

## SPRING '01 - 15.615 -- THE MANAGER'S LEGAL FUNCTION

### FINAL EXERCISE

**1. *Weighting and strategy:*** There are two questions. Answer both. They will be weighted equally. Each question has two parts. Answer each part. They will be weighted equally. Mark clearly where the answer to each question and part begins. Each particular point you should address appears in a sentence or clause ending with a “?” Don’t neglect to respond to any “?”

**2. *Sources:*** You may consult any sources. But the only sources you are expected to consult are the assigned readings and lectures for the course. Your answers will be evaluated in terms of those readings and lectures, especially the readings, so consulting other sources is not likely to do much good. The key materials for this exercise are those for class 21 (second class on bankruptcy) through class 22 (on e-commerce).

**3. *Format and submission of answers:*** You should submit your answers in paper copy at the start of Thursday’s class, unless some other arrangement has been made. Your exam should have a cover sheet which includes your name, “ESL” if English is your second language, and a precise word count for the entire document. Please start each of the two questions on a fresh sheet. **Your entire submission should not exceed 2,000 words.**

**4. *Some general advice:*** You aren't supposed to be a lawyer, and I don’t expect you to have definite answers to legal questions. You are supposed to be a manager with educated instincts about legal problems, including an understanding of broad legal doctrines, the ability to spot where legal issues will have an impact on a business arrangement and the individuals involved, and the ability to evaluate in a preliminary way how legal considerations shape risks and opportunities. Each exam question will ask you to address legal issues in a business context from the point of view of a manager. It will not be necessary to cite specific cases or statutes. Make sure that, in your answer, you show that you understand general legal principles and can apply them to specific facts. I don’t try to “trick” people in these exams. Look for the main issues suggested by the facts and questions and get to them. You are free to spend as much or as little time on this exam as you decide. However, I do not think you should have to spend more than five hours if you have been doing the reading during the semester, and you may be able to complete the exam in much less time than that.

### FACTUAL BACKGROUND TO BOTH QUESTIONS

You are the COO at TechMD Co. (“TMD”), a start-up company with a hot technology. Diagnostic imaging (of which the earliest technology was X-rays, but which now includes safer and more powerful tools such as CT scans) is one of the fastest growing fields in medicine. With TMD’s technology, a radiologist (the medical specialist who interprets diagnostic images) can use the internet to draw upon a data-bank of diagnostic images and the medical treatment records associated with those images. The software permits images to be matched, similar to the way a

police department matches fingerprints, although TMD's software is more complex in that the doctor can specify features upon which a match is based. For example, if a radiologist detects a brain tumor with an atypical location and shape, TMD's technology could call up dozens of the most closely-matched images in TMD's data bank. The radiologist could find out how these other cases had been diagnosed and treated, and the resulting medical outcomes.

TMD has gone through two rounds of financing, during which it has developed a prototype, and arranged preliminary evaluation by doctors and hospitals from which the reports have been positive.

Your boss at TMD is Ms. Top Dog, whose training is in computer science. Your background is management and strategic planning, and so Ms. Top Dog relies heavily on you in business matters. Until recently, TMD had a simple business model in mind: TMD would market its technology to doctors and hospitals. However, recent developments have prompted consideration of a more complex model. First, it is becoming clear that a very large data-bank will be needed, since doctors find this tool most useful for atypical scans. In fact, TMD will need to recruit a large proportion of the major medical teaching centers in the US. Second, it has become clear that these medical teaching centers are not willing to simply provide their records and use TMD's service. Rather, they want some proprietary stake in the venture. In fact, there already exists a company, called The Data Joint Venture Co ("DJV"), which is a for-profit company created and owned by a half-dozen leading medical teaching centers, which has been involved in simpler forms of image sharing. The medical teaching centers which set up DJV want to expand it to other centers and then have the expanded DJV form a strategic partnership with TMD. If TMD is not responsive, there is a good chance that DJV will try to develop a competing technology.

#### **QUESTION I:**

Ms. Top Dog is planning to sit down with TMD's attorneys and executive committee to review a series of law-sensitive planning issues. She wants to first try to get some appreciation of the issues in a preliminary discussion with you. She knows you aren't a lawyer, but you have a much better grasp of these issues than she does. She has asked you for a brief memo raising what you think might be the key law-sensitive issues with respect to the following:

- A. ***The structure of DJV and antitrust law:*** Ms. Top Dog would like DJV to be a relatively passive strategic partner, but DJV is likely to want an assertive role. She is wondering if the antitrust laws might work to TMD's advantage. Is it likely that the antitrust laws will put limits on a plan by DJV to bring within DJV a large proportion of major medical centers across the country? What would be the relevant antitrust analysis and law-sensitive issues? Is it likely that DJV may be pressed by the antitrust laws into a relatively passive role in its dealings with TMD? What would be the relevant antitrust analysis and law-sensitive issues?
- B. ***Protecting TMD's intellectual property:*** Having DJV as a close strategic partner is going to make protecting TMD's intellectual property more difficult. DJV is

sophisticated and a potential competitor. What kinds of intellectual property protection would best protect TMD? How should TMD plan for the fact that the relevant technology will continue to evolve? What are the main legal risks TMD faces with respect to compromising its IP position, especially with respect to DJV?

(over)

## QUESTION II:

It is a year later, and it has been a bad year. Some key personnel defected. There have been mutterings from potential customers that the image matching needs refinement for many diagnoses, which will set back development by at least 18 months. And there has been serious divisiveness at the Board level. As a result, money is running out and it is not going to be easy to raise more.

Ms. Top Dog is about to go into a meeting of the board's Executive Committee, and there are two issues as to which she would like some preliminary advice from you.

- A. ***The Pusher proposal:*** Ms. Top Dog was approached a week ago by Mr. Big Cheese, the CEO of PusherCo, a major manufacturer of pharmaceuticals and medical devices. Mr. Cheese said that Pusher was willing to pump funds into TMD. He casually mentioned loans or investments or a combination of both, and threw around big numbers. But he emphasized that one of Pusher's crucial requirements would be that Pusher would have to be confident that, if TMD did go into bankruptcy, Pusher would walk away with TMD's core technology. Can a deal with Pusher be structured which would give Pusher that result? How do different possible forms of cash infusion from Pusher affect this analysis?
- B. ***The problem board members:*** Ms. Top Dog is troubled by the recent attitude of Mr. Vulture, one of TMD's board members. Mr. Vulture was put on the board by one of the second-round VC firms. But for the past six months, it has often seemed that Mr. Vulture was more interested in getting his firm out of TMD than in TMD's success. Ms. Top Dog suspects this reflects some reordering of priorities within Mr. Vulture's VC firm. She expects Mr. Vulture to propose that the deal with Pusher be structured so that current investors have the option to be bought out, although only Mr. Vulture's firm would be interested. That will make the deal less attractive to Pusher. Up until now, Ms. Top Dog has put up with what she considers Mr. Vulture's lack of focus on TMD's interests, but she does not want a possible Pusher deal compromised. Does she have a firm legal basis on which to challenge Mr. Vulture if he acts as she anticipates? What are the relevant legal standards?

[end]