RESTITUTION
Mr. Martin
June 29, 2000 Social Security No.________________

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted equally and you should spend equal amounts of time on each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book and this examination paper. If you use more than one blue book, make sure that your social security number is on each and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

Because several people will take this examination on a deferred basis, you must fill in your social security number in the space above and you must turn in this white examination paper along with your blue book or blue books. There will be no examination credit unless an examination paper is returned bearing your social security number.

QUESTION ONE

Esther was married to, but separated from, Chester. Their three children lived with Esther. Esther met a man named Lester who was charming, handsome and smart. Esther told Lester that she was in the middle of divorce proceedings. Actually, as she knew, no Complaint for Divorce had been filed by her or by Chester.

Lester was a widower with two children of his own. Esther and Lester decided to get married as soon as Esther got divorced. They decided that they would live in Lester's house. Lester's house, however, was too small for the new family with its combined five children.

For the purpose of enlarging the house, Esther furnished $15,000 of her own money. Esther and Lester borrowed an additional $15,000, unsecured, signing the note as husband and wife. In return, Lester promised to deed a half-interest in the house to Esther. This promise was oral. In any case Lester didn't have title to the house. The house, as Lester knew, was held by a professional fiduciary company as trustee of an irrevocable trust for the benefit of Lester's children pursuant to Lester's late wife's estate plan.

The addition was built onto Lester's house at a cost of $30,000. Esther and her children moved in. Lester redecorated several rooms to suit Esther.

In three months Esther knew that she had made a terrible mistake. She lost all desire to marry Lester who turned out be be, in her opinion which she didn't hesitate to express, a foul-tempered grouch. She and the children moved back in with Chester who didn't seem to be all that bad anymore compared to Lester.

Before long, Esther and Lester each learned about the other's little lies. Both consulted lawyers.

PART A

Esther asks her lawyer if there is any way that she can get the benefit of Lester's promise to convey a half-interest in the house to her. Failing that, she wants to get back the $15,000 that she invested in Lester's house. She also wants to avoid liability on the promissory note. Formulate a legal strategy for Esther.

PART B

Lester tells his lawyer that he is stuck with a house which is way too big for his needs and he has to make payments on a $15,000 loan as well. He never, he says, would have entered into these transactions but for being led down the garden path by the two-timing Esther. At a minimum, he wants to pay back nothing to Esther and, if possible, to make her pay the $15,000 note. Formulate a legal strategy for Lester.

PART C

Assume that Esther and Lester both pursue their remedies in accordance with your strategies as formulated above. How should the judge decide the case? Why?

QUESTION TWO

How should the damages, if any, be calculated in each of the following cases? Explain your answer. If you think that there should be no damages, explain why.

1. The Turkish bathhouse case. Vick, a builder, erected a Turkish bathhouse on Rick's property. The bathhouse was designed for Rick by an architect, Arch. Arch also prepared the

construction contract. When Rick signed the contract, the price for erecting the bathhouse was stated to be $50,000. When Vick signed the contract, the price for erecting the bathhouse was stated to be $75,000. This resulted from the fraud of Arch who perceived that, unless he intervened in events, the bathhouse was not going to be built. To avoid this outcome (and to obtain his commission) Arch inserted $75,000 as the price on the contract when it was submitted to Vick, the builder, for signature, but inserted $50,000 as the price when it was submitted to Rick, the owner, for signature. Arch was indicted for the fraud, but fled the jurisdiction.

Vick built the bathhouse. Rick refused to pay more than $50,000. Vick sued for the difference, $25,000. Because the bathhouse was built for the purpose of satisfying Rick's idiosyncratic taste, it increased the market value of Rick's property by little if anything.

2. The coal tramway case. Pursuant to an easement granted by Grant, Digger erected a tramway over Grant's land to enable Digger to transport coal from the mine to the railroad. The stated purpose of the easement, as set out in the document recorded at the Registry of Deeds, was "for the transport of coal from Digger's mines at Blackacre." Digger paid Grant $25,000 per year for the use of the easement. This price was not related in any way to the tonnage of coal to be transported. Pursuant to the easement, Digger transported 1,000,000 tons of coal from Blackacre to the railroad via the tramway. Digger also transported 500,000 tons of

coal from Digger's nearby mines at Whiteacre to the railroad via the tramway. Grant sued Digger because the misuse of the easement was a trespass. In testimony, Grant admitted that the trespassory misuse of the easement caused him no damages because the tramway was already in existence and operating pursuant to the easement.

3. The "everybody was happy" used car case. Bigfleet Corp. ("Bigfleet") leased a fleet of a thousand motor vehicles from Leaseco for Bigfleet's business purposes. Little was Bigfleet's motor vehicle manager.

Each motor vehicle lease provided that, at the expiration of two years or 50,000 miles, whichever first occurred, Bigfleet would return the vehicle to Leaseco for disposal. Leaseco would then sell the vehicle. If the sale price realized by Leaseco was greater than the "Blue Book" value of the car, Leaseco would refund the difference to Bigfleet. If the sale price realized by Leaseco was less than the "Blue Book" value of the car, Bigfleet would reimburse Leaseco the difference.

Little realized that this arrangement gave Leaseco no incentive to maximize the prices it received for used cars and that Bigfleet was paying substantial amounts to Leaseco. Little arranged with Leaseco to sell the used vehicles himself.

By superior marketing skill, Little was able to realize substantially better prices for the vehicles than Leaseco had done. After every sale, Little paid Leaseco the "Blue Book" value of the car; thus Leaseco received the same amount of money and was saved the expense of disposing of the vehicles. Bigfleet no longer had

to make any payments to Leaseco because Little was realizing overall more than the "Blue Book" value on the cars that he sold. Little kept for himself the difference between the sale price of the vehicles and their "Blue Book" value. Bigfleet sued Little.

QUESTION THREE

Minnesota Governor and would-be presidential candidate Jesse "The Body" Ventura had a pre-politics career in the unusual (but oddly related) field of professional wrestling. In the course of his wrestling career, he fought a match in federal court against the World Wrestling Federation.[1]

In 1984, the World Wrestling Federation ("WWF") entered into licencing agreements with a videotape distributor for the production of videotapes of WWF matches. This agreement resulted in the production of approximately 90 videotapes of WWF performances involving Ventura as a wrestler and also as a commentator. Ventura was not aware of WWF's agreement until he discovered that the videotapes were being circulated.

Ventura began wrestling for WWF in 1984. As a wrestler, Ventura was paid under an oral contract with WWF. There was no mention of royalties in this contract. In late 1984 Ventura suffered medical problems and went to work for WWF as a "color" or

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[1]. The case is reported as Jesse Ventura d/b/a Jesse "The Body" Ventura, a/k/a James G. Janos v. Titan Sports d/b/a World Wrestling Federation, 65 F.3d 725 (8th Cir. 1995). In the interest of fairness to all students who are taking this open book examination, the volume containing this case has been temporarily removed from the shelf in the MSL library.

"heel" commentator[2] pursuant to an oral agreement paying him a flat $1000 per week. Ventura claims that this oral agreement included an understanding that he was being paid for no purpose other than a live performance. WWF denies that such a term formed part of the contract.

In 1987, Ventura hired an agent to negotiate a better contract. The agent asked for a contract that included royalties on videotapes that exploited Ventura's image. WWF refused to accede to this term, explaining that its policy was to pay royalties only to "feature" wrestlers. According to Ventura's complaint, but unknown to him at the time, this was untrue; royalties were a negotiable item in all WWF contracts. However, because he wanted the WWF work, Ventura then accepted a written contract that waived royalties.

Between 1987 and 1990, Ventura's agent met with WWF annually, in person and by telephone, to negotiate Ventura's performance fees. During each negotiation, the agent asked WWF's representative if WWF had changed its policy regarding the payment of videotape royalties, and each time WWF replied that none of the "talent" received videotape royalties unless they were the featured performer on the videotape. At the same time, however, WWF was making numerous royalty payments which were inconsistent with this purported policy, as Ventura can now document.

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[2]. A color commentator provides the story of the wrestling match. A heel commentator is a color commentator who takes the role of the "bad guy."

Ventura worked for the WWF as a commentator under this contract until 1990. In 1990 Ventura went to work as a commentator for WWF's main competitor. Soon thereafter he filed this action against WWF seeking royalties on WWF videotapes that featured his image.

Discuss Ventura's rights to the royalties. Discuss WWF's defenses.

QUESTION FOUR

Professor Wendy J. Gordon, a scholar who approaches Restitution from the perspective of economics, has recently commented:

> Some observers believe that the common law has treated the internalization of harms quite differently from the way it has treated the internalization of benefits. If Harriet installs a reeking cattle feedlot next to Peter's residential neighborhood, for example, Peter will probably be able to obtain damages or an injnunction against her, in nuisance. If, by contrast, Harriet builds a luxury hotel next to Peter's land, absent contract she will have no legal right to obtain monies from him, no matter how high his land value rises as a result of her development. For injuring her neighbor, Harriet must pay. But for benefitting him, she cannot use the law to demand compensation that he has not agreed to pay. As Saul Levmore has observed, "The law

appears ready to create missing bargains in tort where harms are concerned, but is reluctant to do so in restitution where benefits are at stake."

(Professor Levmore is another Law and Economics scholar). The phrase "create missing bargains" is an economist's description of litigation. In this vernacular, parties who have been unable to agree on a bargain turn to the law to "create" the "missing bargain." Even tort recovery is viewed as a bargain. If the parties cannot settle a tort claim--they turn to the law to determine the "bargain" or amount of money which the defendant will have to pay to the plaintiff as the "price" of the latter's injury.

Why do you think that the law is "ready to create missing bargains in tort where harms are concerned," but "reluctant to do so in restitution where benefits are at stake"? Be sure to make a coherent argument with reference to materials studied in this course.

END OF EXAMINATION

RESTITUTION
Mr. Martin
June 28, 2001 SSN: ______________________

FINAL EXAMINATION

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QUESTION ONE

America Online (AOL") is an internet service provider which provides a variety of services to its customers or "members" as they are called by AOL. These services include the transmission of electronic mail ("e-mail") to and from other members and across the internet.

Dental at Discount, Inc. ("DAD") is engaged in the business of selling discount dental service plans. DAD membership entitles members to discounts from participating dentists. DAD solicits new members by means of advertising messages sent and delivered by e-mail.

There are various methods of advertising products on the internet. AOL sells "banner" advertising for a fee. A banner advertisement consists of a short phrase appearing on the user's computer screen which encourages the user to "click" on the banner, resulting in the reader being provided with more information about the advertiser's product. DAD's practice, however, involves the sending of large-volume, unsolicited, commercial e-mail messages to internet users. For these messages it pays no fee to AOL. These messages, known in the trade as "unsolicited bulk e-mail" or "UBE," are often referred to as "junk e-mail" or "spam." DAD sends large volumes of UBE through AOL's computer system to generate customer leads for DAD's products.

AOL seeks to block UBE or spam, not least to protect its own revenues from paid advertising. AOL's "conditions of membership," displayed on every new member's computer at the time of enrollment, forbid use of AOL for spam. AOL has also put in place various electronic filtering programs in an attempt to block spam. Neither the verbal prohibitions nor the filtering programs have been effective. Bulk e-mailers ignore the prohibitions. They also develop counter-programs that use deceptive practices to mask the source and quantity of their transmissions in order to thwart the filtering programs.

DAD claims that it doesn't keep records enabling it to determine how many e-mail messages have been sent to AOL subscribers. However, AOL has learned that DAD received approximately 130,000 customer "leads" as a result of DAD's e-mail solicitations. In the bulk mailing or telemarketing business, it is generally assumed that "leads" will be generated in proportion to solicitations at a rate somewhere between 1/10 of 1% on the low side, and 1/2 of 1% on the high side. Extrapolating, this suggests that DAD initiated somewhere between 2,600,000 and 13,000,000 UBE transmissions in order to harvest 130,000 leads. DAD insists that its practices violate no law and are comparable to direct mail and telemarketing solicitation, both of which are commonplace and undoubtedly legal.

AOL gets a lot of complaints about spam from its customers. AOL's president tells its general counsel that AOL has got to do something about the spam problem and DAD in particular. The

general counsel turns to a law student who is summer intern in AOL's legal office and asks the intern to research all possible theories under which an action could be brought against DAD for injunctive relief or for damages, You are that intern. (And lucky for you, because if you figure out a successful legal strategy your future in the practice of e-commerce law is assured).

As a preliminary matter, you have come to the conclusion that DAD is correct when it claims to be violating no law, in the sense that there is no Act of Congress or other statute which prohibits using the internet to send spam. In the absence of a statutory solution to the problem, you research the common law.

1. Tort. Figure out if AOL has a cause of action against DAD originating in tort law. Identify DAD's defenses to any tort claim.

2. Contract. Figure out if AOL has a cause of action against DAD originating in contract law. Identify DAD's defenses to any contract claim.

3. Unjust enrichment. Figure out if AOL has a cause of action against DAD originating in the law of unjust enrichment. Identify DAD's defenses to any unjust enrichment claim.

QUESTION TWO

College educations were not part of the picture for the Dogberry family of Foulhaven, Massachusetts, but lack of formal education didn't stunt the growth of family talent for rural real estate acquisition.

Alfred and Anna Dogberry were the parents of three children the eldest of whom was William, born in 1971. In the late 1970's William inherited $5000 from Anna's late mother. Anna used the $5000 as the down payment to buy a few acres of wetland called Brackacre, improved with a farmhouse that was little more than a shack, for $35,000. For several years Alfred made the mortgage payments on Brackacre although the property was held in William's name.

Anna bought Brackacre as part of a plan to ensure that each of her children should get a place to live upon achieving adulthood. Unfortunately, Alfred and Anna got divorced in 1990 and this plan was never carried into effect for the children other than William. In connection with the divorce William sided with his mother. At her suggestion, he deeded all his interest in Brackacre to his mother in order to prevent his father from asserting any claim to it. Subsequently, Anna told William that he could have Brackacre as a place to live if he would make the monthly mortgage payments. William did this, starting in 1991.

William married in 1994. William and his wife improved the shack with aluminum siding, a new roof and a new kitchen. Anna's new husband Charles helped them with the improvements.

At the time of her remarriage Anna recorded a deed in which she conveyed all of her real estate to herself and Charles as tenants by the entirety. At the same time Charles recorded a similar deed conveying all of his real estate to himself and Anna as tenants by the entirety.

Brackacre abutted a highway, Interstate route 995. In 1998 the Jim Dandy Sign Co. wanted to erect a billboard on Brackacre that would be visible from the interstate. William gave Jim Dandy permission to do this in consideration of a monthly rental of $500 which Jim Dandy paid and William accepted for a period of two years. A lot of people in Foulhaven complained about the billboard. Earlier this year, the town building inspector discovered that the billboard violated the Federal Highway Beautification Act and ordered William to remove it. William did not remove the billboard. Jim Dandy did not remove the billboard. Finally the town paid a contractor to remove the billboard at the town's expense and recorded a lien against Brackacre for the cost of removal, $12,500.

In May of 2001 William wanted to buy a boat. He proposed to borrow money from a bank using Brackacre as collateral. The bank explained to William that he couldn't borrow money on Brackacre because he didn't own it; his mother and stepfather owned it. Also, said the bank, neither the bank nor anybody else would lend money on Brackacre as collateral until the town's $12,500 lien was discharged by payment. William then demanded $12,500 and a deed to Brackacre from Anna and Charles. Anna and Charles refused to pay the money or to execute the deed.

The Bush administration proposes changes in federal wetlands protection laws which, if put into force, will allow the Brackacre wetlands to be filled for construction. The parcel's location next to the highway would make it suitable as a site for a regional

shopping mall. A real estate speculator has offered Anna and Charles $500,000 for Brackacre. Anna and Charles want to take the money.

Does William have any rights against his mother and stepfather? Explain. Assume, regardless of your actual answer to this question, that William has some rights. If so, how will he go about asserting them?

QUESTION THREE

Jill agreed to be interviewed by a newspaper reporter, Claudia, who was writing a series of investigative articles about women who had been sexually abused by male psychotherapists. Claudia promised Jill that her name would not be used and that she would not be identifiable in the story. Jill contends that this promise was broken when the Boston Globe published the third of Claudia's five-part series entitled "Sex with the Shrinks." The article contained Jill's account of sex with her therapist, stated (correctly) that she was a lawyer, referred (correctly) to the lawsuit against the offending therapist in which she had won a $300,000 malpractice judgment, and indicated (correctly) that she was a member of a state legislative task force that had written proposed legislation which, if enacted, would make sexual activity between psychotherapists and patients a crime.

Jill sued Claudia and the Boston Globe, alleging that the agreement to conceal her identity was a contract which was breached by the inclusion of details in the article such as her profession

and her participation on the state task force. Inclusion of her service on the state task force, she contended, made her absolutely identifiable because the task force's report listed its members and she was the only woman non-legislator.

Subsequent to the initiation of Jill's suit, and in an unrelated case, the Supreme Judicial Court of Massachusetts decided on First Amendment grounds that a reporter's promise of confidentiality could not be the basis of a suit for breach of contract. Jill therefore amended her complaint. She now claims that Claudia and the Globe have been unjustly enriched by the publication of her (Jill's) story. Jill notes that Claudia received a $10,000 prize when her series on "Sex with the Shrinks" was judged the best investigative story of the year by a national newspaper foundation.

Should Jill recover? If so, what damages? If not, why not?

QUESTION FOUR

The law of unjust enrichment is known in other common-law jurisdictions as well as in the United States. It has not received uniform judicial approval. In England a notable twentieth-century judge, Lord Justice Scrutton, described the law of unjust enrichment as "characterized by a history of well-meaning sloppiness of thought."

A Canadian Supreme Court judge, Mr. Justice Martland, dissenting in a case decided on the basis of unjust enrichment, said:

> . . . [T]he adoption of this concept [unjust enrichment] involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe Judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The test would be his individual perception of what he considered to be unjust. <u>Pettkus v. Becker</u> [1980] 2 S.C.R. 834, 117 D.L.R.3d 257, 274.

On the other hand, a Canadian legal scholar has written as follows:

> . . . [U]njust enrichment is one of the last major areas of law where the law is overwhelmingly judge-made. It has emerged from the common law. By analyzing the operation of the principle we are able to detect an important role undertaken by the judiciary over many aspects of commercial, family and political life. The principle is dynamic and in recent years the Canadian courts have used it in highly innovative ways. As a centre piece for change, the principle has proved remarkably flexible and adaptable to an extraordinarily diverse number of areas. Partly, this has been accomplished by the assimilation of common law and equity, and a willingness to take the common law, case by case process into controversial areas. For example, the principle of unjust enrichment has been the basis for the judiciary to express, and indeed reflect, a broad spectrum of values and attitudes. Thus, social changes in family relationships (as in the cohabitation cases) are vested with legal consequences as a result of applying the principle. [The author goes on to cite other Canadian examples]. . . . G. B. Klippert, <u>Unjust Enrichment</u>, vii-viii (Toronto, 1986).

You are invited to offer your comments in response to these critiques. You may agree with either point of view, or disagree, but be sure to make a coherent argument with reference to materials studied in this course.

END OF EXAMINATION

RESTITUTION
Mr. Martin
June 27, 2002

FINAL EXAMINATION

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QUESTION ONE

Humongous Construction Co. ("Humongous") was the contractor, and Damright Co., ("Damright") its subcontractor, on a contract to build a hydroelectric plant. Damright was to build a storage dam to impound the waters of Greek Creek. Under the contract, Humongous was to deliver to Damright all of the cement, gravel, sand, and steel which were to become part of the dam. Damright was to furnish all other materials and all labor and equipment.

There were delays and cost overruns from the beginning, which each side blamed on the other. The contract provided that Damright would do all of the preliminary excavation for the project. Upon commencement of the work, however, Humongous was already doing the excavation and refused to allow Damright on the job until the excavation was finished (months later, said Damright, than if Damright had done the job itself). Damright repeatedly complained to Humongous that Damright had to suspend construction because Humnogous's deliveries were not kept up to schedule. Humongous complained that Damright's cessation of operations for the winter of 1999, with the dam behind schedule, interfered with Humongous's progress on other parts of the project. Finally, with the winter seasonal shutdown in 2000 approaching, Damright told Humongous that if materials were not supplied on time as needed Damright would quit the job and hold Humongous responsible. Damright waited until

December 15, 2000, for more materials. No materials having been supplied, Damright moved off the job and never returned.

The contract price for the subcontract was $3,330,000. Damright had received $3,130,000 in progress payments, and would have been entitled to another $200,000 if it had finished the job. Damright, however, had spent $5,710,000 building as much as it did. It would have cost another $290,000 to finish the job, making a total construction cost of $6,000,000.

Litigation ensued. Each side accused the other of breach of contract. After all of the evidence was in at trial, the jury was asked the following special question: "Did Humongous materially breach the contract prior to December 15, 2000?"

Part A.

Explain the consequences if the jury's answer to this question is "Yes." Be specific.

Part B.

Explain the consequences if the jury's answer to this question is "No." Be specific.

Part C.

Assume that the jury answered the question "Yes." How much should Damright recover as damages for Humongous's breach? Explain your answer.

QUESTION TWO

Dr. DeFaulto was a psychiatrist who lived with his wife, precariously so far as finances go, in the nice Boston suburb of Andover, Massachusetts. Dr. DeFaulto had bought a parcel of land from Farmer Crabtree for $60,000, paying $10,000 in cash and giving a note for the remainder under a purchase money mortgage held by Crabtree. To build a home on this land, Dr. and Mrs. DeFaulto borrowed $500,000 from IdiotBank of Andover giving in return a note and mortgage. When the $500,000 proved insufficient to finish the landscaping and to install the swimming pool, Dr. and Mrs. DeFaulto borrowed another $50,000 from Friendly Finance Co., giving in return another note and mortgage.

When there wasn't enough money to make all the monthly payments on these debts Dr. DeFaulto paid IdiotBank and Friendly first, on the rationale that Farmer Crabtree was the least likely of the three to take collection action. Farmer Crabtree, however, wanted to retire to Florida with the money he could get from foreclosing. When Dr. DeFaulto fell behind on his payments to Crabtree, Crabtree started foreclosure proceedings.

At this point Dr. DeFaulto turned to his lawyer, Philander Podsnap, with whom he had a relationship of trust and confidence. Podsnap investigated the mortgage situation and came to the conclusion that there was no way in which Dr. DeFaulto and his wife were going to be able to carry their mortgage debts. Podsnap's proposed solution to the DeFaultos's problem was that he, Podsnap, should buy the DeFaulto's house.

Unfortunately Podsnap's clients weren't any better at paying their bills than Dr. DeFaulto's patients were. Podsnap knew that he could not qualify for mortgage financing to buy the DeFaulto's house. So, instead, Podsnap agreed to pay all of the DeFaulto's outstanding mortgage obligations as they came due in return for a deed conveying the house and property to him. Podsnap prepared all of the papers required for the transaction. At no time did Podsnap tell Dr. or Mrs. DeFaulto to seek independent legal advice. Podsnap didn't record the deed because the DeFaulto's conveyance of the property to him, a stranger, violated covenants in the DeFaulto's mortgages to Crabtree, IdiotBank and Friendly.[1]

As a result of this transaction, Podsnap moved into the DeFaulto's luxurious home. Farmer Crabtree, IdiotBank and Friendly Finance Co., didn't need to know anything about the transaction so long as Podsnap's checks arrived regularly to satisfy the monthly mortgage bills. Podsnap's checks, however, soon ceased to arrive regularly.

Some of the checks that did arrive, bounced. And Podsnap had other troubles. The Internal Revenue Service served him with a Delinquency Notice in the amount of $125,000.

Then came the fire. The house burned to the ground.

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[1]. This footnote is inserted for the benefit of students who haven't studied Property. You should realize that Dr. and Mrs. DeFaulto's conveyance of the property to Podsnap by deed in no way released Dr. and Mrs. DeFaulto from their personal obligations to pay Crabtree and to repay the money that they borrowed from IdiotBank and Friendly Finance.

Podsnap had insured the property for $650,000, naming himself as loss payee. From the insurance proceeds, Podsnap paid the IRS its $125,000. He gave his wife $500,000 in return for her written and enforceable promise not to seek alimony or spousal support in the event that the Podsnaps divorced, something that Podsnap thought likely to happen. Podsnap then filed for bankruptcy. His (many) creditors insist that the gift to Mrs. Podsnap was fraudulent as to them. The creditors are asking the Bankruptcy Court to cancel the gift to Mrs. Podsnap so that the $500,000 may be applied to their (the creditors') claims.

The remaining $25,000 Podsnap took to Atlantic City where he reversed years of bad luck at the gaming tables, returning to Massachusetts with $100,000. Of course, Podsnap's creditors in the bankruptcy court want this $100,000 to be applied to the satisfaction of their claims as well.

All three lenders started foreclosure proceedings on the property in Andover. All three realized, however, that the land without a house on it would fall far short of satisfying their claims. All three lenders, therefore, sued Dr. and Mrs. DeFaulto on their notes.

What are the rights of Dr. and Mrs. DeFaulto?

QUESTION THREE

In the early 1990's plans were laid for a new industrial park adjacent to Interstate Route 93 in Andover. The developer and owner of the land was Overreach Co. ("Overreach"), a major developer of such properties in the northeastern United States.

Overreach entered into a general construction contract. The general contractor, in turn, entered into a subcontract for all sewage and drainage work with a subcontractor, Bigger Diggers, Inc. ("Bigger Diggers"). At the request of Overreach the subcontract specified that all pipes used in the sewage and drainage work were to be extra-heavy cast iron pipes manufactured by Fat Boy Pipe Co. ("Fat Boy"). Overreach wanted Fat Boy pipes because this product had given reliable service in other industrial parks developed by Overreach. Knowing that it is very expensive to locate leaks and to dig up and repair defective sewer installations, Overreach was willing to pay Fat Boy's premium price in the hopes of avoiding repair costs down the road.

Unfortunately the new sewage installation proved from the start to be leaky. Overreach knew that it could not commence occupancy of the industrial park buildings if the sewer and drainage systems did not pass environmental compliance tests. Overreach therefore insisted that Fat Boy and Bigger Diggers solve the problem right away.

The executives at Fat Boy blamed Bigger Diggers for the problem. The executives at Bigger Diggers blamed Fat Boy.

Actually, none of them knew what the problem was. Without admitting any liability, Fat Boy agreed to pay to Bigger Diggers 75% of the cost of repairs and to furnish any new pipe that was needed. Bigger Diggers agreed to do the necessary repairs.

During the repair period, Fat Boy conducted an extensive investigation in an effort to pinpoint the cause of the leaks. After reviewing early reports, Fat Boy's engineers began to suspect that their pipe was blameless. Nevertheless, Fat Boy continued to make payments and to supply new pipe because Fat Boy wanted to keep up its good reputation with Overreach.

Finally the testing was complete. Fat Boy concluded that its pipe was entirely without fault and that poor installation was the sole cause of the problem. By this time Fat Boy had paid out $125,000 for repairs and had furnished $25,000 worth of new pipe. Fat Boy demanded $150,000 from Bigger Diggers. Bigger Diggers refused to pay. Fat Boy sued Bigger Diggers. Its complaint sets out the facts in the foregoing paragraphs. Fat Boy demanded repayment of the $150,000 on the grounds of mutual mistake.

Bigger Diggers responded asserting that, on the facts alleged in the complaint, Fat Boy had acted as a mere volunteer in making the payments and furnishing the new pipe and that, as a matter of law, Bigger Diggers was not liable to refund the money regardless of whose fault or shortcoming had caused the problem to arise.

Discuss Fat Boy's claim. Discuss Bigger Diggers's defense. Decide who should win the case.

QUESTION FOUR

University of Texas Law School Professor Douglas Laycock is the author of the article "The Scope and Significance of Restitution," which was assigned in your reading at p. 68. He was the reporter (i.e. executive head) of a committee formed by the American Law Institute to draft a new or Second Restatement of Restitution. This effort was not successful because agreement could not be reached within the committee on many key points. Professor Laycock is, therefore, understandably sensitive to some of the conceptual problems associated with this body of law. Laycock has written:

> What we now know as the law of restitution and unjust enrichment was developed through a number of more specific remedies and causes of action: quasi contracts, constructive trusts, accounting for profits, rescission, equitable lien, subrogation, indemnity, contribution, replevin, ejectment, and more. Each had a separate origin and its own set of historical limitations. Some originated in equity, some at law; some are surviving relics of the writ system and the forms of action. Some are labels for fictional explanations that enabled courts to reach just results without fully confronting some doctrine that stood in the way.
>
> There is another tradition of describing unjust enrichment in terms of morality and conscience. Justice Cardozo said the defendant must return any benefit "received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." [citation omitted]. Such formulations have the obvious problem that they give little guidance and they invite juries to second-guess the fairness of transactions covered by other rules of law. They have the great advantage that they give the courts flexibility to deal with unjust enrichment that falls between the cracks of existing rules, whether from changing social norms, the cleverness of subtle wrongdoers, or the tendency to neglect legal formalities in conducting human relationships.

> Some of the old vocabulary is still useful, and the new vocabulary carries its own potential for confusion. "Restitution" and "unjust enrichment" turn out to have multiple meanings, and we have not yet settled on an unambiguous modern vocabulary to distinguish all those meanings.

You are invited to offer your own thoughts in response to this analysis. Please begin by asking yourself, "What was, for me, the hardest material in the Restitution course?" Then see if Professor Laycock's analysis makes it any easier to figure out <u>why</u> your particular stumbling block was hard for you. Be specific with reference to materials studied in the course.

END OF EXAMINATION

RESTITUTION
Mr. Martin
June 26, 2003

SSN: ______________________

FINAL EXAMINATION

This is an open book examination. You may use any material which you have brought with you whether prepared by you or by others. Questions will be weighted equally and you should spend equal amounts of time on each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, make sure that your social security number is on each one and number the blue books ("1 of 2," "2 of 2," etc.).

Because at least one student will take this examination on a deferred basis, you must fill in your social security number in the space above and you must turn in this white examination paper along with your blue book or books. This is a temporary measure for examination security purposes only, and this examination paper will be returned to you upon request after all students have taken the examination.

QUESTION ONE

Philander S. Podsnap was a lawyer in Boston. One day he received a telephone call from the Suffolk County Jail. Jack D. Ripper wanted Podsnap to represent him. Jack D. Ripper had been indicted for the murder of Cherry DeLite, an exotic dancer. Law enforcement officials believed Ripper to be the mass murderer known, because he cut up his victims with a chainsaw, as the Boston Mangler.

Podsnap told Ripper that his fee for the trial would be $100,000, paid in advance. Ripper did not have funds. Podsnap's personal motto in such matters was, "Crime does not pay-- enough." He contemplated with dismay the small sum which was all he would receive from the Committee for Public Counsel Services. Then he had a better idea. Instead of a fee, Podsnap asked for the exclusive rights to publicity about Ripper's life and deeds. Ripper readily agreed. Podsnap prepared a written agreement by which Ripper assigned exclusive rights to Podsnap and Podsnap agreed to handle Ripper's trial. Both signed the agreement.

Podsnap had the idea that a book of the "true crime" genre about the Boston Mangler would easily sell 100,000 copies, and there would be paperback rights, serialization rights and movie rights to be sold as well. Also, Podsnap perceived, if he controlled publication of the story then he could portray himself as a talented criminal defense lawyer. This would improve his

reputation and attract new business. It works for Alan Dershowitz; it should work for Podsnap, too.

Podsnap recognized that, if Ripper were acquitted, the book idea would go nowhere. People won't buy a book about a criminal defendant who has been found by a jury not to be the Boston Mangler. Accordingly, Podsnap persuaded Ripper to enter a plea of not guilty by reason of insanity. The jury rejected this plea and found Ripper guilty. He was sentenced to life plus ninety-nine years.

Ripper fired Podsnap. Ripper appealed his conviction on the grounds of ineffective assistance of counsel at his trial. Podsnap had to admit, to himself, that this trial had not been his best performance. In particular, Podsnap's cross-examination of the prosecution's forensic psychiatrist had only enabled the latter more fully to explain his views to the jury.

To pay his new lawyer for the appeal, Ripper sold the exclusive rights to publicity about his life and career to the West Publishing Co. ("West"), which was starting a new line of true crime books to complement its existing hornbook and Nutshell series. West paid Ripper $50,000 for the rights, money which Ripper paid to his new lawyer. Ripper was also to receive a five per cent royalty on book sales and movie rights. West contracted with a ghostwriter who, with Ripper's aid, soon produced a book entitled I was the Boston Mangler.

Podsnap was furious. Not only had his exclusive book been pre-empted but, also, Podsnap was portrayed in the book as a

bumbling incompetent. Even worse news was to come. West sold the movie rights for $1,000,000. In the movie, Rodney Dangerfield was cast as Podsnap.

Podsnap sued Ripper and West for breach of contract and unjust enrichment.

The book describes the murder of Cherry DeLite in horrifying and nauseating detail. Cherry's estate sued Ripper and West for various torts and unjust enrichment.

1. Discuss Podsnap's rights against (a) Ripper and (b) West.

2. Discuss Cherry's estate's rights against (a) Ripper and (b) West.

3. If both Podsnap and Cherry's estate recover from Ripper, will one plaintiff have priority over the other? Why?

QUESTION TWO

"Great ponds," in Massachusetts and Maine, are ponds ten acres in size or larger. It is a peculiarity of the law of Massachusetts and Maine (which was part of Massachusetts until 1822) that title to great ponds is in the state for the benefit of the public, and cannot be alienated or conveyed to private owners.

Sandy Bottom Lake in northern Maine is a great pond. As with many lakes in northern Maine, access to Sandy Bottom Lake is difficult. Only one road-- a rutted dirt track-- reaches the lake. At that point there is a primitive landing where canoes and small boats can be launched. To reach any other destination on the lake or lake shore, you must go by boat.

At one time the Clearcut Paper Co. ("Clearcut") owned all of the shoreline of Sandy Bottom Lake. In 1959 Burt Countryman, a licensed Maine Guide, bought ten acres of shorefront land and a nearby island from Clearcut for the purpose of creating a fishing camp. From timber cut on the land, Countryman built log cabins. Electricity, telephones and running water were all unavailable and unwanted. Countryman's guests, or "sports" as Maine guides call their customers, liked the primitive isolation of the camp. Countryman treated the island as an extension of the camp. Often fishing parties would land on the island for picnics; people sometimes camped there; and Countryman built a shed on the island for out-of-season storage of his boats and canoes.

In 2000 Countryman was ready to retire. Clearcut had gone out of business many years before and Clearcut's land had passed through several mesne (i.e. intermediate) conveyances to a conservation group called Maine Environmental Busybodies ("MEB"). MEB offered to buy Countryman's land but Countryman received a better offer from one of his sports, Michael Urban.

Urban bought the land for $50,000, planning to create a year-round vacation retreat for himself. Urban sought solitude above all. For this reason he decided to build on the island rather than on the shore. He improved the boat shed, built a frame cottage which was insulated for winter use, drilled a well, and established a sewage disposal system. The construction project was very expensive because all of the materials had to be brought by small boat from the landing.

In 2002 MEB complained to the State of Maine about this intrusion in Sandy Bottom Lake. The state notified Urban that it, not he, owned the island. Urban's lawyer researched the issue. The law goes back to the 1640's and the cases are old, but finally the lawyer confirmed the bad news that the state's title to great ponds includes any islands therein. Countryman offered to rescind the sale of the camp to Urban. Urban refused and sued Countryman for breach of covenant seeking as damages the money he had spent on improvements to the island. Countryman counterclaimed for rescission. As a condition of rescission, Countryman tendered back the $50,000, with statutory interest, to Urban.

1. Should Countryman be allowed to rescind? Why or why not?

The State of Maine has forbidden Urban from trespassing on the island. The Governor of Maine is using Urban's frame cottage as a private retreat comparable to the U.S. President's Camp David though on a humbler scale.

2. Does Urban have any rights against the State of Maine?

(At common law, which you may assume to be the law of Maine, no one can acquire rights against the sovereign by adverse possession. There are no adverse possession or other property law issues in this question).

GO ON TO THE NEXT PAGE

QUESTION THREE

Mrs. Gump was a little old lady from Philadelphia who remembered the delicious home made ice creams of her childhood. Using her late mother's recipe box, Mrs. Gump re-created traditional American ice creams. So many people praised Mrs. Gump's ice creams that she decided to offer them for sale in a local fancy-grocery emporium. Before long, "Mrs. Gump's" had a reputation in Philadelphia as the best of the super-premium ice creams.

The distinguishing features of super-premium ice cream are its high butterfat content and its low air content or, as it is called in the trade, "overrun." Air is whipped into ice cream to give it volume. Mrs. Gump's contained so little air that it outweighed most other ice creams by thirty to forty per cent.

In 1990, Mrs. Gump moved production from her kitchen to a small factory. Later she opened a tasting room in the factory. The tasting room soon became a shoppe. The fancy-grocery emporium expanded, becoming a chain of stores. Mrs. Gump's fame expanded with it. Soon people were asking if they could open "Mrs. Gump's Ice Cream Shoppes" in other neighborhoods. Mrs. Gump graciously authorized this use of her name (for a fee, of course) and agreed to supply the shoppes with their requirements of authentic Mrs. Gump's ice cream. The shoppes, in turn, agreed to sell only Mrs. Gump's ice cream. The small factory grew. Without ever intending it, Mrs. Gump had become a successful franchisor.

Mrs. Gump had a son, Stanley Gump, who had gone to business school and knew a few things about franchising. He took more and more responsibility for the business as Mrs. Gump began to think about a well-earned retirement. In 1994, Stanley began offering Mrs. Gump's franchises throughout the northeastern United States.

In 1995, Stanley created promotional materials for prospective franchisees which described Mrs. Gump's as "the highest quality ice cream on the market, bar none," as evidenced by the fact that Mrs. Gump's was "ten per cent heavier than Haagen-Dazs." The materials stated that "Mrs. Gump supervises the production of every gallon" although, in fact, Mrs. Gump was spending most of her time in Florida.

Soon there were more than 1000 Mrs. Gump's franchises from Maine to Virginia. To meet the demand, production was contracted out to a commercial ice cream manufacturer. In 1998, without telling the franchisees, Stanley modified the recipes by increasing the overrun with the result that Mrs. Gump's became somewhat lighter in weight than Haagen-Dazs.

In 2000 Stanley made an interesting discovery. The profits on the ice cream sold to the fancy-grocery store chain were greater than the profits on the ice cream sold to the franchisee shoppes. Stanley did the obvious thing. He arranged to supply ice cream for retail sale to major supermarkets and convenience store chains. The owners of the shoppes found themselves facing competition from retailers in their own neighborhoods which sold at lower prices.

In 2001 Stanley correctly perceived that the health-conscious public was turning away from super-premium ice cream to lower-calorie dairy treats. Stanley introduced "Mrs. Gump's Early American Yogurt" for supermarket and convenience store sale only. The new product was a runaway success, but the sale of Mrs. Gump's super-premium ice cream declined as yogurt sales grew.

Marilyn Sweet is Mrs. Gump's former franchisee in Andover, Mass. In June of 2000 she paid a franchise fee of $100,000 with her life savings. Mrs. Gump's agreed to construct and lease a shoppe to her. She agreed to lease the shoppe for a ten-year term at a fixed rental plus a percentage of sales. Marilyn resigned from her job as manager of a local restaurant where she had been earning $40,000 per year. She purchased equipment for the shoppe from suppliers approved by Mrs. Gump's at a cost of $50,000 which she borrowed. Marilyn had read Stanley's 1995 promotional materials. She also met with Stanley who told her that, "In your market you ought to gross $300,000 per year." Marilyn had visited several Mrs. Gump's franchises in other towns and had hired a lawyer to represent her in negotiations. She spent a total of $15,000 in travelling expenses and legal fees.

Marilyn's franchise was unprofitable from the start. Although she worked 60- and 70-hour weeks she was unable to pay herself a salary. Last week her lender foreclosed on the equipment. Marilyn has lost her life savings, her business and her self-esteem.

Marilyn tells you this story at your law office. You agree to represent Marilyn. You prepare and file a complaint demanding in

the alternative (a) damages for breach of contract, and (b) rescission and restitution.

You think you can establish that Mrs. Gump's action of competing with its own franchisees constituted a material breach of the franchise agreement. If you are right, what will be Marilyn's damages for the breach?

At a pretrial conference the judge tells you that she will require you to "elect" between the claim for damages for breach of contract and the claim for rescission because the causes of action are inconsistent. Which theory-- restitution or damages-- should you elect to pursue? Why?

QUESTION FOUR

A commentator on Restitution has observed: "A court which is able to manipulate the concepts of constructive trust, quasi-contract, unjust enrichment and restitution can arrive at any result it wants to arrive at, regardless of law and regardless of precedent. Restitution is, therefore, fundamentally undisciplined and unprincipled. A court which invokes 'natural justice and equity' as the basis for its decision is announcing that the court considers itself at liberty to decide in accordance with its own notions of justice and fair play. But all notions of justice and fair play are culturally conditioned. Accordingly, cases decided in accordance with principles that the courts call 'restitutionary' tend, in fact, to be decided in accordance with the value system of the upper middle class white males who dominate the legal culture."

Offer your own comments in response to this thesis. You may agree or disagree, in whole or in part, but be sure to discuss the arguments that are to be made both pro and con with reference to the reading materials for this course.

END OF EXAMINATION

RESTITUTION
Mr. Martin
July 1, 2004

SSN: ____________________

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted equally and you should spend equal amounts of time on each question. Please write legibly, start each question on a new page, and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, make sure that your social security number is on each one and number the blue books ("1 of 2," "2 of 2," etc.).

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QUESTION ONE

A promise of employment by Sheikh Al-Anon, a wealth Arab, lured Podsnap away from his home in Massachusetts during the late 1990's. Podsnap found himself occupied as the Sheikh's constant companion. The Sheikh, a frequent high-stakes gambler, required Podsnap to accompany him on numerous visits to casinos in the United States and insisted that Podsnap claim credit for the Sheikh's gambling winnings. Podsnap signed for the Sheikh's gambling winnings on forms that were submitted to the Internal Revenue Service. He claims that he believed at the time that his signing for the Sheikh's gambling winnings was a condition of his employment and that, if he refused to do so, he would be discharged.

In 2002 Podsnap's circumstances deteriorated. Sheikh Al-Anon's demands left Podsnap at the point of exhaustion. He began to have marital difficulties. And the IRS began to contact him about taxes due on the gambling winnings he had signed for. Podsnap gave notice of his resignation to Sheikh Al-Anon in late 2002 because he "could no longer continue to work at such a pace," according to his resignation letter.

After leaving the Sheikh's employ, Podsnap began negotiations with the IRS about the unpaid taxes on the gambling winnings. In August 2003 Podsnap reached an agreement with the IRS according to which he paid past obligations, interest and penalties in the

amount of $400,000 on the winnings he had claimed as his own. Podsnap never informed the IRS that the gambling winnings actually were won and retained by Sheikh Al-Anon.

Podsnap wants to be reimbursed by the Sheikh for the $400,000 which he paid to the IRS. Podsnap's tax lawyer has referred Podsnap to you, an experienced litigator of oddball cases. Analyze Podsnap's possible claims against the Sheikh, the Sheikh's possible defenses, and the likelihood of Podsnap succeeding on his claim.

[The analysis called for in the preceding paragraph counts as ninety per cent (90%) of this question. Your <u>one-paragraph</u> answer to the following question counts as the remaining ten per cent (10%)]:

Will you take the case? Why or why not?

QUESTION TWO

Calzone bought a fried dough shop at Salisbury Beach from Dorito. Calzone already owned a nearby pizza shop. The terms of the deal were these: for $25,000, Calzone bought the name of the business ("Mama Mia's Fried Dough"), the goodwill, and the equipment. Calzone agreed to pay $25,000 upon the signing of the purchase agreement, and did so.

Separately from the purchase of the business, Calzone leased from Dorito the property on which the fried dough shop was located for a term of five years with the option of an additional five years at Calzone's election. The rent was $12,000 per year. In one term of the lease, Calzone obligated himself to build an addition to the existing building at least 20 feet by 20 feet for

the purpose of providing additional seating. The addition was to be completed not later than one year after the signing of the lease. In consideration of this promise on Calzone's part, the lease provided that Calzone would pay no rent for the property in the first year of the five-year term.

At the end of the first summer of operation by Calzone the addition had not been constructed. Calzone told Dorito that he (Calzone) had not been able to get a building permit. Dorito secured a building permit and built the addition at his own expense in the fall of that year.

Late in the following spring it became apparent that Calzone had lost interest in operating Mama Mia's Fried Dough. No rental payments were yet due, but Dorito noticed that Calzone was not making preparations to open for the summer. Dorito also noticed that Calzone had added fried dough to the menu at his nearby pizza shop. In June, when the first lease payment was due, Dorito did not receive a check. Dorito thereupon promptly exercised his right under the lease to re-take possession. Dorito proceeded to re-open Mama Mia's Fried Dough. Even with the new seating in the addition, however, business was off. Dorito concluded that customers were getting their fried dough at Calzone's pizza place.

Calzone sued Dorito the return of the $25,000.

Discuss the rights of the parties.

GO ON TO THE NEXT PAGE

QUESTION THREE

The estate of Horace Dimpole was sold at auction. Among the items sold was a safe. The auctioneer advised the bidders that neither he nor the estate's executor knew the combination that opened the outer door nor possessed the key that opened the inner door. As displayed, the safe's outer door was open but the inner door was locked.

Julius Orange and his wife Violet were the proprietors of a small secondhand store. They frequently attended estate auctions for the purpose of acquiring inventory, and they purchased the safe at the Dimpole auction for $50. They took it to Yale Lox, their regular locksmith, to have the safe put in working order for resale. In working order, the safe would sell for $400 to $500. As Julius and Violet watched, Lox opened the inner door. Inside was $125,000 in cash. In return for ten percent of this, Lox agreed to tell nobody about it.

Lox used his $12,500 to buy 1000 shares of Pyramid Financial Corp. stock, which he still holds and which have doubled in value.

Julius and Violet used their $112,500 to buy a used Jaguar automobile and to pay approximately one-third of the purchase price of a new and larger house, the remainder being borrowed under a mortgage note. Unfortunately, new wealth brought them no new bliss.

Julius and Violet agreed to divorce. In the divorce settlement Violet agreed to accept a lump sum cash payment of

$150,000 from Julius and to deed to him her interest in the car and in the house. Julius obtained half of this sum by borrowing it from a bank, securing the loan with a second mortgage on the house. The remainder, $75,000, exhausted Julius's savings.

With her $150,000, Violet bought a condominium in Florida into which she moved. Julius soon fell far behind on mortgage payments on the new house. The first mortgagee foreclosed. At the foreclosure sale, Julius's house was sold to Fred Third for a sum that was sufficient to pay off both mortgages but which produced a surplus, duly paid to Julius, of only $10,000.

Julius has filed for bankruptcy listing assets of $10,000 in cash and the Jaguar, against liabilities of $175,000.

In the meantime Armageddon Bank, employer of the late Mr. Dimpole, was investigating certain shortages in its accounts. It came to the conclusion that Dimpole had systematically embezzled over $500,000 from the bank. Dimpole's crime required the connivance of his secretary. The secretary has been indicted. (Dimpole, of course, can't be punished). In exchange for a recommendation for leniency, the secretary will testify that Dimpole used to secrete the proceeds of his embezzlements in the safe bought by Julius and Violet.

Discuss Armageddon Bank's rights (if any) against (a) Julius, (b) Violet, (c) Lox, and (d) Third.

GO ON TO THE NEXT PAGE

QUESTION FOUR

The law of unjust enrichment is known in other common-law jurisdictions as well as in the United States. It has not received uniform judicial approval. In England a notable twentieth-century judge, Lord Justice Scrutton, described the law of unjust enrichment as "characterized by a history of well-meaning sloppiness of thought" in Holt v. Markham, [1923] 1 K.B. 504, 128 L.T. 719.

A Canadian Supreme Court judge, Mr. Justice Martland, dissenting in a decision based on unjust enrichment, said:

> . . . [T]he adoption of this concept [unjust enrichment] involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe Judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The test would be his individual perception of what he considered to be unjust. Pettkus v. Becker [1980] 2 S.C.R. 834, 117 D.L.R.3d 257, 274.

On the other hand, a Canadian legal scholar has written as follows:

> . . . [U]njust enrichment is one of the last major areas of law where the law is overwhelmingly judge-made. It has emerged from the common law. By analyzing the operation of the principle we are able to detect an important role undertaken by the judiciary over many aspects of commercial, family and political life. The principle is dynamic and in recent years the Canadian courts have used it in highly innovative ways. As a centre piece for change, the principle has proved remarkably flexible and adaptable to an extraordinarily diverse number of areas. Partly, this has been accomplished by the assimilation of common law and equity, and a willingness to take the common law, case by case process into controversial areas. For example, the

principle of unjust enrichment has been the basis for the judiciary to express, and indeed reflect, a broad spectrum of values and attitudes. Thus, social changes in family relationships (as in the cohabitation cases) are vested with legal consequences as a result of applying the principle. [The author goes on to cite other Canadian examples]. . . . G. B. Klippert, Unjust Enrichment, vii-viii (Toronto, 1986).

You are invited to offer your comments in response to these critiques. You may agree with either point of view, or disagree, but be sure to make a coherent argument with reference to materials studied in this course.

END OF EXAMINATION

RESTITUTION
Mr. Martin
June 30, 2005 SSN: ____________________

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted equally and you should spend equal amounts of time on each question. If there are subparts within a question, each of the subparts will be weighted equally. Please write legibly, start each question on a new page, and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, make sure that your social security number is on each one and number the blue books ("1 of 2," "2 of 2," etc.).

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QUESTION ONE

This Question One consists of three sub-questions.

Part A.

Baron Figtree owns a farm in Iowa but lives in Boston, Massachusetts, because he likes the symphony and the ballet. Tim Thinwhistle owns a neighboring farm in Iowa. Thinwhistle pays Figtree $1000 per year to allow Thinwhistle to store hay in Figtree's barn and graze not more than twenty cows on Figtree's fields. Recently Figtree learned that Thinwhistle has harvested 800 bushels of feed corn that Thinwhistle grew on Figtree's land without Figtree's permission. The corn is stored in a silo on Thinwhistle's farm and has been offered for sale to a couple of other local farmers, one of whom tipped off Figtree. Explain what remedies are available to Figtree and which would be the best from his perspective.

Part B.

Professor Toad is a botanist who contracted with Earthworm Publishing Co. ("Earthworm") to prepare by September 30, 2005, a book of photographs of pond life with brief scientific explanations of the symbiotic interactions between the various plant and animal species shown in each photo. The contract calls for Prof. Toad to receive $10,000 upon completion of the book plus $1.00 per copy for each copy sold beyond the first 1000 copies. Earthworm explained to Prof. Toad that it had a contract with Quagmire Society, an

environmental group, to purchase 1000 copies, and possibly many more, for use as a fundraising give-away to Quagmire's members and contributors. On June 1, 2005, at which time Prof. Toad had expended about $1500 on film and travel expenses, and had devoted about 250 hours of effort to the project, Earthworm told him to stop all work because Earthworm had just learned that Quagmire Society had become defunct. Earthworm has refused to pay anything to Prof. Toad. If he sues, what recovery should he receive, and why?

Part C.

Col. Bart Bombast, the base commander at a U. S. Army post called Fort Powderpuff in Connecticut, contracted with Short & Sparks Co., an electrical contractor, to install and maintain at an agreed-upon price landing field lights for a landing strip adjacent to the base commander's residence at Fort Powderpuff. Short & Sparks began work by digging trenches for the purpose of running cables alongside the landing strip. When this initial excavation work was complete, Short & Sparks sent a bill for $26,000. The bill was returned to Short & Sparks by Fort Powderpuff's accounts payable officer because the base commander lacked statutory or regulatory authority to enter into such a contract without inviting competitive bids, and such bids had not been sought. Short & Sparks has been informed by its lawyers that it has no legal recourse against the Army and it should contact its congressional representative for assistance. Explain the reasoning behind this advice.

QUESTION TWO

Beauregard Bugleboy owned a house and lot in Alabama on which he lived at the end of his life with his female companion Sally Sidesaddle, to whom he was not married. On August 15, 1995, Beauregard recorded a deed of the house and lot to his son Buford. On January 15, 1998, Beauregard executed a will in which he gave to Sally a life estate in the property (meaning that she has the right to live on the property for the rest of her life) on condition that she pay the annual real estate taxes, that she maintain the property in reasonable condition, that she not marry or cohabit with another man, and that she not vacate the property. At that time Beauregard was seventy-six years old; Sally was thirty-three. Beauregard died on December 1, 1998, and his will was duly admitted to probate. Sally continued to live on the property.

Buford (who lived in Florida) received real estate tax bills for the property and paid them in every year from 1996 to 2004.

In 2003 Buford began to wonder why he was paying real estate taxes on property that he owned when, he observed, he didn't live there, didn't want to live there, and couldn't live there even if he wanted to. He also wondered if he could sell the property. He reviewed his late father's will and observed that Sally was supposed to be paying the real estate taxes. He contacted Sally on three different occasions and asked her about her intentions with

regard to the taxes. She told him that she would get back to him, but did not. Buford then consulted an Alabama lawyer, Seymour Saltlick.

Saltlick investigated and found recorded at the Registry of Deeds a deed executed on January 15, 1998, by which Buford conveyed the house and lot back to his father.

Buford examined a copy of this deed, determined that he himself had been in Florida on January 15, 1998, and declared that his (purported) signature on the deed was actually in his father's handwriting.

Alabama maintains a separate court of equity, presided over by a Chancellor with full equitable powers. Buford, represented by Saltlick, commenced an action in equity to set aside the deed as a forgery, seeking a declaration that the house and lot were not part of his father's estate, and seeking to eject Sally from the house and land.

Sally, by counsel, answered and counterclaimed seeking a declaration that she had a life estate in the property. She also counterclaimed for improvements to the house and land since December 1, 1998.

The case was tried before the Chancellor, sitting as fact-tinder, because there is no right to a jury trial in equity. Buford testified that he didn't execute the deed dated January 15, 1998. He testified that he did not learn of this deed until 2004 when Saltlick investigated the matter for him. Asked on cross-examination why he had not earlier sought to retake possession of

the land, since he was now claiming that he owned it, Buford testified that, until Saltlick investigated, he thought that he had to comply with his father's wish and let Sally live there for the rest of her life.

Sally testified that she had given up her own domicile when she moved in with Beauregard. She testified that Beauregard told her, and she believed, that she had a life estate in the property. Relying on this assertion, and believing it to be true, she had the entire house re-plumbed, installed new wiring, modernized the heating system, and had the house painted. All of this work was done with her own money, she said, in the total amount of $15,000.

The Chancellor found as a fact that the January 15 deed was a forgery. The Chancellor therefore ordered that deed cancelled and set aside. How should the Chancellor then decide the parties' remaining claims?

QUESTION THREE

Tipper was a law student who also tried to make money in the stock market. He read a lot of self-help publications about investing, noticing that most of them merely repeated familiar advice such as, "Stick to your investment plan but always be alert to unexpected opportunities." One day when he was reading a paperback book entitled How to Buy Stocks he noticed more. He noticed that substantial portions of it were identical to passages in another book that he had recently read, Planning Your Financial Future. Tipper determined that Planning Your Financial Future had been published after How to Buy Stocks and concluded that the

former had been copied from the latter. He wrote to the publisher of How to Buy Stocks, Big, Pink & Co. ("Big Pink"), advising Big Pink that portions of How to Buy Stocks had been plagiarized by the author of the later book. He offered to provide a copy of Planning Your Financial Future in which he had highlighted the plagiarized passages, with marginal references to the pages and paragraphs of How to Buy Stocks from which the passages had been copied.

In a written response, Big Pink invited Tipper to send his marked-up copy of Planning Your Financial Future. Tipper sent the book to Big Pink along with a letter. In the letter, Tipper wrote, "I will, of course, expect a 'finder's fee' for my 'tip' in the event that you recover damages for copyright infringement."

Big Pink replied in relevant part, "We do not ordinarily pay persons who supply is with information that is publicly available. In any event the question of compensation cannot be addressed until our legal counsel review the matter of possible infringement."

Tipper heard nothing more from Big Pink. In a newspaper two years later, however, he read that Big Pink had been successful in securing an award of damages for copyright infringement from the publishers of Planning Your Financial Future. Tipper wrote to Big Pink demanding one-third of the amount recovered.

Big Pink replied, denying that it had contracted with Tipper or was otherwise obliged to compensate him. Nevertheless, Big Pink enclosed a check for $200 which it described as an "honorarium." Tipper retained the check but did not cash it. Instead, he filed suit to recover one-third of the amount recovered by Big Pink.

(a) Discuss Tipper's rights in contract.

(b) Discuss Tipper's rights in unjust enrichment.

QUESTION FOUR

Attached to this examination is an excerpt from a case entitled Greenberg v. Miami Children's Hospital Research Institute, 264 F.Supp.2d 1064 (S.D.Fla. 2003), which is largely self-explanatory. Read the excerpt carefully, note that the count based on unjust enrichment is the only count of the plaintiffs' complaint which survives the defendants' motion to dismiss for failure to state a claim on which relief can be granted, and comment on the unjust enrichment issues raised by the complaint.

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ORDER GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

MORENO, District Judge.

This case presents an unfortunate legal dilemma set against the backdrop of a historic breakthrough in the treatment of a previously intractable genetic disorder. Both parties in this case were jointly engaged in a noble and dogged pursuit to detect and find a cure for a fatal genetic disorder called Canavan disease, a rare genetic disease that occurs most frequently in Ashkenazi Jewish families.

Plaintiffs, a group of individuals and non-profit institutions, are attempting to assert legal rights against Defendant researcher and his research institution's commercialization of the fruits of their Canavan disease research. Before the Court is Defendants' Motions to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Because the Court finds that Plaintiffs have failed to allege sufficient facts as to all their claims except unjust enrichment, the motions are GRANTED *in part*.

I. BACKGROUND

Plaintiffs Daniel Greenberg ("Greenberg"), Fern Kupfer ("Kupfer"), Frieda Eisen ("Eisen"), David Green ("Green"), Canavan Foundation, Dor Yeshorim, and National Tay–Sachs and Allied Diseases Association, Inc. (collectively "Plaintiffs") brought this diversity action for damages and equitable and injunctive relief to redress Defendants' alleged breach of informed consent, breach of fiduciary duty, unjust enrichment, fraudulent concealment, conversion, and misappropriation of trade secrets. The individual plaintiffs Greenberg, Kupfer, Eisen, and Green are parents of children who were afflicted with Canavan disease. The other Plaintiffs are non-profit organizations that provided funding and information to Defendants to research and discover the Canavan disease gene. Defendants are the physician-researcher, Dr. Reuben Matalon ("Matalon"), Variety Children's Hospital d/b/a Miami Children's Hospital ("MCH"), and the hospital's research affiliate, Miami Children's Hospital Research Institute ("MCHRI").

The Complaint alleges a tale of a successful research collaboration gone sour. In 1987, Canavan disease still remained a mystery—there was no way to identify who was a carrier of the disease, nor was there a way to identify a fetus with Canavan disease. Plaintiff Greenberg approached Dr. Matalon, a research physician who was then affiliated with the University of Illinois at Chicago for assistance. Greenberg requested Matalon's involvement in discovering the genes that were ostensibly responsible for this fatal disease, so that tests could be administered to determine carriers and allow for prenatal testing for the disease.

At the outset of the collaboration, Greenberg and the Chicago Chapter of the National Tay–Sachs and Allied Disease Association, Inc. ("NTSAD") located other Canavan families and convinced them to provide tissue (such as blood, urine, and autopsy samples), financial support, and aid in identifying the location of Canavan families internationally. The other individual Plaintiffs began supplying Matalon with the same types of information and samples beginning in the late 1980s. Greenberg and NTSAD also created a confidential database and compilation—the Canavan registry—with epidemiological, medical and other information about the families.

Defendant Matalon became associated in 1990 with Defendants Miami Children's Hospital Research Institute, Inc. and Variety Children's Hospital d/b/a Miami Children's Hospital. Defendant Matalon continued his relationship with the Plaintiffs after his move, accepting more tissue and blood samples as well as financial support.

The individual Plaintiffs allege that they provided Matalon with these samples and confidential information "with the understanding and expectations that such samples and information would be used for the specific purpose of researching Canavan disease and identifying mutations in the Canavan disease which could lead to carrier detection within their families and benefit the population at large." Compl. ¶ 21. Plaintiffs further allege that it was their "understanding that any carrier and prenatal testing developed in connection with the research for which they were providing essential support would be provided on an affordable and accessible basis, and that Matalon's research would remain in the public domain to promote the discovery of more effective prevention techniques and treatments and, eventually, to effectuate a cure for Canavan disease." *Id.* ¶ 22. This understanding stemmed from their "experience in community testing for Tay–Sachs disease, another deadly genetic disease that occurs most frequently in families of Ashkenazi Jewish descent." *Id.* ¶ 23.

There was a breakthrough in the research in 1993. Using Plaintiffs' blood and tissue samples, familial pedigree information, contacts, and financial support, Matalon and his research team successfully isolated the gene responsible for Canavan disease. After this key advancement, Plaintiffs allege that they continued to provide Matalon with more tissue and blood in order to learn more about the disease and its precursor gene.

In September 1994, unbeknownst to Plaintiffs, a patent application was submitted for the genetic sequence that Defendants had identified. This application was granted in October 1997, and Dr. Matalon was listed as an inventor on the gene patent and related applications for the Canavan disease, Patent No. 5,679,635 (the "Patent"). Through patenting, Defendants acquired the ability to restrict any activity related to the Canavan disease gene, including without limitation: carrier and prenatal testing, gene therapy and other treatments for Canavan disease and research involving the gene and its mutations.

Although the Patent was issued in October 1997, Plaintiffs allege that they did not learn of it until November 1998, when MCH revealed their intention to limit Canavan disease testing through a campaign of restrictive licensing of the Patent. *Id.* ¶ 29. Specifically, on November 12, 1998, Plaintiffs allege that Defendants MCH and MCHRI began to "threaten" the centers that offered Canavan testing with possible enforcement actions regarding the recently-issued patent. Defendant MCH also began restricting public accessibility through negotiating exclusive licensing agreements and charging royalty fees. *Id.* ¶ 30.

Plaintiffs allege that at no time were they informed that Defendants intended to seek a patent on the research. Nor were they told of Defendants' intentions to commercialize the fruits of the research and to restrict access to Canavan disease testing. *Id.* ¶ 21.

Based on these facts, Plaintiffs filed a six-count complaint on October 30, 2000, against Defendants asserting the following causes of action: (1) lack of informed consent; (2) breach of fiduciary duty; (3) unjust enrichment; (4) fraudulent concealment; (5) conversion; and (6) misappropriation of trade secrets. Plaintiffs generally seek a permanent injunction restraining Defendants from enforcing their patent rights, damages in the form of all royalties Defendants have received on the Patent as well as all financial contributions Plaintiffs made to benefit Defendants' research. Plaintiffs allege that Defendants have earned significant royalties from Canavan disease testing in excess of $75,000 through enforcement of their gene patent, and that Dr. Matalon has personally profited by receiving a recent substantial federal grant to undertake further research on the gene patent.

Although the case was initially filed in the U.S. District Court for the Northern District of Illinois, it was transferred pursuant to an Order entered by the Honorable Robert W. Gettlemen on July 8, 2002. Defendants Matalon and MCH/MCHRI subsequently filed their separate motions to dismiss on *September 20, 2003.*[1]

II. LEGAL STANDARD

A court will not grant a motion to dismiss unless the plaintiff fails to allege any facts that would entitle the plaintiff to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.,* 795 F.2d 948, 953 (11th Cir.1986).

1. Defendant Matalon has adopted the Memorandum of Law filed by MCH and MCHRI in