BUSINESS ASSOCIATIONS – Starkis

Spring 2006

Final Exam

This exam contains an extended fact pattern, with a summary of the participants and their roles at the end. I strongly advise you to read over the fact pattern and all the questions before starting any analysis, making any notes, or answering any of the questions.

The time allocations indicated are suggested maximums for your use of time, but you can spend your time as you wish, and the allocations do not necessarily reflect either the amount of time you should spend on a particular question or the scoring value of the questions. You may answer the questions in any order you wish so long as the answers are marked with the correct question number, but please be sure that if you do take the questions out of order you check to make sure you have answered all the questions before turning your exam in.

Clearly print your social security number at the top of this page and on the cover of each bluebook you use. Number each of the bluebooks in the order you use them and put the total number on at least the last book (e.g., “3 of 3” or “5 of 5”).

You may not use your books or any other materials during the exam.

In your bluebooks, please write on every other line, and write only on one side of each page.

15 minutes To read through exam
Mabel Underwood was depressed. She had just received word that her partners had decided to replace her. What her friend Harriet Walker said was that the executive committee had reviewed the status of all the junior partners and concluded that she (Mabel) and one other long-time junior partner were not as productive as some of the younger members of the design firm. Just as she was about to dial her lawyer on her cell phone, a NatEx Ground delivery truck driven by Salvatore Fusco ran a stop sign and crashed into the driver’s side of her vehicle knocking her unconscious and causing severe bodily injuries.

After a two-month stay in the hospital and six weeks of doctor-ordered absence from work, Mabel returned to her office to discover that once her four weeks of sick leave had been used up, her things had been moved out of the space she had been occupying for five years and put in storage. She went in to protest to Jim Margolies, the Managing Partner, but was told that he was too busy to see her. His secretary gave her a letter signed by Margolies, dated about the time her sick leave ran out, saying that the Executive Committee had voted in accordance with the Agreement of Partnership to terminate her with two months’ severance pay. Along with the letter she was handed a check for the three-months total, and a security guard soon appeared to escort her out of the building with a cart on which were piled all her personal belongings and effects. The guard, Charles Hardcase, led her, crying, out past the desks and worktables of most of the other partners and staff though he could easily have taken her out through a shorter and more private route. Then before they left the work area, the security guard added, loud enough for everyone to hear, “No wonder they fired this old woman. You know, we found a box of stolen supplies in her office when we cleaned it out.”

Not long after that, Mabel met with her lawyer to get an update on her legal claims. The lawyer had good news and bad. He told her that she could easily win her case against Today’s
Modern Design Partners, the 100-member firm that had terminated her. He said he had researched the law and found an old case that said partners owe one another the highest degree of loyalty. He said the case had been cited thousands of times and looked like good law to him. Given the way the Executive Committee had treated her, the case, he said, was going to be easy to win, even though they probably couldn’t get any money for what Hardcase had done to her because he worked for the security company, Parsons Security Service, L.L.C., not for the partnership and even the security company was off the hook because what Hardcase had done was an intentional tort and therefore couldn’t be their fault. Suing Hardcase himself would probably be a waste of money and time.

The bad news, he said, was that she wasn’t going to get fully compensated for the injuries she suffered in her car. He had done some research on that and found out that, although NatEx Ground (official name, National Express Ground Services, Inc.) was a wholly owned subsidiary of National Express, Inc., one of the major national delivery companies, the NatEx Ground drivers are “independent contractors,” who have to buy the trucks from another NatEx subsidiary, National Express Equipment, Inc., usually by financing the purchase through National Express Credit Services Corp. The truck that struck Mabel had minimal insurance coverage, and the driver, Salvatore Fusco, owned the vehicle in name only since the outstanding balance owed to the NatEx credit company was probably more than the vehicle was worth, even before the accident. He had a home, but that was heavily mortgaged as well. Fusco, the lawyer said, was not an employee of anyone. He paid NatEx Ground for the routes he was granted, and they paid him for deliveries according to a schedule in their contract. Bottom line: take the meager insurance money and run.

For its part, the NatEx organization was having bigger problems. It had decided to expand into yet another area to compete with United Parcel Service (now UPS). UPS had gone into a variety of businesses, including computer repair, to better serve its customers. When customers of
companies like Toshiba sent their computers back to Toshiba for repair, the computers got no farther than a UPS terminal in the midwestern U.S., where UPS personnel repaired it under a contract with Toshiba and shipped it back to the customer. UPS was doing this in all kinds of fields, even shipping lobsters from a big tank at the same UPS terminal to locations around the world on behalf of a Canadian company.

NatEx decided it could make money in the adult novelty business, by maintaining a supply of adult reading material and sex toys at a central warehouse and operating websites – under names other than its own – where these materials could be ordered. As soon as an order was placed, the automated shipping process would start, and NatEx Ground would deliver the material the following day. The high profit margins of the merchandise, coupled with the elimination of the retailer, would provide a great yield to the company.

But NatEx needed a site to construct the warehouse, somewhere near its own current central offices. If it were known that NatEx was seeking to expand, local real estate prices and opposition might both increase. Jim Alvarez, the Vice President for Facilities of National Express, Inc., called Bob Hightower, a commercial broker he knew, and asked Alvarez to get someone to find properties in the area that met NatEx’s needs. Hightower, in turn, placed a call to Alexei Todarescu, an independent real estate broker, to whom he owed a favor. Hightower gave Alexei the particulars but never mentioned NatEx. He also told Alexei of the need both to keep the matter as quiet as possible and to lock in any particularly good prospects at a price that would not climb thereafter. Alexei understood the last instruction to mean that he was to pay whatever might be necessary to get signed options on any such choice parcels. Though Bob had said nothing about the client’s identity, Alexei was sure, based on the commercial realities of the area and Jim’s close connections with NatEx, that NatEx was the client.
Alexei went to work immediately. He found one parcel, a piece of old farmland owned by the three children of a deceased farmer, Wilbur Smith, whose widow still lived in the old farmhouse. They signed a purchase agreement to sell the place and all the equipment to Alexei, who had convinced them he came from a farming family in the old country and wanted to try his own hand at the family trade. The farm had most recently been an economic failure, and the Smith children felt a little bit guilty about the “high” price Alexei had agreed to. The deal was to close in two months.

Not sure whether NatEx would be successful in getting the necessary permits to turn the farmland to commercial use, Alexei continued to look. He found another piece, this one without the use-regulation issues. The owner, Earthbound L.P., was run by Sidney Harcourt, the general partner. Sidney was a wily old fellow who had been making a modest living but wanted to retire soon. He didn’t buy any of Alexei’s innocent, bumbling entrepreneur act, but took a liking to Alexei anyway. Alexei reminded Sidney of himself as a young man. After letting Alexei ramble on for a while, he interrupted and said, “Cut the act. We both know you’re looking to make a commission from whoever you’re fronting for, probably NatEx. I’ll tell you what; you sign a binding deal with me for fifteen percent over whatever it is you were ready to pay and we’ll split that amount between us when the deal closes. And you’ll still get your regular commission above that.”

Alexei, recognizing not only a kindred spirit but perhaps a master, quickly agreed and signed a purchase agreement as “authorized agent for National Express, Inc.” to buy the property sixty days from the date of the agreement. As soon as he left Harcourt’s office, he called Bob Hightower and told him of the two agreements. Bob knew one of the agreements would have to be dumped, and that might cost a bit, but the total outlay would probably be much less than if they had gone openly into the market on behalf of NatEx.

Bob then called Jim Alvarez and gave him the good news. Jim seemed delighted and told
Bob he’d be getting back to Bob soon. Jim then reported back to NatEx’s president, who seemed equally pleased that one more loose end in the project seemed to have been covered. The president directed Jim to review the signed agreements, to check out with the lawyers how costly and difficult it might be to get the necessary permits for the cheaper parcel, the farmland, and to report back within two weeks with a recommendation as to which parcel they should proceed on.

However, before the two weeks were up, a leak had developed, and the local paper and two national news organizations were reporting “rumors” that NatEx was going into the porn business. Large shareholders and some of the company directors, who had approved the project in the first place, began to complain loudly and publicly about the inappropriateness of any such doings and about the press’s apparent willingness to entertain and publish such “unfounded, malicious, and demeaning rumors.” The president called Alvarez and told him to “bury the deal. Now!” and to do it quietly.”

Both the Smith children and Earthbound L.P. are threatening to take National Express, Inc., “and everybody else involved” to court.
Dramatis Personae — The Players

Feel free to remove this page for ease of reference, but be sure to turn it in with your exam and bluebooks when you're finished.

Mabel Underwood — Junior partner in TMDP who was terminated and who got into a motor vehicle accident with a NatEx Ground truck.

Today's Modern Design Partners (TMDP) — A 100-member design firm.

Jim Margolies — The Managing Partner of TMDP.

Harriet Walker — A junior partner and friend of Mabel.

Parsons Security Service, L.L.C. — Provides security at TMDP.

Charles Hardcase — Security guard.

National Express, Inc. (NatEx) — A national delivery service that is the sole shareholder of a number of related corporate entities, including those listed below.

Jim Alvarez — the Vice President for Facilities of National Express, Inc.

National Express Ground Services, Inc. — Does business as NatEx Ground and focuses exclusively on ground deliveries.

Salvatore Fusco — Drives a NatEx Ground truck, which he owns.

National Express Equipment, Inc. (NEEI) — The supplier of NatEx Ground trucks, including the one owned by Mr. Fusco.

National Express Credit Services Corp. (NECSP) — The credit arm of NatEx that loaned Mr. Fusco the money to buy his truck.

Bob Hightower — A commercial broker contacted by Jim Alvarez to find a new warehouse site for NatEx.

Alexei Todarescu — Another real estate broker, contacted by Bob Hightower as a favor to find the warehouse site, who signed two deals for real estate parcels.

Smith children — Signed with Alexei to sell him their father's old farm and equipment.

Earthbound L.P. (ELP) — Owner of the second parcel, under agreement with Alexei as agent for NatEx.

Sidney Harcourt — The general partner of ELP who struck a deal with Alexei.
Questions

You do not need to answer the following questions in order in your bluebooks so long as you clearly identify each answer with the proper question number. Deal with the questions in any order you choose.

For any question that asks you to give legal advice, assume you represent only that party and no one else. If your advice would include any legal claim, be sure to explain the basis for the claim and the specific party or parties against whom the claim could be brought.

If any part of an answer you would give to any question is something you have already said in another answer, don’t repeat what you’ve said but do give the question number where that discussion appears.

50 minutes  1. Evaluate the advice given to Mabel Underwood by her lawyer. If she consulted you to replace that lawyer, what else if anything would you tell her?

60 minutes  2. What should National Express’s lawyers be telling them about the possible claims by the Smith children, Earthbound L.P., and their own shareholders if the press confirms the rumors about NatEx’s intentions and the share price falls?

30 minutes  3. How would you advise Alexei Todaescu?

10 minutes  5. Optional Write any question you were prepared to answer on this exam but have not been asked (directly or indirectly) and then answer it. [You will get no credit if what you write here should reasonably have been included in your answer to an earlier question.]

15 minutes  Review

Good luck with your other finals, and enjoy the summer!