial opinions other than the excerpts of opinions in your textbook. This is a test of your analytic skills; it is not a test of your ability to find cases or narratives setting forth analysis performed by others. Violation of these instructions constitutes an honor code violation.
- Although you may refer to commercial outlines if you feel they help you understand the material, they are not authority for your answers. In other words, if you are stating the rule or test that applies in a given situation, you need to cite the Federal Rule of Civil Procedure and/or the judicial opinion in the text that

addresses that rule or test. Gilbert's, Emmanuel's and the like are not sources of authority. If you quote material you did not author in your exam answer, you must use quotation marks to identify the language as non-original and you must cite the source. You may cite cases from the text book using one of the parties names (e.g. "Conley,p__") and you may cite the Federal Rules of Civil Procedure as follows: FRCP 15 or R 15.

- You are NOT permitted to ask me any questions during the exam period.

3. **Test Taking Pointers:**

- Think before you begin writing. Organize your answer and thoughts before you begin writing.
 - If your answer to an issue eliminates other issues clearly raised by the hypothetical, assume that the other issues will arise and discuss what would happen if the court addressed those issues. For example, if you conclude the complaint will be dismissed on statute of limitations grounds but the facts clearly raise an issue about whether the joinder of two parties as plaintiffs was appropriate, discuss the joinder issue even if you believe "in real life" the court would not reach that issue because the complaint would be dismissed on statute of limitations grounds.
 - Explain your conclusions. That is, with respect to each issue raised in the exam, make sure you do "a" and "b" below. Do "c" and "d" where appropriate.
 - a) Identify the applicable law (FRCP and/ or case law).
 - b) Apply the applicable law to the facts given in the hypothetical, discussing any factual nuances that create uncertainty in applying the rules.
 - c) If there is applicable case law on point, analogize and or distinguish the facts of the precedent to help you decide the "gray" areas raised by the hypothetical.
 - d) Identify the policies underlying the relevant procedural rules and doctrine where appropriate (probably only where you encounter a "gray" area)
 - While some of the names in the scenarios are names of real entities or people, the scenarios that follow are purely fictional. Use only the facts I give you in answering the questions asked.
 - Failure to follow any of these instructions may result in loss of points.
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Scenario A

Plaintiff, IT Solutions, Inc. (“IT Solutions”) sued Defendant, Rick Resnick, for trademark infringement in the USDC for the District of New Hampshire. IT Solutions, a Delaware Corporation with its principal place of business in Amherst New Hampshire, is an on-line retailer of computer and computer related products and services. IT Solutions does business both nationally and internationally.

IT Solutions owns the federally registered trademark, “IT Solutions.” It also owns the registered domain name, “ITSolutions.com.”

Resnick recently started a small business, Technology Solutions, to provide information technology (“IT”¹) support services to individuals within 25 miles of his office in Lewisburg Virginia. (Resnick’s office is located in his home.). Resnick is Technology Solutions’ sole employee. Resnick went to GoMama.com, a well established purveyor of domain names, and entered the Technology Solutions, hoping to find a suitable domain name for his business website. GoMama.com website generated several unregistered domain names available for purchase, including “IT-Solutions.com.” Resnick purchased “IT-Solutions.com” and set up a website using that domain name. Technology Solutions home page advertises “Information technology services provided with integrity, excellence and teamwork.” The upper right hand corner of the website homepage says “serving Lewisburg, Selinsgrove, and the surrounding areas.” The website contains an “About Us” page that gives Resnick’s biographical information, a “Resources” page that provides links to online sources for IT self help (the online sources are not owned or run by Resnick) and a “Contact Us” page. A Virginia telephone number appears at the bottom of the Contact US page along with an active email link: RResnick@IT-Solutions.com. Resnick uses this address for all of his business email. Customers can book appointments on the website and Resnick confirms them. Otherwise the website provides information and does not provide for any other communication or any purchases.

To protect its trademark and domain name, IT Solutions engages a consultant, Trademark Protection, to monitor potentially infringing uses of the trademark “IT Solutions” and IT Solutions’ domain name, “ITSolutions.com.” In the course of its regular monitoring, Trademark Protection discovered Technology Solutions website. It informed IT Solutions. IT Solutions then sent Resnick an email cease and

¹ IT is an acronym for “information technology.” According to Wikipedia “IT spans a wide variety of areas that include but are not limited to things such as processes, computer software, computer hardware, [programming languages](#), and data constructs. IT professionals perform a variety of functions (IT Disciplines/Competencies) that range from installing [applications](#) to designing complex [computer networks](#) and information [databases](#). A few of the duties that IT professionals perform may include [data management](#), networking, engineering [computer hardware](#), database and software design, as well as management and administration of entire systems.

desist letter. The letter explained that IT Solutions owned the trademark “IT Solutions”. It further stated that the services Technology Solutions offered were very similar to those IT Solutions sells. It noted that IT Solutions had been in business for twenty-five years and was known nationally and internationally. The letter stated that Technology Solutions use of the domain name “IT-Solutions.com” was likely to cause confusion in the marketplace. The letter continued: “Customers who find the IT-Solutions.com website are likely to assume it is a site owned and operated by IT Solutions and any dissatisfaction with your services is likely to reflect badly on IT Solutions irreparably damaging our reputation.” IT Solutions then demanded that Resnick immediately stop using the domain name “IT-Solutions.com” and offered to reimburse Resnick for the domain name registration fee provided that he transfer ownership of the domain name to IT Solutions.

Resnick replied by email stating that he had no knowledge of IT Solutions existence until he received the letter. He argued that IT Solutions could have and should have purchased the domain name IT-Solutions.com if it believed its use by others would be confusing. Resnick concluded by saying he had invested in business cards brochures, newspaper and radio advertising all using the domain name IT-Solutions.com and that he would have to be compensated for the losses consequent to having to change domain names for him to be willing to transfer the domain name to the IT Solutions. Over the next three months, Resnick and IT solutions CEO wrote a total of ten emails back and forth arguing about the issue. At the end of three months they were no closer to resolving the controversy and IT Solutions filed a complaint alleging trademark infringement in the USDC for the D of New Hampshire.

Resnick has moved to dismiss under FRCP 12(b)(2) arguing the court lacks personal jurisdiction over him. IT Solutions has argued in response among other things that the Resnick’s emails to IT Solutions’ CEO provide support for its argument for personal jurisdiction.

Question One

You are the Judge assigned to this case in the USDC. Decide the defendant’s motion to dismiss under Rule 12(b)(2).

The New Hampshire Long Arm Statute provides:

Nonresident Defendant. –

- I. JURISDICTION. Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious or infringing act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the

courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

Question Two

Assume for purposes of this question only that the Court granted the Motion to Dismiss discussed in Question One above. (This is not an indication of how question one should be decided.) Assume that thereafter IT Solutions filed a trademark infringement claim against Resnick together with a state law breach of contract claim against GoMama.com in state Superior Court in Lewisburg, Virginia. IT Solutions breach of contract claim alleges that GoMama.com contracted to manage the registration of IT Solutions' domain name "ITSolutions.com" and that it breached its contract with IT Solutions when it registered an almost identical domain name IT-Solutions.com to Resnick's company. IT Solutions alleges the contract provides that GoMama.com will provide it with an easily recognizable and unique domain name and that it breached that agreement by registering Resnick's domain name as IT-Solutions.com. IT solutions has demanded \$10,000 in damages for GoMama's breach of contract. IT solutions claims 25,000 in damages against Resnick and seeks a permanent injunction barring him from using the domain name IT-Solutions.com. GoMama.com is a Delaware Corporation with its headquarters located in Reston Virginia.

You represent Resnick. You have researched the law and you think the plaintiff has stated a claim for trademark infringement. You and your client would prefer that this case be heard in federal court. Your client also tells you that GoMama.com overcharged his credit card \$500.00 for registering the IT-Solutions trademark and he'd like his money back. You have researched the law and facts and believe you can state a claim for breach of contract against GoMama.com for the overcharge. Describe the procedural strategies you will pursue/the procedural steps will you take at the answer and pre-answer stage. (You don't have a copy of the complaint so there is no reason to discuss admitting, denying or pleading lack of knowledge or information sufficient to form a belief in response to the allegations in the complaint.)

Lewisburg, Virginia is located in the Western District of Virginia. Reston Virginia is located in the Eastern District of Virginia.

The Law:

Assume Virginia has adopted Rules of Civil Procedure identical to the Federal Rules of Civil Procedure.

Virginia's Long Arm Statute provides: Jurisdiction: Courts of this state are authorized to exercise jurisdiction over non resident to the full extent provided by the due process clause of the United States Constitution.

Trademark Infringement Under the Lanham Act (federal statute)

A plaintiff in a trademark case has the burden of proving that:

The defendant's use of a mark has created a likelihood-of-confusion about the origin of the defendant's goods or services. To do this, the plaintiff must prove:

- 1) That it has developed a protectable trademark right in a trademark.
- 2) That the defendant is using a confusingly similar mark in such a way that it creates a likelihood of confusion, mistake and/or deception with the consuming public. The confusion created can be that the defendant's products or services are the same as that of the plaintiff, or that the defendant is somehow associated, affiliated, connected, approved, authorized or sponsored by plaintiff.

Breach of Contract under Virginia Law:

The Plaintiff must prove:

The parties entered into an enforceable contract (offer, acceptance and consideration)

The defendant breached a term of the contract

The Plaintiff suffered damages as a consequence of the breach.

Scenario B

David Byrd (a Massachusetts resident) filed suit against his former employer, Staples, Inc. (a Delaware corporation headquartered in Minnesota) in federal court in Massachusetts alleging violation of the Massachusetts Whistleblower Protection Act. Staples has moved for Summary Judgment. The parties have submitted the following in support of their positions:

Affidavit of David Byrd:

“In March of 2009, I had been working for Staples at the Lexington Store for about two years. I was hired as a Sales Associate. Twice during my time at Staples I was named Associate of the month. In addition, I was consistently the Top Seller of the store’s “Product Replacement Plan,” a warranty plan that generated substantial profits for Staples.

On March 19th I was working at the checkout when my manager John Jacobs came to the register where I was working, turned off the "Lane Open" light and told me to go clean the men's bathroom. I had never been asked to clean the bathroom before. I walked into the bathroom and saw that someone had thrown up all over the floor of one of the stalls. It smelled horrible. I felt nauseous just standing in the room.

I went back to my Manager who was working on the floor and asked for protective gear. When I started work at Staples we had been shown a video that instructed associates about the exposure to hazardous materials. It said that Staple would provide protective clothing, gloves and mask for employees handling hazardous material. Jacobs told me they didn't have protective gear at the store. He said vomit was not a hazardous material and insisted that I clean the bathroom immediately. I used a bucket and mop and sponge. I didn't have gloves. Vomit got on my hands and clothes during the process. I washed my hands and wetted my clothes in the sink in the bathroom, but the smell remained. I asked my manager if I could go home and shower and change but he insisted that I finish my shift.

The next day when I came into work I went to the employee bulletin board in the break room and looked at the Occupational Health and Safety Administration poster. I wrote down phone number for the complaint hotline and called while on my break. I reported that I had been required to clean the bathroom without protective gear the day before. The person who answered confirmed that the store should provide me with protective gear for cleaning any biohazard and confirmed that vomit is a biohazard. She thanked me for reporting the violation of OSHA regulations.

Two weeks later another manager, Lisa Anderson asked me to clean the men's room. Again there was vomit on the floor. (We later learned that a homeless man who hung out in the neighborhood was using the store bathroom after drinking binges.) I asked Anderson for protective gear and told her I had spoken to OSHA the last time this had happened and they had confirmed that Staples was required to provide me with protective gear. She said I shouldn't be calling OSHA I should be working through managers at the store, but then insisted that we couldn't leave the bathroom like that and said she'd clean it herself but she couldn't because it was the men's room. I cleaned the bathroom without protective gear and at the end of my shift went home and called OSHA again to file a complaint.

Two day later, on March 30th, I was suspended. Jacobs told me he was suspending me for giving a customer Canadian penny at the cash register. The customer had apparently come back and complained to another sales associate after he checked out at my register.

On April 4th I was terminated. Jacobs told me he was terminating me for having sold a product replacement plan for a paper shredder that was not eligible for the product replacement plan. I checked the company website and discovered that in fact, the product protection plan is not available for paper shredders. They had been

eligible in the past, but policy had changed and I didn't realize the policy had changed.

I have been looking for a job since April of 2009 and have not been able to find work since."

Testimony of Linda Homer, OSHA inspector:

"On March 29th I contacted the Staples store and spoke with David Jacobs. I told Jacobs we had received two complaints about employees being required to handle biohazards, specifically human vomit, without protective clothing. Jacobs said the store was "committed to providing safe working conditions for our employees." On April 3rd I conducted a surprise inspection at the Lexington, MA Staples store. I asked Jacobs, the store manager on duty that day, to show me the protective gear they kept on site for employee use when handling hazardous materials. Jacobs told me that they did not have protective gear at the store, but that it was on order. I issued a citation and \$500.00 fine for violation of OSHA regulations.

Deposition Testimony of John Jacobs:

Question: "Why did you suspend John Jacobs?"

Answer: "We instituted a money handling policy a year ago that requires employees to check all currency they receive from customers to determine if it's counterfeit. We train employees to identify counterfeit currency and to distinguish US currency from foreign currencies. We are very serious about our sales associates being diligent in following the policy. Our personnel policies allow us to suspend employees for failure to follow our counterfeit detection policy. David Byrd gave a customer a Canadian penny. He accepted the Canadian penny from one customer (I know this because the cash drawers are checked each night for counterfeit and foreign currency. Each sales associate receives a "clean" cash drawer at the beginning of his shift.) Byrd then gave it to another customer as change. This made it clear that he was not following the counterfeit detection policy. He had two opportunities to identify the penny as foreign currency and he failed to do that.

Q: "Have you ever suspended an employee for giving a customer foreign currency as change before?"

A: "No."

Q: "Have you ever had a sales associate accept foreign currency from a customer before and then give that currency out as change?"

A: "Yes, we had an employee do that during her training period"

Q: "You didn't suspend her or take other job action against her?"

A: "No, she was still being trained in the counterfeit detection procedures."

Q: "Why did you terminate David Byrd?"

A: "Because he sold a replacement plan for a really poor quality shredder. That replacement plan allows the customer to get a replacement if there is a problem with the shredder. It was a ten-year plan! We'll probably have to replace that thing ten times! The shredder was not on the list of eligible products for the protection plan. That's an expensive mistake. Our personnel policy leaves it to my discretion to determine whether to fire an employee for poor performance. I thought this was poor performance."

Q: "When did you learn that my client had sold the replacement plan for the paper shredder?"

A: "On March 15th."

Q: "What was your reaction when the OSHA inspector came to the store?"

A: "Honestly, I was pissed off. We had realized we needed protective gear in the store and it was on order, it just hadn't arrived yet. I don't understand why the inspector found it necessary to cite and fine us when we were taking steps to remedy the problem."

The Law

The Massachusetts Whistleblower Protection Act requires that a Plaintiff claiming protection under the Act prove the following elements:

- 1) that the plaintiff engaged in protected whistleblower activity, including reporting the employer's a violation of law;
- 2) that the defendant knew or had knowledge that the plaintiff engaged in such activity;
- 3) That retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity (retaliation includes any adverse job action including suspension and discharge);
- 4) That plaintiff was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions or privileges or employment; or suffered some other wrong actionable under state tort or contract theory and;
- 5) That the plaintiff can demonstrate, by a preponderance of the evidence, that he or she would not have been subject to an adverse action (including suspension or discharge) in the absence of their protected whistleblower conduct.

Question Three

You are the Judge assigned to hear this case. Decide Staples motion for Summary Judgment. Staple has moved for Summary Judgment on the elements 3 and 5 only.

Question Four:

Assume the facts above. In addition assume for purposes of this question that the judge denied the motion for summary judgment. (This is not an indication of how question 3 should be answered.) Assume the case went to trial on Byrd's violation of the Whistleblower Protection Act claim and that the jury returned a general verdict for the plaintiff. The Verdict form said: "We the jury find for the plaintiff and award damages in the amount of \$100,000.00." All appeals periods have run.

Now assume that you represent another employee from the Lexington MA staples store. Ann Rhodes is also suing Staples for violation of the Whistleblower Protection Act. In November of 2009, Rhodes called OSHA complaining that she was required to clean bathrooms without protective gear. OSHA then cited Staples for violating OSHA regulations. Staples subsequently terminated Rhodes. Can you use the decision in Byrd's case in Rhodes suit?