

MEMORANDUM

TO: Students Enrolled in Remedies Spring 2003

FROM: Michael Allen

DATE: May 2003

SUBJECT: Remedies Final Examination

I have prepared this memorandum to discuss my thoughts on the final examination in this course. I have not attempted to be as detailed as is possible in response to the question. In addition, to the extent you raised issues that are not covered in this response but that are correct, I made sure to give you appropriate credit. For example, I did not include a discussion of a preliminary injunction with respect to Kidman's claim against Special Memories. I suspect some students will do so. If they do, they will receive credit.

To assist you in your review, I have attached a copy of the examination as Exhibit A and a copy of my grading sheet as Exhibit B. My thoughts on the exam are as follows:

Section A

Special Memories

- Ms. Kidman's claims against Special Memories are governed by the Uniform Commercial Code as enacted in Marbury. We have assumed that Marbury's version of the UCC is the same as that enacted in Florida.
- The first thing to recognize is that Ms. Kidman is a *buyer* under the UCC. As such, she has a number of options under the Code. These options are as follows:
 - Option #1: Ms. Kidman could "cover" or replace the bookcase under the terms of Section 2-712. So long as Ms. Kidman sought to cover within a reasonable time and proceeded in a commercially reasonable manner, the Code allows her to obtain a substitute bookcase.
 - In this case, we know that there is a substitute bookcase available in Brazil. It also appears from the facts we have that such cover would be reasonable because Brazil is the only place to locate a similar bookcase.
 - If Ms. Kidman covered, Section 2-712(2) provides that the damages would be calculated by taking "the difference between the cost of cover and the contract price together with incidental or consequential damages . . ."

- To calculate the damages here the first thing that you would do is take the cost of cover (\$25,000) less the contract price (\$10,000). This would yield a base damage award of \$15,000.
- Ms. Kidman would also be entitled to receive any incidental damages associated with cover. See Section 2-715(1). Incidental damages would include the estimated \$2,000 shipping cost from Brazil.
- The Code does allow for Ms. Kidman to recover consequential damages. See Sections 2-712(2) and 2-715(2). In addition, Ms. Kidman suffered consequential damages of \$100,000 when she lost the publishing contract as a result of the failure to deliver the bookcase.
 - The problem here is that the contract excludes consequential damages. The Code allows parties to exclude consequential damages unless the exclusion is unconscionable. See Section 2-719(3).
 - The Code provides that an exclusion of consequential damages is prima facie unconscionable if it limits recovery with respect to injury to a person with respect to a consumer good. The same rule is not applicable in terms of a commercial loss.
 - In this case, the prima facie rule does not apply. Moreover, there is no evidence of unconscionability on the face of the problem. Therefore, it is likely that Ms. Kidman will not be able to recover the consequential damages she suffered.
- Therefore, under the cover option Ms. Kidman would be entitled to receive \$17,000 in damages.
- Option #2: A second option under the Code is for Ms. Kidman to proceed under Section 2-713 for non-delivery or repudiation. Under this section, a person is entitled to “the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental or consequential damages . . .”
 - The interesting question here is setting the market price. It seems to me that there are three possibilities that could be discussed.

- First, one could argue that the \$50,000 Cruise was willing to pay is the market price when the buyer learned of the breach. Therefore, the damages would be $\$50,000 - \$10,000 = \$40,000$. The counter-argument is that there no market for this unique bookcase and Cruise's offer is based on spite.
- The second option is that the relevant market price would be the \$25,000 of the Brazil order. If one took this approach you would have $\$25,000 - \$10,000 = \$15,000$. So, you would end up less than the damages under cover. Kidman would argue that the \$25,000 does not count because the Brazil situation is not on all fours with the United States market.
- Finally, one could argue that there is no market price. Under this situation you would be forced to look at another section of the code.
- There are no incidental damages here. The shipping does not count because under this section there is no cover.
- The same analysis consequential damages would apply here.
- Option #3: A third option would be for Ms. Kidman to seek specific performance of the contract under Section 2-716(1) and (2). In specific performance, a party is ordered to perform as promised under the contract. In this case, that would mean that Special Memories would be ordered to deliver the bookcase.
 - In order to be entitled to specific performance, Ms. Kidman must demonstrate that the bookcase is unique or that there is no other special circumstance. On these facts, the bookcase is probably unique and so the specific performance decree should enter, especially because there is no serious argument that Special Memories will be burdened by the injunction. It could be argued that the Brazilian bookcase means that this bookcase is not unique. However, the better argument is that the bookcase is unique because (1) it is scarce and (2) was specially manufactured.
 - Although Section 2-716(2) allows for damages in addition to the specific performance decree, the same analysis concerning consequential damages applies here.
- Option #4: The fourth option is for replevin of the bookcase under the terms of Section 2-716(3). Replevin could be appropriate here because the good (the bookcase) is identified to the contract. The advantage of a replevin action is that a party need not make out the equitable requirements of inadequate remedy at law

and balance of hardships. In this case, the replevin remedy would yield the same result as the specific performance decree but with less effort.

- The potential issue to discuss with respect to replevin is whether the possibility of cover with the Brazilian bookcase negates the option. The question is a close one. It would depend on whether cover was reasonable in this case. One could come out either way depending on your analysis of the scant facts we have been given.
- Option #5: You might argue that Ms. Kidman should be able to receive damages of \$45,000 based on the consequential gains that Special Memories would obtain by selling the bookcase to Tom Cruise. It is unlikely that such an argument would be successful. First, it is difficult to argue that the terms of the UCC would allow this type of remedy, based on rescission of the contract and restitution of consequential profits. Moreover, no court has yet extended restitutionary recoveries to include such consequential profits in this type of situation.
- Summary: Under these facts, I would advise Ms. Kidman to either use replevin under 2-716(3) or to cover and recover the damages of \$17,000 from Special Memories. Given her past interactions with Mr. Cruise, she may wish to use the replevin route.

Arthur Read

- There are three ways in which Ms. Kidman could proceed concerning Mr. Read, all of which are not mutually exclusive. I discuss each separately below:
 - Option #1: Ms. Kidman could seek to have Mr. Read punished for criminal contempt of the injunction to stay out of her house. Ms. Kidman would need to submit the matter to the court that issued the injunction and request that the court forward the matter to the appropriate prosecutorial agency. In the alternative, the court could appoint a special prosecutor. The prosecutor could not be Ms. Kidman or her counsel. In any criminal contempt proceeding, Mr. Read would be entitled to a trial by jury with all the protections of a criminal trial. Mr. Read could face jail time or pay a fine to the government. Ms. Kidman would not receive any portion of any fine Mr. Read was ordered to pay.
 - Option #2: Ms. Kidman could seek to proceed against Mr. Read for civil contempt. As with criminal contempt, Ms. Kidman would need to bring the violation of the injunction to the attention of the court. The court could then elect to proceed with the matter. If it did so, Ms. Kidman's counsel would likely act as the "prosecutor." The burden of proof in connection with such civil contempt proceedings is clear and convincing evidence. Mr. Read would not be entitled to a jury in connection with these matters.

- There are two civil contempt options available to Ms. Kidman. One is coercive civil contempt. The goal of such contempt is to get Mr. Read to obey the injunction to stay out of Ms. Kidman's home in the future. It would be difficult to craft a coercive civil contempt sanction in this respect without turning into a criminal contempt situation should Read repeat his violation. The court could set a fine schedule to apply in the future in an effort to have Mr. Read comply with the injunction. While you would not face the issues implicated in Bagwell with the complex injunction, it is still difficult to say that such an order would be materially different from any criminal sanction about which someone knows in advance. Moreover, this type of remedy will not likely advance Ms. Kidman's goals.
- The second type of civil contempt is compensatory civil contempt. The goal in this type of contempt is to compensate the victim, here Ms. Kidman. The basic issue here would be to determine the harm to Ms. Kidman. The same basic concepts of damage calculation apply here as apply below in connection with a discussion of a separate damages action. I will defer discussion to that point. It would be far better to proceed with a separate damages action because (1) the burden of proof for Ms. Kidman is lower (preponderance of the evidence); (2) it is not clear that Ms. Kidman could recover for emotional distress as part of the contempt proceeding; and (3) Ms. Kidman may be entitled to recover punitive damages in a separate damages action but not as part of the civil contempt proceeding. This assessment is so even though Mr. Read will be entitled to a jury in a separate damages action. Moreover, the collateral bar rule would not apply in this situation so it is possible that Mr. Read could challenge the validity of the original injunction.
- Option #3: Ms. Kidman could file a separate damages action against Mr. Read. Such an action could be in addition to any action for criminal contempt or coercive civil contempt. She could not also pursue compensatory civil contempt because such an action would be a double recovery. There are two general issues to consider in a separate damages action: compensatory damages and punitive damages.
 - Compensatory damages: The basic goal of compensatory damages is to put Ms. Kidman back in the position she would have been in if Mr. Read did not destroy the Oscar. There are two causes of action that could supply a basis for the award of compensatory damages. The first is for destruction of the Oscar itself and the second is for the intentional infliction of emotional distress.

- In terms of the destruction of property issue, we cannot get the Oscar back. Therefore, we need to value what was lost. The fundamental rule in such a situation concerning loss of property is that the plaintiff is entitled to market damages. That is, the market value of the Oscar. We do not have enough information to determine whether it would be possible to calculate such a market value. Some options include:
 - The cost paid by the Academy of Motion Picture Arts and Sciences for each Oscar. Such an amount, while we do not know it for certain, would probably be quite low.
 - A second option would be to determine if other Oscar's had been auctioned or otherwise sold on the open market. The problem with such an approach is that the other Oscars that may have been sold in such transactions would not have been an Oscar won by *Ms. Kidman*.
 - A third option would be to have an expert attempt to provide an estimate of what Ms. Kidman's Oscar would have fetched in a sale at auction or on the open market. We do not know what such an estimate would be. This is most definitely an option to be considered.
- While the normal rule is that market damages are the measure of damages. Ms. Kidman could argue that the Oscar was a form of special value property, something like a lost wedding album or other property of great sentimental value. Once again, we do not know the amount of such damages. It would likely not be greater than the expert testimony concerning the hypothetical sale of the Oscar. In any event, these are all options.
- In terms of the emotional distress damages, the same basic rule applies: we want to put Ms. Kidman back into the position she would have occupied if Mr. Read had not committed the tort. In order to do this, the jury will need to make a reasonable determination of the value of her emotional distress. A jury's determination in this regard will be upheld so long as it is reasonable. We do not have enough information to value this damage. Much will depend on the jury's evaluation of Ms. Kidman's testimony.
- Punitive Damages: Ms. Kidman should also be able to recover punitive damages against Mr. Read. The following issues are pertinent to the

punitive damages analysis based on Marbury's adoption of the Florida punitive damages statute:

- Assuming Ms. Kidman sued in state court, she would need to comply with the terms of 768.72(1) with respect to getting permission to plead punitive damages. She would almost certainly be able to show that there is a "reasonable showing by evidence in the record" that there is a reasonable basis for recovery of punitive damages. On the facts we have, Mr. Read acted intentionally in destroying the Oscar.
- Substantively, Mr. Read would likely be liable for punitive damages under Section 768.72(2) in that he had actual knowledge of the wrongfulness of his conduct and that there was a "high probability" that damage to Ms. Kidman would result and yet went ahead and destroyed the Oscar in front of her. Ms. Kidman will need to make her showing by clear and convincing evidence, but it seems clear that she would be able to do so at trial.
- It is also likely that there will be no statutory cap on punitive damages. Section 768.73(1)(c) provides that no cap applies if "the fact finder determines that at the time of the injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant. . . ." Under the facts in this case, Mr. Read had a specific intent to harm Ms. Kidman. The only argument that Read could assert for a cap would be that the harm discussed in this section of the statute does not include either destruction of property or the infliction of emotional distress. I do not believe that he would be successful in these arguments.
 - There will, of course, be a limitation on punitive damages under the Due Process Clause(s) of the United States Constitution. Gore, State Farm. We cannot assess this limitation issue until we have an award of compensatory damages in the case.
- Summary: Ms. Kidman should most likely proceed in a separate damages action against Mr. Read seeking compensatory damages for the destruction of the Oscar and the intentional infliction of emotion distress. She should also be able to recover punitive damages. Ms. Kidman may also wish to determine if the court is interested in referring the matter for criminal contempt prosecution.

Dorothy Saur

- The first thing to recognize with respect to Saur is that Ms. Kidman has issues both with respect to past conduct (the use of her likeness over the past five months) and the future (Saur's indication that she will continue to use the likeness). I will address each situation in turn:
 - Past Conduct: Ms. Kidman has two basic options in terms of the past conduct.
 - The first option is that she could seek damages flowing from Ms. Saur's misappropriation of Kidman's likeness. If she did so, the goal would be to place Ms. Kidman in the place she would have occupied if no wrong had occurred. As with many other things, the key issue would be determining how to value the harm to Ms. Kidman. One option would be to have testimony concerning how much Ms. Kidman would have taken as a fee for allowing the picture to be used in advertising. The problem is that on the facts we have that amount is nothing, because she never would have done so. The basic problem here is that any measure of damages seems quite speculative.
 - The better option is for Ms. Kidman to pursue restitution as a means to measure recovery. In restitution we are concerned with taking any benefit from the defendant that she received from the plaintiff. In this case, the issue would be how much of the benefit at issue (\$5,000 per month in revenue) is attributable to Ms. Kidman's picture and how much is attributable to other factors of production at the restaurant.
 - We have an easy place to start because we know that \$1,000 per month in revenue is the baseline concerning the pre-Kidman era. The real problem is how much of the \$4,000 per month increase in revenue is from the picture. We do not have the details necessary to come to a conclusion. It seems certain that some part of the increase is due to the picture and some part is (or may be) due to the new food. It might take expert testimony to make a determination in this regard. All told, Ms. Kidman's damages here would be between \$20,000 and \$0 depending on the testimony.
 - By the way, the fact that Ms. Kidman delayed bringing the damage action should not have any impact on whether the claim may proceed. The claim for money damages seeks a legal remedy and the claim was filed within the statute of limitations. The only way in which there could be an impact here is if the court (1) determined that Ms. Kidman's conduct should have an impact in an equitable setting (see discussion below); and (2) determines that restitution is equitable in this situation. In that case, it is conceivable, although as discussed below unlikely, that laches or another remedial defense could play a role here.

- Future Conduct: A separate issue concerns Saur's indication that she will continue to use Kidman's picture. Ms. Kidman has two basic options to address this harm:
 - The first option would be to seek a declaratory judgment stating that Ms. Saur's action is unlawful. So long as there is an actual controversy between the two parties, a declaratory judgment would technically be proper. I would not advise pursuing this remedy because it lacks coercive effect, which on these facts is required.
 - The second option is for Ms. Kidman to seek a preventative injunction against Ms. Saur's use of Kidman's picture in the business.
 - I would advise Ms. Kidman to first pursue a preliminary injunction seeking to stop the use of the picture pending the resolution of the lawsuit. To prevail, Ms. Kidman essentially would need to show that she has no adequate remedy at law, that she is likely to prevail on the merits (which, with the possible exception of equitable defenses discussed below, is a given under the terms of the question) and that the balance of hardships tips in her favor.
 - It is likely that Kidman would be able to show an inadequate remedy at law because her likeness is unique. It will not matter that we are looking only the time between the injunction hearing and the trial because the likeness is unique at all points on the continuum.
 - In terms of the balance of hardships, Ms. Saur will argue that granting the injunction will cause her a hardship in terms of her business. All we would need is for the balance to tip ever so slightly in Saur's direction to justify denying the injunction. Whether the court accepts this view as a practical matter is dependant, in my view, upon whether it accepts the laches argument set out below.
 - One other point is worth mentioning here. Ms. Saur may argue that a preliminary injunction is inappropriate because it would change the status quo. While this may be true in some sense, this argument would likely not be enough to justify denial of the injunction. Moreover, the court could construe the status quo in the case as being the last lawful state of affairs, *i.e.* when Ms. Saur was not using the picture.

- Ms. Kidman would also seek a permanent injunction against the use of her likeness. The requirements for a permanent injunction are, for all intents and purposes, the same as for a preliminary injunction. The major difference is that to avoid a permanent injunction a defendant would need to show that the balance of hardships indicates that the defendant would be substantially prejudiced by granting the injunction. Of course, Marbury might have adopted a rule to the effect the court will not even balance hardships when a defendant's conduct is intentional. In this case, Ms. Saur's actions were intentional.

- A final point to consider here is whether Ms. Saur may successfully assert any remedial defenses. There are a number of different defenses that Ms. Saur could assert, all of which flow in one way or another from Ms. Kidman's supposed delay in asserting her complaints about the use of the picture. The relevant possibilities are discussed below:
 - Laches
 - Under this doctrine, a party is not entitled to equitable relief if the court determines that (1) she waited for an unreasonable length of time to assert the claim for relief at issue and (2) the other party (here Saur) has been prejudiced by the unreasonable delay.
 - We do not have enough information to judge whether there was any delay at all by Ms. Kidman in asserting her rights. If it does turn out to be the case that Ms. Kidman knew about the use of the picture five months ago, the next issue will be whether her delay in informing Saur was unreasonable.
 - In terms of prejudice, Saur will be able to argue that she has relied on a lack of objection to the use of the picture in structuring her business. The practical problem will be that if what Saur was doing was unlawful to begin with, her chances of showing that she was prejudiced by any delay will be quite low.

- A final issue is whether you can succeed on a laches defense when a statute of limitations, which is also applicable, has not yet run. In this case, both a statute of limitation and laches would apply because Ms. Kidman is seeking both a legal and equitable remedy for the same harm. The statute of limitation has not yet run.
 - While it is possible to prevail on a laches defense in such a

situation, it would take a great deal of prejudice to the opposing party to justify such a result. It does not appear that such a level of prejudice is present in this case.

- Equitable Estoppel
 - A second possibility is equitable estoppel.
 - The elements of an equitable estoppel are (1) an act or conduct by Kidman inconsistent with the relief she now seeks against Saur, (2) Saur's reasonable reliance on Kidman's actions, and (3) injury to Saur.
 - In terms of the first element, the key point to discuss is whether in the factual circumstance here you can have estoppel by silence. This is a difficult issue in general and particularly so when we consider what Saur was doing may have been illegal in any event.
 - In terms of reliance and injury, the arguments largely track those made above with respect to laches.
- Waiver
 - A third possibility is that Kidman waived her right to prevent the use of the picture. The definition of waiver is intentional conduct by Kidman that is inconsistent with the assertion of the right at issue in the lawsuit with Saur. While it is possible to make this argument, my sense is that Saur would not prevail. A delay is not inconsistent with making the argument. If Saur was to prevail, it would likely need to come in connection with laches or equitable estoppel.

Section B

- There are two issues to deal with concerning Super Studios' claim against Ms. Kidman:
 - The first issue is whether Super Studios may obtain positive specific performance of the contract to perform in The Minutes. The studio should not prevail on its claim. A party will not be allowed to obtain specific performance of a personal services contract.
 - One reason is that it is difficult to monitor the enforcement of the injunction.

- A more important reason why personal services contracts are not specifically enforceable is because the 13th Amendment to the United States Constitution prohibits slavery and involuntary servitude.
- The second issue is whether Super Studios can obtain what is called negative enforcement of the personal services contract. That is, may the studio preclude Kidman from working on a movie for anyone else during 2004 when she was committed to work on The Minutes.
 - The answer to this question depends on whether the services under the contract are deemed unique. If the situation is viewed as simply a contract for a female actress to perform, it might not be deemed unique. The better view is that the subject matter of the contract is unique because it calls for acting services by Ms. Kidman – an Oscar winner.
 - Seen as involving unique services, the studio will probably be able to obtain negative enforcement of this contract. The only additional question would be that such negative enforcement would only be possible during a period for which Ms. Kidman had a contractual obligation to work for Super Studios. On these facts, that condition would be met.