

MEMORANDUM

To: Spring 2002 Remedies Class
From: Michael Allen
Date: May 8, 2002
Subject: Final Exam – Outline of Answer

I wanted to take the time and provide you with an outline of possible responses to the questions posed in the final examination. You should recognize a few things about this outline. First, this outline may not contain all possible points that students could legitimately raise in response to the questions. I would certainly give credit when a student provides a correct response that I did not think about. Second, I have used an outline form. I expected (and I am sure that you all used) an essay format. Third, I do not expect that any student will raise all of the points in the outline. Finally, I only provided an outline with respect to Section I. Section II is all about your ability to take and defend a position.

For your reference I have also attached the following two items to this memo: (1) as Exhibit A a copy of the exam itself since you could not remove it from the test room, and (2) as Exhibit B a copy of my grading sheet. With these preliminaries out of the way, here are my thoughts on the exam:

Section I

Question 1: Sally v. Mario

There are really four major areas that you could raise in response to this question, although the second and third areas could be considered together:

1. The Truck
 - Basic Rule: With respect to torts related to property, a plaintiff is entitled to receive market value and not replacement cost.
 - In this situation, the market value of the truck is the cost of the truck less depreciation. On the facts presented, Sally would be entitled to receive \$5,000 (the blue book value) even though the replacement value is \$75,000.

2. The Russian Hull

- **Basic Rule:** As set forth above, with respect to torts related to property, a plaintiff is entitled to receive market value and not replacement cost.
- If you follow the basic rule, you end up with a recovery of \$50,000 (less the offsetting benefit discussed below)
- As Sally's lawyer, you want to try to get around the basic rule if you possibly can. There are two possibilities for getting around the basic rule and actually getting replacement value in this situation:
 - You could argue the Russian Hull is actually a component part of the larger space shuttle bus. The facts are not clear about the construction of this shuttle bus. Therefore, we would need to develop the facts. If we were able to determine that the Russian Hull was actually a component of a larger system, replacement value would be the appropriate measure of recovery.
 - Another means to get replacement value, and the means most directly presented by the facts, is to argue that the Russian Hull is actually special value property. You would argue that the Russian Hull should actually be considered to be a space shuttle bus (or a portion thereof). As such, Sally should be entitled to receive the replacement value for the space shuttle bus. This argument tracks the one made in the case involving the barge used as a drydock.
 - Under either replacement cost method, the relevant figure under the problem as presented is \$1,000,000 (less the offsetting benefit discussed below) based on the estimates of the aerospace companies concerning what it would cost to get a replacement. There does not appear to be any other hulls for sale.
- Another issue to discuss with respect to the Russian Hull is that any recovery Sally gets with respect to the Russian Hull must also take into account the benefit she gets as a result of the destruction of the Russian Hull. In particular, Sally will not now need to spend the \$35,000 on retrofitting the Russian Hull. Therefore, the \$35,000 must be subtracted from any recovery Sally obtains.
- Conclusion: In my opinion, the best analysis gives Sally a recovery of \$965,000 with respect to the Russian Hull (*i.e.*, \$1,000,000 less \$35,000), exclusive of the possibility discussed below of recovering consequential damages.

3. Consequential Damages

- Consequential (or special) damages are those that are the proximate result of the defendant's action but do not necessarily flow from that action.
- In this case, it is possible that Sally will be able to recover consequential damages against Mario if she loses the second NASA contract. The amount of these damages are unclear which, as discussed below, may be a significant problem. Assuming that the problem with amount is addressed, Sally should be able to recover her profit on the contract if she loses it on account of Mario's actions.
 - The damages must have been proximately caused by Mario's wrongful conduct. On these facts, the proximate causation requirement is satisfied.
 - It will not be a defense for Mario to claim that he did not know about the contract's existence. Such a defense is only viable in the context of a breach of contract.
 - Mario may be able to avoid liability for consequential damages if Sally is not able to prove such damages to a "reasonable certainty." Based on the facts in the problem, it seems that Sally may have difficulty with the reasonable certainty requirement. More factual development would be warranted on this element.

4. Punitive Damages

- Sally should be able to recover punitive damages under the standards set out in Fla. Stat. 768.72(2). It could be argued that Mario's conduct rose to the level of "intentional misconduct" under subsection (2)(a) because he knew that drunk driving was wrong and that activity is per se likely to result in harm. Even if this were not the case, Mario's conduct is certainly "gross negligence" under subsection (2)(b) because drunk driving shows the requisite level of recklessness.
 - Sally will have the burden of showing that Mario is liable for punitive damages. Her burden will be "clear and convincing evidence." *See* Fla. Stat. 768.725.
- In terms of amount, Sally should be entitled to receive up to the greater of \$500,000 or three times compensatory damages. *See* Fla. Stat. 768.73(1). None of the exceptions allowing higher punitive damage awards apply.

- Sally will have the burden to prove the amount of her damages. Her burden will be proof by the “greater weight of the evidence.” *See Fla. Stat. 768.725.*

Question 2: Bob the Builder v. Sally

- The basic rule for recovery based on a breach of contract is expectancy damages. In other words, Bob is entitled to receive what he would have received had Sally fully performed under the contract at issue.
- The problem for Bob in this case is that his expectancy under his contract with Sally is a loss. If Sally had performed and Bob had completed the contract, Bob would have suffered a loss of about \$200,000 (\$450,000 cost of pad at completion less the contract price of \$250,000). In the terms we used in class, this is a losing contract.
- Bob’s alternative is to use another means of measuring his recovery for Sally’s breach of contract. The first way is restitution in which we measure Bob’s recovery not by his expectation under the contract but rather by Sally’s unjust gain. The other option is rescission of contract. In rescission, the theory is that you put both Sally and Bob back in the position that each occupied before the contract was made. In general, Bob is free to elect his remedy, so he may choose restitution or rescission instead of expectancy damages.
- A court could describe Bob’s recovery in restitution either simply as a case of unjust enrichment or using one of the traditional equitable devices. The device most suited to this problem is the quasi-contract. In a quasi-contract the law implies a contract to pay for the amount of the unjust enrichment.
- In terms of rescission, Bob may rescind the contract if Sally’s breach goes to the heart of the deal. On the facts presented, Sally’s breach does go to the essence of the deal. Therefore, Bob may obtain rescission-based recovery by treating the situation as if he had never entered into the contract with Sally. If you proceed with rescission, it also means that all benefits that were conferred by one party on the other have to be returned. In terms of Bob, this task is easy; return any payments Sally has made. As discussed below, this issue is not so clear in terms of Sally.
- The main issue when dealing with restitution is determining the amount of the defendant’s unjust enrichment. The same measurement issue would be faced in terms of rescission. Here the issue is figuring out by how much Sally has been unjustly enriched

or, using rescission, how much of a benefit did Bob confer on Sally by his performance.

- One possibility is that Sally has been enriched by (or Bob has conferred a benefit of) \$425,000, the actual value of launch pad 3 given Bob's 95% completion.
- Another possibility is that Bob should only get 95% of the contract price (95% of \$250,000). The theory on this point is that Sally is not being unjustly enriched by getting a pad that she had been promised for \$250,000. If Bob underbid that is his fault. We will make Sally pay, but not more than the contract price. The same logic would flow from a rescission based measurement of damages.
- Yet another possibility is that we would take evidence about what it would have cost a reasonable contractor to construct the pad to 95% of completion and then allow Bob to get this amount as her recovery. Of course, you can run into a number of proof issues here. Also, you would need to decide whether you view this reasonable person at the time of contracting or at the time of performance. This timing issue could make a very big difference if we assume that Bob did not intentionally underbid the contract.
- The bottom line for Bob is that he will certainly be able to avoid the use of the expectancy measure of recovery. Exactly what he can get and whether it will be done via restitution or rescission is unclear and will be the subject of much battle at trial.

Question 3: Sally v. Space-Parts-R-Us

- The first issue to recognize here is that the Space-Parts/Sally contract contains a limitation of remedy clause. The clause provides that the exclusive remedy for breach of contract is repair of the system, or in Space-Parts' sole discretion, replacement. This type of limitation on remedy is effective. Fla. Stat. 672-719(1).
- Sally will be able to get out of this exclusive remedy under Fla. Stat. 672-719(2) if the remedy fails of its essential purpose. On these facts, Sally should be able to avoid the exclusive remedy. The company has not been able to repair the system after several attempts. The company has also refused to replace the system.
- Once Sally gets out of the exclusive repair/replacement remedy, she may pursue

the other remedies available to her under the Uniform Commercial Code. Fla. Stat. 672-719(2). Those remedies include damages as well as equitable relief.

- The first thing that should come to mind as a remedy under the Code given Sally's situation is equitable relief in the form of specific performance under Fla. Stat. 672.716(1). Under this section, she would be entitled to specific performance if she can show that the goods are "unique or in other proper circumstances." *Id.* Sally should be able to meet this standard here given what we know about the pad. It is required by the EU Agency and she cannot find another one.
- Sally should also seek to have the decree entered as a preliminary injunctive order. She arguably should be able to do so under Fla. Stat. 672.716(2), which provides that the court may enter other relief that the court may deem just.
- In order to obtain the preliminary relief, she would need to meet the applicable standards. Although the standards differ somewhat in state and federal court, they basically require: (1) irreparable harm/no adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) threatened injury to plaintiff outweighs the harm to the defendant if the injunction is entered; and (4) granting the injunction will serve the public interest.
 - In terms of irreparable injury/no adequate remedy at law, you would need to consider whether money damages would adequately compensate the plaintiff in the absence of relief now. If the relief is not granted, Sally will probably lose her contract with the EU Agency. If she can get all her damages, the company might have an argument that the damages make her whole. As discussed below, if Sally cannot get her consequential damages, the company's argument on this factor will be considerably weaker.
 - On these facts, Sally seems to have a substantial likelihood of success on the merits.
 - The balance here seems to tip in favor of Sally. All the company would have to do is what it takes to put Sally where she should have been if Space-Parts had lived up to its bargain in the first place. Also, it seems that the company has other systems but that it just does not want to give them to Sally. Of course, we do not know enough about how difficult it is to install the system. Such facts

could make a difference in the balancing equation.

- It seems that the public interest would tip in Sally's favor, or at least be neutral. For example, the commercial space business is important to the economy while allowing people to breach their contracts is not.
- In addition to equitable relief, Sally should also pursue monetary relief as an alternative should the court decline to enter an injunctive order. She has three possible sources of such monetary relief:
 - First, Sally may proceed under Fla. Stat. 672.714(1) to recover damages for breach when goods have been accepted by a buyer.
 - Sally's measure of recovery under this theory is set forth in Fla. Stat. 672.714(2) and is the difference between the value of the goods as warranted and the value of the goods as delivered. In our case, the value of the goods as warranted was \$100,000 under the contract. A very strong argument can be made that the value of a system that will not work is \$0. Therefore, Sally has a strong claim for damages of \$100,000 under this section of the Code.
 - Sally should also be able to recover her incidental damages caused by the company's breach of contract. Fla. Stat. 672-715(1). In this case, it seems clear that the \$10,000 Sally spent attempting to locate a new system (*i.e.*, attempting to cover) are incidental damages. In addition, these costs appear to have been commercially reasonable under the circumstances.
 - Finally, there will likely be a major debate over whether Sally will be able to recover consequential damages in this case.
 - (1) The Code provides for such damages. *See* Fla. Stat. 2-715(2).
 - (2) Under the facts of the problem, Sally's loss of the EU Agency contract, if it occurs, would be consequential damages. The company knew about

them – a requirement of the Code – based on the language of the contract. Moreover, the amount of damages are reasonably certain in this case unlike the second NASA contract concerning Mario.

- (3) The issue is whether the consequential damages exclusion in the contract precludes recovery in this case. There are several points to make about this issue:
 - (a) The Code allows the exclusion. Fla. Stat. 672-719(3).
 - (b) One could argue that the exclusion is unconscionable. That argument is not likely to be successful given (i) that this is a commercial transaction and (ii) the contract indicates that the parties each read the contract and had legal counsel review it.
 - (c) The final argument to make is that when the repair and replacement remedy failed of its essential purpose all of the limitations on remedy, including those as to consequential damages, went away. Courts are divided on the issue of whether the exclusion survives. On the one hand, the parties did agree to the exclusion separately than the repair and replacement clause. Therefore, the parties' intent is clear that consequential damages are excluded. On the other hand, the Code says that Sally gets the remedies provided for under the act and not the remedies provided by the contract. In other words, if you allow the exclusion to stand, Sally does not get the benefit of the plain language of section 672-719(2).
 - You might also consider how fundamental the breach was.
 - You might also consider the position you took on the inadequacy of the legal remedy when you requested

specific performance.

Question 4: Country Club v. Sally

In my view there are four credible responses to the Country Club's request for injunctive relief are set forth below. The question only called on you to select two responses. I also plan to take into account any additional options raised in exam answers.

- Laches
 - The best response would be that the Country Club's request for injunctive relief is barred by the equitable defense of laches. Under this doctrine, a party is not entitled to equitable relief if the court determines that (1) it waited for an unreasonable length of time to assert the claim for relief at issue and (2) the other party (here Sally) has been prejudiced by the unreasonable delay.
 - In terms of the unreasonable delay, the facts tend to support Sally's argument that the Country Club waited too long to assert its claim. The Club is complaining about launches of satellites from launch pad #1. Those launches began in 1995 and continued at a rate of three launches per year from 1995 through 2001. All of these launches involved the same payloads and the same type of rocket. Moreover, they all took place at the same time of the day. In short, it does not appear that much has changed in the relevant period.
 - A final point is that there is nothing in the record to justify the delay. The Club knew about the launches. Also, it does not appear that the club was attempting to negotiate with Sally during this period.
 - In terms of prejudice, Sally will be able to argue that she has relied on a lack of objection to the launches in structuring her business. For example, she uses pad #1 for the first NASA contract and has dedicated her anticipated future launches to other pads.
 - My assessment is that Sally's chances for success on a laches defense are quite high.
- Equitable Estoppel
 - A second possibility is equitable estoppel.
 - The elements of an equitable estoppel are (1) an act or conduct by

the Club inconsistent with the relief it now seeks against Sally, (2) Sally's reasonable reliance on the Club's actions, and (3) injury to Sally.

- In terms of the first element, the key point to discuss is whether in the factual circumstance here you can have estoppel by silence. It seems likely that you could. The Club knew about its complaints and did not take any action. While it did not have an obligation to act, all the time it waited we can assume that the Club was in a position know that Sally was expanding her business and structuring that business with the expectation that the launches, at least as done in the past, were not causing problems.
 - In terms of reliance and injury, the arguments largely track those made above with respect to laches. Sally structured her business under the belief that her actions were not causing an injury to her neighbors. There is nothing to suggest that Sally's actions were unreasonable. Moreover, if she is now forced to stopped launches, her business is likely to suffer.
 - In conclusion, I think that Sally has a good chance of succeeding on her defense of equitable estoppel.
- Waiver
 - A third possibility is that the Country Club waived its right to assert that the launches were harming golfers. While it is possible to make this argument, my sense is that it is more difficult to articulate the situation here in terms of waiver. It is a little like putting a round peg in a square hole.
 - The definition of waiver is intentional conduct by the Club that is inconsistent with the assertion of the right at issue in the lawsuit with Sally.
 - There is no requirement that Sally rely on the waiver.
 - The argument here would be that the inaction of the Club was a waiver of its right. That may be true. The difficulty is that it is harder to see an intentional act. I am not saying that the argument is bad just that it is a little more artificial to make.

- Balance of Hardships
 - Another possible response is that the balance of hardships tips against the issuance of the injunction.
 - The argument would be that on the one hand you have the interests of some golfers in preventing hearing damage. This is an important consideration. It is in the golfers' control, however, whether they are in harm's way. In other words, there are not many launches per year and each launch is in the morning. The golfers could simply stay away during that period of time.
 - On the other side of the ledger is Sally's interest in continued operation of her business. First, she makes her living doing what the Club wants to stop. It is true that the Club is not trying to shut her down. Nonetheless, Sally's business would be harmed if the Club succeeds. In addition, Sally employs 15 people, some of whom may lose their jobs. Finally, the public has an interest in the continued viability of the commercial space industry.
 - My analysis is that this argument is credible but will not be likely to succeed because the Club's request is limited and concerns matters of public health. Of course, a real case could go either way.

Question 5: The Marina v. The Country Club

I would deny the Country Club's request.

- The test for mootness in an injunctive proceeding is whether there is "no reasonable expectation" that the wrong complained of will be repeated. The burden is on the Country Club to meet this test. The Supreme Court has held that this burden is very high.
 - In this case, the Country Club would not meet the burden given the facts. Some important factors to consider in the analysis are:
 - It is true that the Club voluntarily ceased the offending conduct. However, such action is only one factor to consider.
 - You will also look to such factors as how easy it would be to take up the conduct again. Here it would be quite easy. There is still pesticide use, turf will still be replaced and an outside contractor will still be used.

- In addition, the Club can begin the offending conduct again without involving anyone else other than the contractor.
- Finally, it might be difficult to monitor whether the offending conduct had begun again.