Conflict of Laws
Spring 2015
Final Examination

*This examination is seven pages long and contains one problem. As discussed in class, you are responsible for preparing a **single** answer that reflects your joint work. You are welcome to consult any written sources, although you should not need to refer to anything other than the assigned course materials. (In particular, you are not required to know anything more about substantive law than what is presented in the problem.) You are welcome to consult with me at any point with questions about the problem or about the examination process. The state law discussed in the problem is fictitious; for purposes of the examination, please **disregard** anything you know about the actual law of any of the named states.*

Henrietta Hungadinger, the partner who heads the firm's labor and employment practice group, has called you to her office. "I just got off the phone with the general counsel of Mamet Industries," she explains, "and it looks like they have a conflict of laws problem. So naturally, I thought of you." You've got your yellow pad out, and you give her a quick nod. *Go ahead, I'm ready for this.*

"It's a garden-variety departing employee case, we've done a million of these. Theft of trade secrets, breach of non-compete, yadda yadda yadda, go to court, get an injunction, yadda yadda yadda. The client may have screwed up the paperwork a bit, no big deal, if clients never screwed up the paperwork they wouldn't need us, ordinarily no problem. But they may have managed to screw it up in a way that crosses state lines, problem, by which I mean your problem because I got as far as 'comparative impairment' before I decided this employment lawyer is too old to learn new tricks." She pauses for a swig of Diet Coke.

"Let me start from the top. Stop me if there's something you need to know that I'm leaving out. Joe Ross started working at Mamet in 2009. He does process engineering for their chemical plants, some junk I don't understand. Anyway, Joe lives in Ohio and the company's offices are in Arizona and Joe hates hot weather, so he asks, 'Can I work from home?' and he gets them to agree to it. Everything's fine, we think, until yesterday, when

Joe gives a week's notice. He's all cagey about what he's doing next, but someone orks it out from one of Joe's cow orkers that he's going to start designing chemical plants for Dellco. Big problem. Do I need to explain why?"

"Let me guess," you offer. "Mamet and Dellco are competitors, and when Ross goes to Dellco, he's going to design exactly the same kind of manufacturing processes he's been designing at Mamet. And those new Dellco designs are going to be suspiciously similar to the old Mamet designs. Plus, he's going to tell them about Mamet's cost structure and unused capacity, all kinds of things he learned on the job at Mamet." You're starting to get the hang of trade secret litigation.

"Bingo. So like I said, ordinarily, no problem. They've already done the electronic equivalent of escorting him from his desk with his pictures in a box. Next, we'd sue Joe Ross tomorrow, get a TRO keeping him from starting work and Dellco, take discovery on what if anything he's already told his new bosses, and we're off to the races. I could draft the complaint in my sleep. You probably could, too. Count one, theft of trade secrets in violation of Podunk Revised Statutes title eight part flibberty-flop, whatever it is. Count two, breach of contract, viz, violation of the non-compete clause. Bim bam done, send Mamet an invoice and go golfing." (You'd be shocked if Hungadinger has been within a hundred yards of a golf course in her life.)

"Sure," you say, "that sounds straightforward enough. What's the problem?" Hungadinger takes another long pull on her Diet Coke before continuing.

"Problems, plural. First problem is that our dear, beloved general counsel at Mamet, despite being a law school classmate of mine, and despite being one of the toughest negotiators this side of the Rio Grande, and despite having in hand an ironclad, bulletproof employment agreement form drafted in blood and sweat by yours truly, never gets around to inserting the non-compete clause in the piece of paper she shoves at Joe Ross. You're not going to believe what Becky did instead, are you?"

"Probably not," is the only thing you feel comfortable saying.

"She sticks the clause in the employee handbook is what she does. Now, because Becky is not a complete and total idiot, she does incorporate the handbook by reference in the employment agreement. But because Becky is not always *capable of thinking clearly*, you see what she did wrong here? Of course you do, you're a bright egg, the handbook can be unilaterally revised

at the will of the employer. Which, under the law of Ohio, where our new friend Mr. Ross lived at the time, means that whatever page of the handbook has that non-compete clause is just a worthless piece of paper. Sigh." (That wasn't an actual sigh. Hungadinger just said the word "sigh" out loud.) "If she'd just just put that clause in the contract, like *someone in this room* specifically told her to, it the usual Ohio rule of enforcing non-competes would have kicked in and we'd be golfing."

"But Mamet is in Arizona," you pipe up. "What does Arizona law say about incorporation by reference of employee handbooks?"

"Good thinking, Dick Tracy," Hungadinger says with a look that tells you (a) she thought of it herself an hour ago, but (b) is still happy that this is the question that came immediately to your mind. "Arizona employment law makes employee handbooks enforceable on the same terms as the contracts incorporating them as long as the employee was actually given a copy. Which he was. But."

"But?"

"But this is where you start earning your keep, junior space ranger. But Arizona also refuses to enforce non-competes unless they're 'reasonable in time and geographic scope,' no matter how they're presented to the employee. That's a quote from *Scott v. Pidgeon*, Arizona Supreme Court, 2004. Why? Because of the 'delicate balance between the employer's interest in avoiding the misuse of its investment in specialized training and business development and the employee's interest in putting his skills to gainful use and society's dual interests in the enforcement of contract and robust competition.' That's a direct quotation, by the way, no punctuation in the original. Is this one reasonable? Maybe. The time element is probably fine. *Pidgeon* upheld a one-year clause, like ours. But geographically? *Pidgeon* also said it might not enforce a nationwide clause, only one, let me get this, 'limited to a reasonable geographic propinquity to Arizona.' Gah, Justice Seiko couldn't write his way out of a paper bag." Another swig of Diet Coke. "You see where this is going? And by where, I mean, literally where in the world is Carmen Sandiego, industrial spy?"

"Some state other than Arizona?"

"Right again, grasshopper. Dellco is incorporated and headquartered in Florida. And, get this, Ross let slip to that orker I mentioned that he moved to Florida in January. That's right, close your jaw, flies will get in, he ended

his lease on a house in Sandusky and got himself an apartment in Jacksonville, ten miles from Dellco HQ." (Your mouth was firmly shut during the whole of this; it's just how Hungadinger talks.)

"The plot thickens," you venture. Hungadinger raises an eyebrow, as if to say, *don't steal my schtick, kid*. You say nothing else, and look at her expectantly.

"You see why I'm concerned that the non-compete clause might not stick in the Arizona courts. It might, but if we've got a another alternative without the uncertainty, so much the better."

"Well," you say, "what about Florida law? What does it have to say about incorporation by reference and non-compete clauses?

"Part of that is easy," Hungadinger says with a nod. "Florida usually allows incorporation by reference. I pulled a First District Court of Appeal case from 2011 with facts on point, and the Shepard's check came out clean. So I think we're good there."

"And as for non-compete clauses?"

"Sigh. Why don't we talk about something more pleasant for a bit? Like root canal, or the life cycle of grubworms, or what it's like to be a Chicago Cubs fan. Or, I know, the trade secret cause of action. Trust me, she said, I know what I'm doing. All will be revealed." Yes, she really did just say "she said." You get used to it after a while. You flip to a new page in your yellow pad, and she continues. "The issue with your usual trade secret suit, and I'm sure I'm only telling you things you already know, you bright young thing, is that the plaintiff needs to point to some specific information, the oh, what do the courts call it, yes, a *trade secret*, that defendant A has obtained improperly or improperly disclosed to defendant B. But we don't have any proof yet that any Mamet Proprietary Confidential Information"—the way she says it, you can hear the capital letters—"has changed hands. Just a strong suspicion that when these conniving jackals get together, they're going to connive about jackaling some Mamet PCI."

"So, inevitable disclosure doctrine?" you ask. This gets you a raised eyebrow and a tilt of the head.

"Five points to Gryffindor. We argue that Joe Ross has 'extensive and intimate knowledge' of Mamet operations. We describe the close overlap between his duties at Mamet and his duties at Dellco. We plead that unless he has an 'uncanny ability to compartmentalize information' he 'cannot help

but rely' on Mamet PCI even if he pinky-swears not to. Result: injunction. Not as reliable as the contract claim, but any port in a storm." (Since when do fifty-eight-year-olds say "pinky-swear?") You nod along; numerous states have accepted the inevitable disclosure doctrine as Hungadinger describes it. But that thought gives you a sinking feeling.

"Where do the relevant states come down on the inevitable disclosure doctrine?" you ask. "Right now, I have Ohio, Arizona, and Florida."

"Ohio yes, Arizona no," Hungadinger replies, "exactly as we could have predicted from their attitudes towards non-compete clauses. Ohio courts will enter injunctions against new employment where the old employer show inevitable disclosure. The *O'Neill* case says it's necessary to prevent the loss of the employer's 'valuable informational property.' Arizona courts won't: there's a follow-on to *Pidgeon*, I think it's called *Matsushita*, in which the court said that the reasonableness test in *Pidgeon* means there's a 'strong Arizona public policy against enjoining a change in employment outside of the most narrowly drawn limits.' That's another reason to think, by the way, that the *Pidgeon* test might go against us: the Arizona courts increasingly seem to be reading it against employers." She's getting serious now. Less sarcasm and more info-dump.

"And Florida?"

"That's the thing. *Gazzara v. Martin*. Here, let me get you the exact wording. 'We hereby decline to adopt the inevitable disclosure doctrine. Ordinary trade secret remedies already fully protect employers against the *actual*,' emphasis in original, 'disclosure of their trade secrets. Enjoining so-called allegedly "inevitable" disclosures would work an unwarranted extension of trade secret liability. To the extent that the Circuit Court's order went beyond enjoining the disclosure of any of Gzzarra's confidential business information, it was improper. Our decision today does not leave employers helpless, as the dissent asserts. They are free to protect their interests using non-competition clauses with their employees, and we will continue to enforce such clauses according to their terms. We believe that contract law is better suited to balance the legitimate interests of Florida employers and Florida employees than the tort law of trade secrets.' You get all that, bucko?"

"I think so."

"So where do we sue?"

"One moment. Remember how you said I should ask you if there was more information I needed?" She nods. "I need more information." She nods again. "Starting with what choice-of-law rules the various states use." She nods again. All business now.

"Ohio is First Restatement. Arizona is Second Restatement, which I understand is something different. And Florida is comparative impairment, which is, as I said, when it struck me that I should have someone who knows something actually work up a conflict-of-laws analysis."

"Okay. Now there are a few things I think I missed along the way. I didn't catch where Mamet is incorporated."

"You didn't catch it because I didn't say. They're incorporated in Delaware. No operations or employees there, though, to the best of my knowledge."

"And do we know anything about Delaware law on point?"

Hungadinger, glancing at her own notes, starts rattling off doctrines. "Handbook incorporation by reference: yes. Enforces non-competes: yes. Injunctions against inevitable disclosure: yes. This is *Delaware* we're talking about. Choice of law is interest analysis as the good prophet himself, Brainerd Currie, brought it down from the mountain." (You suspect that Hungadinger may know more about choice of law than she will admit to, and that this last line is meant to remind you of that fact.)

"Got it," you say. "Just a few more things. What can you tell me about the mechanics of how the contract between Mamet and Ross was signed?"

"He went to Mamet HQ in Arizona for the final negotiations and to meet some of the key players he'd be working with," she replies. "It was formalized and executed in a conference room there."

"Did Mamet fly out at all from Ohio to Arizona after that? Go anywhere else of interest? Like, say, Delaware?"

"He was in Arizona for a week of meetings maybe once every three or four months. And he flew the coop to Florida this January, of course. Beyond that, nothing anyone at Mamet knows of. So it strikes me as exceedingly unlikely in the extreme that we can get personal jurisdiction over him in Delaware. That would be making it too easy."

"And where does Dellco operate?"

"Only in Florida, apparently. But if you're thinking about jurisdiction over them, don't worry. I thought about that, too"—she taps her head—"and

at this stage of the hunt, Joe Ross is the prey. Trust me on this. I'm not as dumb as I look." (She doesn't look dumb in the slightest, and she knows it, and she knows you know it, which means … yep.)

"Choice of law clause?"

"No, sadly. But I can promise you Mamet won't make that mistake again."

"Anything else worth knowing about the trade secrets at issue? I'm looking for any relevant geographic contacts," you say. Hungadinger thinks for a moment.

"They've got a corporate data center in Arizona, which is where all the company servers are. He had his own computer in Ohio with him, which he used to log in to do Mamet work. The work he did related to Mamet facilities in Arizona, Oklahoma, and Indiana."

"That's all I've got for now. What do you want from me?"

"Write me a memo saying where we should sue, what arguments we can make, what law we'll get, and whether Becky will go through the roof when she finds out. Let's say 4,000 words, give or take. If it's more, it's more. If it's less, it's less. As long as it's clear, cogent, and brilliant. You know, your usual. Now get to it, Lord Baltimore, and help me show those knuckleheads down the hall why I want to put you up for partner a year early."

Hungadinger opens another Diet Coke and turns back to her computer. You pretend not to have heard that last part and head back to your office to start writing.

Good Luck!