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Conflict of Laws
Final Examination, Fall 2001
Three Credits

Professor Occhialino
Tuesday, Dec. 11, 2001
9:00 a.m. – 12:30 p.m.

CONFLICT OF LAWS

Three and One-Half Hours

INSTRUCTIONS

1. This is a closed book exam.
2. There are three questions on this examination. Question One will determine 60% of the grade; Question Two 25% of the grade and Question Three each will determine 15% of the grade.
3. Answer Question One and Question Two in separate bluebooks.
4. Write on only one side of a page. Write only on every other line. Write as neatly as possible under the circumstances.
5. Question Three is made up of Multiple Choice and True/False Questions. Answer them on the "Bubble Sheet" using the pencil that that is supplied with this examination. **Be sure** that you put your examination number on the bubble sheet in the manner shown on the next page. There is no penalty for a wrong answer, so if you do not know the answer, it may help and cannot hurt to guess.
6. *** Place your examination number on the top of this page now! Because this examination contains multiple choice questions that may be used in the future, the professor will not grade any student's paper if this examination is not returned at the end of the exam with the proper examination number marked in the appropriate spot.

Question One

Suggested Time: Two Hours

The Wackenhut Corporation, which provides security to corporations and other entities, has its headquarters in Florida and has offices and business operations in 39 states including Texas.

Edward DeSantis, who had just resigned from the CIA, was contacted at his home in Virginia by Wackenhut in early 1995 to see if DeSantis was interested in working for Wackenhut at its Houston, Texas office. Negotiations took place in Virginia, Texas and Florida. Wackenhut orally agreed to hire DeSantis after a long conversation and negotiation in Florida and the parties agreed that a contract would be drafted to reflect their agreement and that DeSantis should proceed to Houston to look for housing.

Wackenhut lawyers prepared the contract in Florida. The contract was signed first by a Wackenhut executive in Florida, and then forwarded to DeSantis who signed it in Houston on October 1, 1995 and mailed the original back to Wackenhut headquarters in Florida. DeSantis did not consult a lawyer before signing the contract.

The contract contained a non-compete agreement. The agreement precluded DeSantis from engaging in any business activity that is competitive with the business conducted by Wackenhut within the geographical limits of the Houston area office, a forty-county area in and around Harris County in which Houston is located, for a period of three years from his date of termination. The parties further agreed "that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law."

On November 15, 1999 DeSantis resigned from the company. Following his resignation, DeSantis formed Risk Deterrence, Inc. (RDI) in Houston to provide security consulting services and security guard services. He sent out letters announcing his new venture to twenty or thirty companies in Texas, over one-half of which were Wackenhut clients. In December 1999, Marathon Oil Company notified Wackenhut that it was terminating its guard service contract with Wackenhut and then signed five-year security consulting and guard service contracts with RDI as did another Wackenhut client, TRW-Mission Drilling Products. Both companies are headquartered within the geographical area to which the non-compete clause applies.

In February, 2000, Wackenhut filed a diversity-jurisdiction lawsuit in federal district court in Texas against DeSantis seeking injunctive relief and monetary damages in excess of \$100,000 for breach of the non-compete agreement.

Florida Law

A Florida statute authorizes the use of covenants not to compete. Fla.Stat. § 542.33 (1987). The statute provides that an agreement not to compete "within a reasonably limited time and area ... and so long as such employer continues to carry on a like business therein" is enforceable by injunction. Fla.Stat. § 542.33(2)(a) (1987). Under Florida law, the only authority the court possesses over the terms of the agreement is to determine the reasonableness of its time and area limitations. More specifically, the court is not empowered to refuse to give effect to such a contract on the basis of a finding that enforcement of its terms would produce an unjust result in the form of an overly burdensome effect upon the employee. *Twenty Four Collection, Inc. v. Keller*, 389 So.2d 1062, 1063 (Fla. 3rd DCA 1997). A Florida court has upheld the enforcement of the same non-compete language in *Maimone v. Wackenhut Corp.*, 329 So.2d 332 (Fla. 3rd DCA 1986). In Florida law there is *no* requirement that an employer prove the agreement was reasonably

necessary to protect its interests. Under Florida law, in an action for injunctive relief, irreparable injury is presumed upon proof of breach of a valid covenant not to compete. *Capraro v. Lanier Business Products, Inc.*, 466 So.2d 212, 213 (Fla.1993). The rationale for this rule is that the practical difficulties of proving irreparable harm would delay immediate injunctive relief--the essence of such suits and often the only effectual relief--and thus diminish the efficacy of covenants not to compete.

Florida continues to apply the Restatement (First) of Conflict of Laws, though the Florida legislature adopted the following statute in 1993:

When a transaction bears a reasonable relation to this state and another state or country, the parties may agree that the law either of this state or such other state or country shall govern their rights and duties. Failing such agreement, the Restatement (First) of Conflict of Laws shall apply to resolve choice of law questions.

Texas Law

Non-competition agreements are not per se an illegal restraint of trade under Texas common law in effect at the time this contract was entered into nor are they per se illegal under the Texas Free Enterprise Act which went into effect on January 1, 2000.

Under Texas common law, non-compete clauses shall be upheld in Texas and are not against public policy unless they are unreasonable as to the geography covered or the length of time that the employee may not compete after the termination of employment. *Hartwell's Office World, Inc. v. Systex Corp.*, 598 S.W.2d 636, 639 (Tex.Civ.App. 1998). In this respect, Texas common law is the same as Florida law. However, Texas common law, unlike the law of Florida, *does* require that the employer prove that the non-compete clause is reasonably necessary to protect its interests or else it shall not be enforced. *Id.*

Texas common law also requires that in order to obtain an injunction in any case, the plaintiff bears the burden of proof that irreparable harm will befall the plaintiff unless an injunction is issued.

The Texas Free Enterprise Act of 2000 declares that in actions asserting violations of non-compete clauses in contracts, no injunction shall lie; instead, the only relief available for breach of non-compete clauses is compensatory damages. A provision of the Act declared its underlying rationale: "No person should ever be deprived of the right to earn a living in the trade or profession of his/her expertise except upon conviction of crime or disbarment from a profession."

Texas has adopted the Restatement (Second) of Conflict of Laws.

Question A DeSantis made motions 1) to have the court rule that the Texas law applied to determine the elements of a claim for breach of the non-compete clause and thus Wackenhut must show that the agreement was reasonably necessary to protect its interests; 2) to have the court rule that the Texas Free Enterprise Act of 2000 applies and bars the granting of an injunction; and, in the alternative, that the Texas common law rule requiring proof of irreparable harm in order to obtain an injunction applies to this case.

In opposition to the motions, Wackenhut asserts that Florida law applies to both issues.

You are an associate in the law firm representing Wackenhut. Senior partner asks you to do the following:

- 1) Present the best arguments in favor of the application of Florida law to the issue of the elements required to prove a claim for breach of the non-compete clause, while anticipating and rebutting the likely arguments of DeSantis; do so.
- 2) a) Present the best arguments in favor of the application of Florida law to the issue the requirements for the granting of an injunction against DeSantis, while anticipating and rebutting the likely arguments of DeSantis; b) in addition, anticipating that this argument might fail, present the best arguments in favor of the position that the common law of Texas and not the Texas Free Enterprise Act applies to this case, while anticipating and rebutting the likely arguments of DeSantis; do so.
- 3) Because it is at least possible that we lose these issues, please tell me if we can get a forum non conveniens dismissal or a change of venue to the federal court in Florida and tell me whether success in either motion would likely change the result in this case and why or why not. Do so.

Question B. You are corporate counsel to Wackenhut. To the dismay of Wackenhut, the Texas Court applied Texas law to determine the DeSantis/Wackenhut litigation. The President of Wackenhut asks you to redraft provisions in the standard contract of employment that will assure that in the future, Florida law will apply to any litigation involving the validity and enforcement of the non-compete clause in the standard contract. Do so, explaining fully how each clause that you draft helps to assure the result sought by the President.

Appendix to Question One

28 U.S.C. Sec. 1404(a)

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Florida Stat. Sec. 1123 “Long Arm Jurisdiction”

Florida courts shall exercise all jurisdiction that is consistent with the United States Constitution.

Question Two
Suggested Time: One Hour

Please note that one portion of the question has been eliminated so that you will have sufficient time to respond within the time allotted. Do not do the portion of the original question that has been 'struck through' below.

Please also note that a "not" has been added to correct a typographical error that we saw during the review session.

You are the White House Counsel. The Congress has just passed the attached bill (H.R. 2926). The President must decide whether to sign or veto the bill. He is not a lawyer. You have received the following memo from the President's Chief of Staff:

Memorandum

To: J. Dean

From: Hal Derman

Congress just passed this Bill in the wake of the attack on the World Trade Center and in response to fears that protracted litigation would bankrupt the airline industry. Others will advise the President about the political implications of the law if it goes into effect and of the workings of the alternative procedure for seeking compensation through the Compensation Program which the Bill creates.

Your task is to analyze the effect of the Bill on preexisting law for those persons who choose not to avail themselves of the Compensation Program but who, instead, choose to file lawsuits for compensation. The President specifically needs and wants clarification of Section 408. That provision apparently displaces state law that was in effect on September 11, 2001 and replaces it with a federal cause of action for damages, but then does not provide a federal law of torts to resolve the cases that will be filed, instead, providing a choice of law rule for determining which body of law to apply. It also apparently contains, in effect, an exclusive forum clause that forces plaintiffs to file in a particular court (though it does not address issues of forum non conveniens, or change of venue nor does it address the effect of such changes of forum on the applicable law).

Please ~~outline in clear, straightforward terminology the process by which litigation would proceed (choice of forum, choice of law) if the bill is vetoed and then, in more detail,~~ describe the operation of Section 408 if it becomes law and how it would modify the preexisting process of litigation in the cases that can be expected to be filed if the Bill is NOT vetoed. Also explain in detail whether and, if so, why there are any constitutional problems with Section 408. Finally, the President would like your evaluation of whether, from the point of view of neutral observer seeking only to achieve justice, it would be wise to replace the preexisting law that would otherwise be applicable with the scheme established by Section 408.

Please submit the memo soon. Thank you.

H.R.2926

Air Transportation Safety and System Stabilization Act (Enrolled Bill (Sent to President))

TITLE IV--VICTIM COMPENSATION

SEC. 401. SHORT TITLE.

This title may be cited as the 'September 11th Victim Compensation Fund of 2001'.

SEC. 402. DEFINITIONS.

In this title, the following definitions apply:

- (1) AIR CARRIER- The term 'air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen.
- (2) AIR TRANSPORTATION - The term 'air transportation' means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.
- (3) CLAIMANT- The term 'claimant' means an individual filing a claim for compensation under section 405(a)(1).
- (4) COLLATERAL SOURCE- The term 'collateral source' means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.
- (5) ECONOMIC LOSS- The term 'economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.
- (6) ELIGIBLE INDIVIDUAL- The term 'eligible individual' means an individual determined to be eligible for compensation under section 405(c).
- (7) NONECONOMIC LOSSES- The term 'noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(8) SPECIAL MASTER- The term 'Special Master' means the Special Master appointed under section 404(a).

SEC. 403. PURPOSE.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.

SEC. 404. ADMINISTRATION.

(a) IN GENERAL- The Attorney General, acting through a Special Master appointed by the Attorney General, shall--

- (1) administer the compensation program established under this title;
- (2) promulgate all procedural and substantive rules for the administration of this title; and
- (3) employ and supervise hearing officers and other administrative personnel to perform the duties of the Special Master under this title.

(b) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.

SEC. 405. DETERMINATION OF ELIGIBILITY FOR COMPENSATION.

(a) FILING OF CLAIM-

(1) IN GENERAL- A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) CLAIM FORM-

(A) IN GENERAL- The Special Master shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

(B) CONTENTS- The form developed under subparagraph (A) shall request--

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the terrorist-related aircraft crashes of September 11, 2001;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such crashes; and

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(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

(3) LIMITATION- No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 407.

(b) REVIEW AND DETERMINATION-

(1) REVIEW- The Special Master shall review a claim submitted under subsection (a) and determine--

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual--

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) NEGLIGENCE- With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) DETERMINATION- Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) RIGHTS OF CLAIMANT- A claimant in a review under paragraph (1) shall have--

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) NO PUNITIVE DAMAGES- The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) COLLATERAL COMPENSATION- The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

(c) ELIGIBILITY-

(1) IN GENERAL- A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant--

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(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) INDIVIDUALS- A claimant is an individual described in this paragraph if the claimant is--

(A) an individual who--

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) REQUIREMENTS-

(A) SINGLE CLAIM- Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) LIMITATION ON CIVIL ACTION-

(i) IN GENERAL- Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) PENDING ACTIONS- In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.

(a) IN GENERAL- Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under this title, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

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(b) **PAYMENT AUTHORITY-** This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.

(c) **ADDITIONAL FUNDING-**

(1) **IN GENERAL-** The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this title, under such terms and conditions as the Attorney General may impose.

(2) **USE OF SEPARATE ACCOUNT-** In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

SEC. 407. REGULATIONS.

Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this title, including regulations with respect to--

- (1) forms to be used in submitting claims under this title;
- (2) the information to be included in such forms;
- (3) procedures for hearing and the presentation of evidence;
- (4) procedures to assist an individual in filing and pursuing claims under this title; and
- (5) other matters determined appropriate by the Attorney General.

SEC. 408. LIMITATION ON AIR CARRIER LIABILITY.

(a) **IN GENERAL-** Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.

(b) **FEDERAL CAUSE OF ACTION-**

(1) **AVAILABILITY OF ACTION-** There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) **SUBSTANTIVE LAW-** The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) **JURISDICTION-** The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim

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(including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

(c) EXCLUSION- Nothing in this section shall in any way limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

SEC. 409. RIGHT OF SUBROGATION.

The United States shall have the right of subrogation with respect to any claim paid by the United States under this title.

TITLE V--AIR TRANSPORTATION SAFETY

SEC. 501. INCREASED AIR TRANSPORTATION SAFETY .

Congress affirms the President's decision to spend \$3,000,000,000 on airline safety and security in conjunction with this Act in order to restore public confidence in the airline industry.

SEC. 502. CONGRESSIONAL COMMITMENT.

Congress is committed to act expeditiously, in consultation with the Secretary of Transportation, to strengthen airport security and take further measures to enhance the security of air travel.

TITLE VI--SEPARABILITY

SEC. 601. SEPARABILITY.

If any provision of this Act (including any amendment made by this Act) or the application thereof to any person or circumstance is held invalid, the remainder of this Act (including any amendment made by this Act) and the application thereof to other persons or circumstances shall not be affected thereby.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.
