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Professor Occhialino
UNM School of Law

May 5, 2004
9:00 a.m –12:00 p.m.

**Conflict of Laws
Final Examination
Spring Semester 2003-2004
Three Hours**

Instructions

1. This is a closed book examination. Bring no materials into the examination.
2. This is a three-question examination. Question One consists of multiple choice questions. Please answer these questions on the Bubble Sheet as instructed below.
3. Questions Two and Three are Essay questions. Please answer each question in a separate bluebook. If you type, please begin each question on a new page.
4. Suggested times for each question reflect the relative point value of each question.
5. Please put your examination number on the top right hand side of this page now. Be sure to hand in this examination with your answers.
5. *** Please write on only one side of each page and only on every other line.
6. For the multiple choice questions, answer on the Bubble Sheet provided with the No. 2 pencil provided and be sure to fill in your exam number as shown in the example below.

(Please do not use the sample examination number.)

BIRTH DATE			IDENTIFICATION NUMBER										SPECIAL CODES					
MO.	DAY	YR.	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
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[SAMPLE]

Question Two

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 1999 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, 1999 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, 2003 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 2003, 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, 2004, 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 a 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, 2004.

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 2004 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 2004 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 Two

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 Three

Suggested Time: Thirty Minutes

You are a legislative aid to a state legislator who has been greatly disturbed by a New Mexico state court judge's ruling that the law of Texas applied to a constituent's lawsuit to the detriment of the New Mexico constituent. The Legislator presented the following draft of a proposed statute for your consideration:

In any case in a New Mexico court in which the New Mexico court has jurisdiction consistent with the United States Constitution and the laws of New Mexico, the New Mexico court shall apply the internal law of New Mexico to all aspects of the case; except that, in litigation in which a New Mexico citizen and a citizen of a different state or country are adversaries, the New Mexico court shall apply the internal law of whichever state, New Mexico or otherwise, that is more favorable to the claim or defense of the New Mexico citizen.

The legislator is not a lawyer. She has asked you:

1. To determine whether the proposed statute is constitutional and to explain fully any constitutional problems that you identify and your reasoning;
2. To draft a modified statute that will survive constitutional attack and will, to the extent possible within the constraints of the Constitution, accomplish the obvious goals of the original proposal.

Please do so.

End of Examination