

**SYLLABUS
CIVIL PROCEDURE II – SPRING 2010**

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Class meets: Tues. & Thurs. 9:00-10:15 A.M., Room 1

Office hours: Monday, 11:00-1:00PM, Wednesday, 11:00-1:00PM,
Thursday 4:30-6:30PM, and by appointment.

ABOUT CIVIL PROCEDURE II

In the first term, we studied the Federal Rules of Civil Procedure (“FRCP”) and examined the structure of a civil lawsuit. This term, we’ll deepen those studies. We’ll start with remedies, trials, the jury right, and post-judgment motions. Then we’ll turn to intensive study of important concepts we’ll recognize from the first term, including personal jurisdiction, venue, and subject matter jurisdiction. We’ll also study supplemental jurisdiction (which “supplements” original jurisdiction), and removal jurisdiction (which permits cases to be “plucked” out of state court). We’ll then turn to the famous “Erie doctrine,” which, broadly speaking, concerns the choice of law in federal diversity cases. We’ll close by studying preclusion doctrine and appeals.

COURSE MATERIALS: REQUIRED AND RECOMMENDED

There will be a new course website. Instructions to access it may be found at either the old course website or by visiting <http://nathenson.org>. We will use the same books as last term, listed below for your reference:

REQUIRED CASEBOOK: Richard L. Marcus et al., *Civil Procedure: A Modern Approach* (5th ed. West 2009) [*hereinafter* “Casebook”].

REQUIRED STATUTES BOOK: Steven Baicker-McKee et al., *A Student’s Guide to the Federal Rules of Civil Procedure* (12th ed. West 2009) [*hereinafter* “Statutes book”].

RECOMMENDED: Joseph W. Glannon, *The Glannon Guide to Civil Procedure* (2nd ed. Wolters Kluwer 2009).

As noted above, Glannon’s book is not required, but is highly recommended for the materials we will cover this term. Although *Glannon* was of limited assistance for some of the first-term topics, it is more helpful for many of the topics we’ll cover this term. Also, as we will find, I have put together *many* study materials.

RESPONSIBILITY FOR AMENDED RULES

On December 1, 2009, amendments went into effect for a number of Rules of the FRCP. On the course website you will find a document showing the changes, most of which have been previously discussed in class. On the Spring examination, you will be responsible for the updated version of the FRCP.

GRADING AND CLASS PARTICIPATION

COMPREHENSIVE SPRING EXAMINATIONS: St. Thomas University School of Law requires comprehensive spring final examinations for its spring term first-year courses. This means that the final examination this Spring will include materials from both this term and last term. So that you have access to materials from last term, the Fall Course Website will remain online until after the final exam.

FINAL EXAMINATION: There will be a single closed-book final examination (probably 4.0 hours) administered on an anonymous basis at the conclusion of the course. Although the exam will be closed-book, I will again provide Rules and Statutes handouts for your use during the exam. The exam is worth 100% of your final grade. It will consist of multiple-choice and one or more essay questions. One of the issues for the essays will be announced in advance (hint – it will likely be personal jurisdiction). Laptops will be permitted for answering essay questions, subject to law school policy as detailed in the Student Handbook. Curving of final grades will be done in accordance with school policy as in the Student Handbook.

CLASS PARTICIPATION AND GRADING: Curving of final grades will be done in accordance with school policy as explained in the Student Handbook. In general, the final grade in this course for most students will consist entirely of the grade on the final examination. However, class participation may result in an adjustment of the examination grade of a half-letter (up or down). A limited number of “bump” adjustments will be provided to the Registrar concurrently with my submission of your final examination grades by anonymous grading number (AGN). Final examination grades below a C- do not qualify for a bump-up, regardless of class participation. Class participation factors may include: class attendance; preparation & participation; performance on quizzes, online “tests,” and class problems; use of the course website’s bulletin board; and attendance at specified STU functions.

ATTENDANCE AND CLASSROOM POLICIES

GENERAL COMMENTS: The atmosphere in most law school classes – including Civil Procedure – is more formal than what you likely experienced as an undergraduate; it’s more like oral arguments in an appellate courtroom. All students are expected to have carefully read, analyzed, and thought about the day’s assignment before coming to class. As would typically happen in an appellate court, we normally proceed via a “modified Socratic method.” Generally, I ask the questions. Students provide the analysis and answers, not visa versa. You should expect to be called on to participate at any time.

CLASS START TIME: Our time – your classmates and mine – is precious. Class will start and end on time. Students arriving late will be permitted to enter but must expressly note their arrival time on the class sign-in sheet. *Cf.* Fed. R. Civ. P. 11.

SIGN-IN SHEET & ATTENDANCE POLICY: Class attendance at St. Thomas is mandatory. Attendance is measured solely by the sign-in sheet. It is each student's responsibility to sign the sheet at the beginning of class. Students deemed absent for more than 20% of scheduled classes may not sit for the final examination and cannot pass the course. I provide the Registrar with an attendance sheet for each class, and that is the exclusive measure of your attendance. If for any reason your attendance is not recorded there, you are considered absent. There are no "excused" absences – if for any reason you anticipate missing more than 20% of the classes, you are advised to withdraw before it is too late to do so. Please review the Student Handbook for further information regarding the attendance policy. Also be aware that it is a serious violation of the Academic Integrity policy to sign in other people or to have others sign you in.

LEAVING THE CLASSROOM: As a general rule, you may not leave the classroom during class. Leaving is disruptive to your classmates and to me. However, I recognize that sometimes people have to leave for legitimate reasons. I trust that people will not abuse this privilege. Legitimate reasons do not include: getting coffee, taking a smoke break, getting food, or making a phone call.

COMPUTER/TECHNOLOGY USE: As an experiment on the effects of laptops on the classroom environment, we may have one or more "no laptop" weeks during the term. These weeks will be pre-announced. Otherwise, laptops may be used for taking notes or other legitimate classroom purposes. However, laptop use is a revocable privilege, so apply a rule of reason. Random internet conduct (IMing, social networking, blogging, etc.) distracts you, and even worse, distracts those around you. I walk around the classroom and may see what you're doing. Non-classroom technology use, such as texting/IMing on an iPhone, PDA or other device, is prohibited.

CONSEQUENCES OF IMPROPER CONDUCT: Students who are unprepared, repeatedly or substantially late, exit the classroom for improper reasons, violate the computer/technology usage policy, or engage in other improper activities may be marked as absent for that session regardless of their presence in the classroom and/or (particularly in cases of being unprepared) may be asked to leave the classroom.

FIRST WEEK'S ASSIGNMENTS CIVIL PROCEDURE II, SECTION 1 – SPRING 2010

All assignments must be read carefully and critically. As you will quickly learn, one read-through is never enough. On the rare occasions when something is assigned for background material, I will use the term "skim" in connection with the materials.

"Casebook" refers to the grey book by Marcus et al. "Statutes book" refers to the book by Baicker-McKee et al. "FRCP" refers to the Federal Rules of Civil Procedure. When Rules of the FRCP are assigned, read both the Rule and Baicker-McKee's commentary in the Statutes book unless I indicate otherwise. Bring your Casebook and Statutes book to every class, along with any other materials assigned for that day.

TUESDAY, JAN. 12 – REMEDIES

- Spring syllabus
- FRCP 65 & commentary (Statutes book), as well as changes to FRCP 65 found in the document "2009 changes to FRCP" (available on course website)
- *Two Men and a Truck Int'l, Inc. v. Clete, Inc.* (found in Syllabus document starting p. 5). Be prepared to discuss the nature of remedies sought in this case.
- Client advice project: The International Project on Human Attitudes ("IPHA"), operates a website at <http://www.iphattitudes.com>. IPHA is concerned about a copycat site being run at <http://www.iphattitudez.com>. IPHA owns all copyrights to its own website. Review both sites as well as the copyright remedy statutes that are found at 17 U.S.C. §§ 502, 503, 504, and 505. (You may locate the statutes either via a WestLaw "FIND" or via links available on the course website.) Come to class prepared to recommend remedies that IPHA might seek in a copyright infringement lawsuit.

THURSDAY, JAN. 14 – ALTERNATIVES TO TRIAL, PRETRIAL, and COSTS

- FRCP 16, 54(d), 68 & commentary, as well as changes to FRCP 54(d) and 68 found in the document "2009 changes to FRCP" (available on course website)
- CB 471-76 and 506-22
- Skim CB pp. 100-13, 491-506

TWO MEN AND A TRUCK INTERNATIONAL, INC., a Michigan corporation, Plaintiff,

v.

***CLETE, INC., a North Carolina corporation, d/b/a Truck and Two Guys Moving;
and Bruce Hensley, an individual, jointly and severally, Defendants.***

Civil No. 1:07CV394.

United States District Court, W.D. North Carolina, Asheville Division.

June 19, 2008*

James M. Harrington, The Harrington Practice PLLC, Charlotte, NC, for Plaintiff.

MEMORANDUM AND ORDER

THIS MATTER is before the Court on Plaintiff's motion for a preliminary injunction. For the reasons stated herein, the Court will grant the requested preliminary injunction, however, rulings on Plaintiff's motions for default judgment and permanent injunction and for attorney fees and costs will be deferred.

I. PROCEDURAL HISTORY

Plaintiff, who is in the moving business, filed a complaint on December 18, 2007, against Defendants Clete, Inc., d/b/a Truck and 2 Guys Moving, and Bruce Hensley, the owner of Clete. According to the complaint, Defendants, who are also in the moving business, are actively advertising and operating a company whose business name bears a confusing similarity to Plaintiff's nationally recognized trademark. The complaint alleges trademark infringement and unfair competition in violation of the federal Lanham Act and Chapter 75 of the North Carolina General Statutes, as well as unjust enrichment. Based on these causes of action, the complaint seeks an injunction that would prevent Defendants from advertising or operating their business as "Truck and 2 Guys Moving" or any other confusingly similar name. It also requests monetary damages, attorney's fees, and statutory interest.

On January 7, 2008, Plaintiff moved for a preliminary injunction, seeking to enjoin Defendants from using the designation "Truck and 2 Guys Moving." Plaintiff also requested that the Court require Defendants to assign their business telephone numbers to Plaintiff; provide accounts of sales and profits to Plaintiff; and destroy or surrender all labels, signs, vehicles, and other advertising bearing the confusingly similar business name. The Court denied this motion without prejudice, finding that the record, at that time, contained no indication that either the complaint or the motion for preliminary injunction had been successfully served on any of the Defendants.

Plaintiff then made a number of attempts to serve Defendants with the summons and complaint. Ex Parte Motion for Alternative Service, filed March 6, 2008, at 2. Defendants, however, consistently acted to evade service of process, using deception and – it

* Ed. note: the case has been edited, including omissions of some citations and footnotes.

appears – threatening tactics.¹ *Id.* After considerable difficulties, Plaintiff requested the Court to detail the United States Marshals Service to effect service of process. The Court did so, and the Marshals Service, after several attempts, finally managed to serve the summons and complaint. Order, filed March 17, 2008, at 1-2 (finding that Plaintiff had used its best efforts to effectuate service and that adequate cause existed to involve the Marshals Service); Process Receipt and Return, filed March 31, 2008, at 1, 3 (indicating that Defendant Hensley again attempted to evade service and that multiple endeavors and surveillance were required in order to successfully serve him).

Plaintiff then renewed its motion for preliminary injunction. Plaintiff served its renewed motion on Defendants by mailing it to their last known address Additionally, at Plaintiff's behest, the Clerk made an entry of default against Defendants on May 15, 2008. Plaintiff then requested a default judgment and a permanent injunction against Defendants.

II. DISCUSSION

A. Motion for Preliminary Injunction

Federal Rule of Civil Procedure 65 governs the entry of injunctive relief and provides in pertinent part that, “[e]very order granting an injunction ... must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail ... the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1). In analyzing the propriety of a preliminary injunction, the Fourth Circuit has observed:

[P]reliminary injunctions are extraordinary interlocutory remedies that are granted in limited circumstances and then only sparingly. The limited circumstances amount to the demonstration of a need to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court's ability in the end to render a meaningful judgment on the merits. If that need is not presented, then a preliminary injunction should not be considered. But if the need is demonstrated, then the entry of a preliminary injunction rests in the discretion of the district court, which is informed by balancing factors under an analysis conducted pursuant to the familiar four-part test described in *Blackwelder [Furniture Co. of Statesville v. Seilig Manuf. Co.]*, 550 F.2d 189, 194-96 (4th Cir.1977)]. Under this test

a court should consider (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the injunction is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.

Further, the plaintiff bears the burden of establishing that each of these factors supports granting the injunction.

¹ Plaintiff represented to the Court that it had hired a private investigation firm to serve Defendants with the complaint and summons. According to Plaintiff, after two unsuccessful attempts to serve Defendants, the firm refused to send its employees back again, believing Defendant Hensley to be dangerous.

In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 526 (4th Cir.2003) (internal citation and quotation marks omitted). “In applying this four-factor test, ‘[t]he irreparable harm to the plaintiff and the harm to the defendant are the two most important factors.’...Emphasis on the balance of these first two factors results in a sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa.” *Id.* (alteration in original) (quoting *Rum Creek Coals Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir.1991)).

In this case, therefore, the Court must first examine whether the “limited circumstances” described in *Microsoft* exist here: namely, whether Plaintiff has demonstrated “a need to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court’s ability in the end to render a meaningful judgment on the merits.” *Id.*

Plaintiff’s complaint includes an affidavit describing numerous specific instances in which customers have confused “Two Men and a Truck” and “Truck and 2 Guys Moving,” including several occasions in which unhappy customers of Defendants expressed dissatisfaction to or about Plaintiff, thinking the two were the same. Based on these occurrences, Plaintiff maintains that “Defendants’ actions are depriving and/or damaging Plaintiff’s market goodwill and confusing Plaintiff’s prospective customers.” Motion for Preliminary Injunction, *supra*, at 15, 19-20 (citing instances of actual confusion by customers and potential customers). The Court finds that there is at least a temporary need to prevent future injuries of this type while this litigation is resolved and that a preliminary injunction would aid in preserving the Court’s ability to render a judgment in the future. The first step of the *Microsoft* test is, therefore, satisfied.

Having determined that the “limited circumstances” are present in which a preliminary injunction may be issued in the Court’s discretion, the Court must now decide whether to exercise that discretion. The Court’s decision is informed by the four-prong analysis described in *Blackwelder*. The first *Blackwelder* factor is the likelihood of irreparable harm to Plaintiff absent the requested relief. Particularly in light of the documented instances of misplaced hostility by Defendants’ customers, the Court finds that enabling Defendants to continue with the alleged infringement is very likely to cause irreparable harm to Plaintiff in the form of lost business, decreased revenue, and loss of reputation and goodwill.

The second *Blackwelder* factor is the likelihood of harm to Defendants from a preliminary injunction. Defendants could indeed incur harm from even a temporary prohibition on the use of their “Truck and 2 Guys Moving” business name; however, the likely harm to Plaintiff from a lack of injunction is potentially greater, given that Defendant’s business is only about a year and a half old and Plaintiff has been in business since 1985.

The third factor is the likelihood that Plaintiff will succeed on the merits. Given Defendants’ history of total passivity and non-responsiveness in this lawsuit, coupled with the striking similarity between Plaintiff’s and Defendants’ business names, the Court finds that this factor weighs very heavily in Plaintiff’s favor.

Finally, as to the fourth factor-public interest considerations – as noted above,

Plaintiff has carefully documented instances of customers' mistaking Plaintiff for Defendants and vice versa. It appears likely that a preliminary injunction would at least temporarily eliminate the potential for such confusion, which would indeed be good for the public.

On the basis of these considerations, the Court concludes that entry of a preliminary injunction is proper in this case. Although Defendants will likely incur harm from such an injunction, the other three *Blackwelder* factors are heavily in Plaintiff's favor and outweigh any potential harm that Defendants may suffer.

B. Motion for Default Judgment and Permanent Injunction

After receiving an entry of default by the Clerk, Plaintiff has moved for entry of a default judgment and permanent injunction. In addition to the injunction, Plaintiff requests the following monetary relief: (1) treble damages "in consequence of [Defendants'] ... willful acts of service mark infringement and unfair competition"; (2) treble damages "in consequence of [Defendants'] ... willful acts, which have caused injury to Plaintiff's goodwill and reputation, and caused Plaintiff to suffer damages in lost revenue due to Plaintiff's franchisees' lost sales"; (3) statutory interest; and (4) attorneys' fees and expenses totaling \$22,210.18. Accompanying affidavits detail the attorneys' fees and expenses incurred thus far in the prosecution of this litigation. Plaintiff has not, however, attached any documentation pertaining to the two different types of treble damages it requests.

The undersigned recognizes that Defendants' past conduct and recalcitrance make it difficult for Plaintiff to ascertain the exact amount of damages. Therefore, as part of the accompanying preliminary injunction, the Defendants will be required to provide the Court and Plaintiff financial information regarding sales and profits while operating under the infringing name. . . . This action will, of necessity, defer any ruling on the Plaintiff's motion for default judgment and permanent injunction until such time as the Defendants comply with the Court's preliminary injunction or the deadline for doing so expires.

As to Plaintiff's request for attorneys' fees and expenses, Plaintiff has already named a sum certain and submitted the necessary supporting documentation. . . . However, because attorney fees and expenses will no doubt continue to be incurred until this litigation is concluded, the Court will also hold in abeyance Plaintiff's request for attorney fees and costs to allow Plaintiff to amend such request and for a single order to encompass the entire fee request.

III. ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's motion for a preliminary injunction is hereby GRANTED, and such is filed contemporaneously herewith.

IT IS FURTHER ORDERED that Plaintiff's motions for a default judgment, permanent injunction, and for attorney fees and costs are hereby held in abeyance pending further developments in this litigation.