

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW
Antitrust, Bankruptcy, & Consumer Law
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FINAL EXAMINATION

Limited open-book. Three hours.

Write your exam number here: _____

All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.

Notes and Instructions

1. Assume that today's date is December 13, 2010.
2. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
3. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
4. During the exam: You may not consult with anyone – necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
5. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam.
6. Unless expressly stated otherwise, assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in class, as well as, where appropriate, the theory and history discussed in class. It is appropriate, if you wish, to note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
7. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
8. Organization counts.
9. Read all exam question subparts before answering any of them – that way you can be sure to put all of your material in the right place.
10. Feel free to use abbreviations, but only if the meaning is entirely clear.
11. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please use a separate bluebook for each subpart.
12. **Computers:** Please clearly label each subpart of your answer.
13. This exam is “limited open book.” The only materials to which you may refer during the exam, other than this exam booklet, scratch paper provided as part of the exam administration, and any special references specifically authorized by the Dean of Students office, are: (a) the authorized copy of the Antitrust, Bankruptcy, & Consumer Law Wypadki, which will be distributed to you in the exam session, and (b) a “reference sheet,” consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which anything may be written and/or printed, including on both sides, front and back, (c) sticky tabs labeled with subject headings to insert into the wypadki, if you so choose. You may not consult or access any other piece of paper, including, but not limited to, a copy of the Antitrust, Bankruptcy, & Consumer Law Wypadki that you have printed out yourself. No materials may be shared during the exam.
14. This exam will be graded anonymously. You may not waive anonymity. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam or afterward will, at a minimum, result in a lower grade, and may result in disciplinary action.
15. Good luck!

Hexed by Hexetron

On January 8, 2008, Carl Carsel returned from Afghanistan to his home in Arkissippi where he'd lived all his life. There wasn't much waiting for Carl in Arkissippi. He found out his high school sweetheart had started a new life without him. And there were no good job prospects in his small hometown. So on December 26, 2008, he moved to Texlahoma to start a new life.

In Texlahoma, employers told Carl that he lacked the kind of education and experience they were looking for. In Afghanistan, Carl had served as a CIA field operative. He was awarded three classified letters of commendation and an Intelligence Star. While that added up to a terrific résumé inside the government, the balance of his accomplishments were classified, and thus they did little to help him find private employment. The CIA has a program for helping transition ex-CIA employees to life on the outside, but Carl had additional problems that held him back. Since returning from overseas, Carl had been suffering from constant headaches, extreme sensitivity to light, severe joint pain, and a feeling of swelling in his throat that made it difficult to swallow. In addition to his other symptoms, or because of them, Carl suffered from a severe lack of sleep and serious depression.

Early in 2009, Carl's high school sweetheart, Melinda Minvalensa, got back in touch with Carl. She revealed to him that he was the father of a young boy. Carl briefly went back to Arkissippi to meet his son and to see if he could make things work with Melinda. But, sadly for Carl, Melinda wasn't interested. So Carl returned to Texlahoma and continued to try to build a life for himself despite his health problems. Over many months, he succeeded only in landing a series of temporary part-time jobs, giving him only a small and irregular income. Without health insurance, Carl was reluctant to go to the doctor. But he reached a point where he felt he could not go on if something could not be done to help him.

Carl saw Dr. Deborah Devane. She found Carl's symptoms extremely puzzling, but luckily for Carl, she took a strong interest in his case and relentlessly pursued an explanation. After a battery of tests produced nothing to suggest a diagnosis, Dr. Devane started working contacts from medical school to connect to physicians in the Washington, D.C. area. That's when she found out about Sarnalander Syndrome. It came from exposure to one or more chemicals encountered during U.S. operations overseas. The details of what had happened were classified, but the good news was that there was a network of doctors exchanging information, and a terrifically effective treatment had been found using a drug called Voralex. Once Carl started Voralex therapy, he felt like a new man. All of his symptoms vanished.

With Carl's new found health, in July 2010, he was able to land a one-time consulting job that paid him more in one month than Texlahoma's median single-adult income for a whole year. The money, unfortunately, didn't last. He used almost all of it to pay for an operation his sister needed. He was hopeful that similar consulting opportunities would come along soon, but with the foundering economy, Carl found nothing but odd jobs.



FIG. 1: The logo for corporate conglomerate Hexetron.

Things would have been financially hard for Carl regardless, but the expense of Voralex therapy was almost impossible to bear.

For many reasons, Voralex treatment is extraordinarily expensive. To begin with, Voralex (vlithiarid voralide) is patented and exclusively sold by Glorvan Group. Moreover, its administration is highly complicated. Voralex is a quirky drug that is rife with the potential for serious side effects. To be effective against Sarnalander Syndrome without risking the patient's life, Voralex must be administered every eight hours in precise dosages that are calculated based on up-to-the-hour blood chemistry data. Moreover, to neutralize the side effects, Voralex must be administered with Norala (noralastivan nalzanthaporale), a drug patented and exclusively manufactured by Pharcaphrax Pharmaceuticals. The proper dosage of Norala, in turn, depends on the Voralex dose and the blood chemistry data.

With such tricky administration, when Voralex was first used for the treatment of Sarnalander Syndrome, patients required hospitalization or treatment in a long-term nursing facility. But a company named Hexetron Home Health soon debuted a product called the Hexetron Infolyzer. The new device made it possible for Sarnalander patients to administer Voralex to themselves at home. To use a Hexetron Infolyzer, the user collects a drop of blood on a test strip (typically by lancing a fingertip), and then inserts the test strip into a slot on the Hexetron Infolyzer. Using a patented laser chromatography technique, the Hexetron Infolyzer performs the blood chemistry analysis and computes the correct dose of Voralex and Norala for the patient.

Even at home, Voralex therapy is not cheap. It costs about \$6,000 per month, with a third of that money going each to Glorvan, Pharcaphrax, and Hexetron. Glorvan's Voralex and Pharcaphrax's Norala are each about \$2,000 for a one-month supply. And the way Hexetron prices its Infolyzer and the test strips, the amount spent on testing also works out to about \$2,000 a month.

Hexetron's business model for the Infolyzer includes charging separately for the Infolyzer unit and for the testing strips. Patients have the choice of either purchasing or renting an Infolyzer. But since an Infolyzer costs \$95,000, about the only way anyone can afford using one is by renting it. Renting is a comparative bargain at \$175 a month. But even with the rental option, Hexetron-brand disposable test strips are about \$20 each, and each one can only be used once. A one-month supply is \$1,825.

Originally, when at-home therapy was first made possible, prices were even higher - adding up to over \$18,000 per month for all three components. Virtually no one could afford it. But under pressure from patients and advocates to bring down prices, the three companies exchanged marketing research with each other. That data showed that charging Sarnalander patients more than \$6,000 per month was likely to cause a large drop-off in the number of patients able to afford the therapy. Following this exchange, each company voluntarily dropped its prices to the current levels, causing patients to be charged only \$6,000 in the aggregate.

People have tried to think of ways to save money on the Sarnalander drug protocol. Some physicians and patient advocates initially suggested to financially strapped patients that they share Infolyzer equipment in order to save money. But that option does not make sense for most Sarnalander sufferers, since it severely restricts a person's ability to travel. Besides, the savings would be less than a hundred dollars a month, since most of the Infolyzer expense comes from the disposable test strips.

There is nothing remarkable about the strips. They aren't patented. They are just a way for inserting the blood droplet into the machine. But Hexetron Infolyzers are made

so that only Hexetron-brand strips will work in them. Constructed out of specially laminated plastic layers, only Hexetron-brand strips will bend in the proper way around the spindles and prongs inside the Infolyzer so as to connect with the laser chromatograph reader head. One might be able to break open the device and rip out the prongs and spindles, but doing so would violate the rental agreement.

A clever upstart manufacturer – Lopri Limited – was able to figure out how to make generic replacement strips that would fit in the Infolyzer. They would have been available for pennies apiece. But before Lopri's generic test strips hit the market, Hexetron purchased their manufacturing facility and turned it into a warehouse for Hexetron marketing materials. Then Hexetron hired all of Lopri's key personnel by paying them hefty salaries and huge signing bonuses.

Also, for a while, it looked like there was hope on the horizon for cutting out much of the cost imposed by Norala. Physicians discovered that another drug, foldazine fasnax, could be used in place of Norala to control side effects. Foldazine fasnax is much cheaper because it is available as an unpatented generic. But soon after this discovery, Hexetron Home Health and Pharcaphrax Pharmaceuticals reached a deal whereby the Hexetron Infolyzer would continue to provide only dosing information for Norala, and not for foldazine fasnax. In a statement, Hexetron Home Health said:

By limiting the Infolyzer's functionality to Norala dosing, we are able to keep costs of the Infolyzer down. Adding functionality for foldazine fasnax would just drive up costs. Moreover, Pharcaphrax will now be paying Hexetron Home Health a substantial monetary contribution, which will enable us to offset costs and keep consumer prices as low as possible. We are proud to make such a positive difference in so many people's lives with our highly innovative at-home solutions for health care.

Carl has only been able to continue Voralex therapy by charging it on his credit cards. At this point, Carl's credit card debt has become overwhelming. (Details on Carl's finances can be found in various tables, *infra*.)

In September 2010, Carl responded to an offer from Pacific Millennium Bank to get a new credit card that would consolidate his debt with balance transfers from his other cards. Pacific Millennium offered a terrific introductory rate of 1.9% for the first month, with a relatively reasonable 11.9% after that. But as it turned out, Pacific Millennium increased his interest rate to 29.99% after the first month. They also simultaneously lowered his credit limit by \$50,000. When Carl called to complain, the bank service professional was able to point Carl to a provision in the cardholder agreement that allowed the bank to increase the rate and to decrease the credit limit. When asked why Pacific Millennium had made the changes, the representative said it was because of a negative item that came up in Carl's credit report, a report that Pacific Millennium Bank had obtained from the Hexetron credit reporting agency.

The credit-card account changes were perilous for Carl. They caused his current balance to be just below the credit limit. The next week, when Carl used his card to buy prescriptions and test strips, Carl ended up going over his credit limit. This led to all kinds of problems. Carl ended up incurring an over-the-limit transaction fee of \$100, an account-over-balance fee of \$125, and an additional \$75 fee for having incurred more than one fee in a single billing cycle.

When Carl contacted the Hexetron credit bureau and asked for a free copy of his credit report, Hexetron refused, telling him he would have to go to Hexetron's website

and sign up for a credit monitoring service if he wanted to see his credit report and credit score. Carl went to the site and downloaded the credit monitoring software that was there, but he eventually decided against signing up for the service.

In addition to his credit card debt, Carl is also struggling with an auto loan. This summer he purchased a used car for \$6,000 from Zitrone Auto Sales, and he financed the purchase through the seller's finance arm, Zitrone Finance Corporation. Unfortunately, as soon as Carl drove the car off the lot, it stalled. Carl immediately tried to return it, but Zitrone wouldn't take it back. Zitrone also refused to honor a written warranty that came with the car. The salesperson told Carl that to enforce the warranty he'd have to take the dealership to court. Since Carl can't afford an attorney, he figures he is stuck. And now that he's over the limit on his credit card, he's worried about how he's going to pay for his next batch of medicine and testing supplies, much less the \$1,500 it would cost to get the car repaired. For now, the car continues to stall every few minutes, making it quite unsafe. It certainly cannot be operated on the freeway, and this in turn has limited Carl's ability to seek employment.

There is one bright spot for Carl. While he hasn't been promised anything, Carl is in line to get a good job in February 2011 at an aerospace-electronics contractor. It's a job that requires a security clearance, and Carl still has his. The only hitch is that the company, Astro-Cyber-Electro Corp. (d/b/a ACE Aerospace), won't be hiring if a pending merger with Hexetron Electronics goes through. The potential problem with the merger is that both ACE Aerospace and Hexetron Electronics are leading manufacturers of small optoelectrical components called *connection/disconnection coded decouplers*. CDCDs, as they are called, are used in various control systems, including drone aircraft avionics and electric-power distribution grids. CDCDs also are used in nuclear weapons as "permissive action links," which prevent unauthorized detonation. The devices are vital to making these systems remotely operable yet terrorist- and hacker-resistant.

A bit of technical background: CDCDs are a specific kind of optico-electronic dipole ("OED"). Unlike other OEDs, CDCDs are manufactured with specified parameters that match the profile encoded on a microchip logic circuit that is embedded in the polymer resin that holds the component together. The microcontroller logic circuit used in a CDCD is the same kind that scores of companies across the world manufacture for a use in a wide variety of applications. That all means that any company that makes OEDs should also be capable of churning out CDCDs with little retooling. In fact, a couple of the current CDCD manufacturers were OED manufacturers who each entered the CDCD market after landing just one sizable defense contract for custom-tailored CDCDs.

As of today, Carl is two months behind on his rent. The manager at his apartment complex has taken a liking to him, and she says she can hold out for maybe another month. But if Carl isn't paid up in full by February 1, 2011, he'll be evicted. Other creditors he has are less friendly. And Carl is afraid he won't be able to make next month's payment on his Pacific Millennium Bank credit card.

This morning - another day without work - Carl received a small set of hex wrenches in the mail. The package was from the Hexetron Tool-of-the-Month Club. Enclosed was a bill for \$25. When Carl called to complain, he was told that he had agreed to be a member of the Tool-of-the-Month club as a condition of downloading the Hexetron credit monitoring software. If he didn't want to pay for them, the telephone service professional told him, he would have to mail them back, at his expense, within 10 days.

Carl is ready to throw in the towel and declare bankruptcy. He doesn't know if that will save him. But it's the only option he seems to have left.

	CDCD market	OED market
ACE Aerospace	40%	10%
Hexetron Electronics	20%	10%
Vayatom	10%	10%
Blastodyne Safety	10%	10%
KJHK Electronics	10%	10%
Cyberdyne	5%	5%
Hrenka-Hübner	5%	5%
Globidion	-	5%
Fabrikam, Inc.	-	5%
Energon	-	5%
Initech	-	5%
Zorin Industries	-	5%
OsCorp Technologies	-	5%
Nakatomi Micro	-	5%
Aybabtu Tech Solutions	-	5%
Total	100%	100%

FIG. 2: Table of worldwide market shares for CDCDs and OEDs. (OED market figures include CDCD sales as well as sales of all other OEDs)

Selections from TEXLAHOMA PROPERTY CODE:

§ 40-13 – Exemptions.

The following property is exempt from garnishment, attachment, execution, or other seizure:

- (a) Home furnishings, including family heirlooms, wearing apparel, household effects.
- (b) Firearms.
- (c) Cash or cash equivalent up to \$3,000.

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Selections from ARKASSIPPI REVISED STATUTES, TITLE XX: DEBTS, JUDGMENTS, AND CIVIL OBLIGATIONS:

§ 77 – Exempted property.

The following property, when owned by any person, is exempt from levy or sale upon execution, writ of attachment or any process issuing out of any court:

- (1) Wearing apparel not exceeding \$1,000 in value. No jewelry shall qualify as wearing apparel unless it is the owner's own wedding ring.
- (2) Household effects, other than wearing apparel, and provisions for consumption not exceeding \$1,000 in value.
- (3) Real estate qualifying as a homestead not exceeding \$500,000 in value.

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FIG. 3: Selected portions of exemption statutes in Texlahoma and Arkassippi.

Month	Income
January 2010	\$1,900
February 2010	\$2,200
March 2010	\$3,100
April 2010	\$200
May 2010	\$700
June 2010	\$1,000
July 2010	\$65,000
August 2010	\$600
September 2010	\$50
October 2010	\$1,700
November 2010	\$300
December 2010	\$1,100
Total	\$77,850

FIG. 4: Carl Carsel's monthly income in 2010. (The December income is projected).

Assets	Value
Cash, checking, savings	\$2,500
Ordinary household items, personal effects, clothing	\$6,000
Diamond engagement ring that belonged to Carl's grandmother	\$25,000
Two antique firearms	\$15,000
Total	\$48,500

FIG. 5: Carl Carsel's assets.

Creditor	Explanation	Amount
Pacific Millennium Bank	Unsecured credit card debt, nearly all of it acquired for prescriptions, testing supplies, and testing equipment rental	\$60,000
Melinda Minvalensa	Accumulated unpaid child support to high-school girlfriend, for which she agreed to delayed payment	\$1,000
Zitrone Finance Corporation	Outstanding debt on a purchase-money secured auto loan for a used car currently worth \$500	\$5,000
Prestige Highlands Apartments	Overdue apartment rent for November and December 2010	\$400
Deborah Devane, M.D.	Medical bills	\$2,000
Ecumena Health	Laboratory services, medical imaging	\$20,000
Hexetron Tool-of-the-Month Club	Hex wrenches	\$50
Total		\$88,450

FIG. 6: Carl Carsel's debts.

QUESTION

Analyze the law as it applies to the above facts. Organize your response as follows, clearly labeling the subparts:

Subpart A: Discuss issues concerning antitrust law.

Here is a non-exhaustive list of questions to consider:

- Is there anything that can be done to bring down the price of Voralex therapy? Do you buy Hexetron Home Health's arguments?
- Do you think the FTC or DOJ will allow the ACE Aerospace merger with Hexetron Electronics to go through?

Subpart B: Discuss issues concerning bankruptcy law.

Here is a non-exhaustive list of questions to consider:

- Should Carl aim for a Chapter 7 or a Chapter 13?
- Can he qualify for a Chapter 7?
- Should he file now or wait a little bit? Why or why not?
- Which exemption law will apply? Is it potentially debatable? Which state exemption law would benefit Carl more?
- If Carl were to file for Chapter 7, how would his creditors fare?
- Can Carl keep his car?

Subpart C: Discuss issues concerning consumer law.

Here is a non-exhaustive list of questions to consider:

- What can be done with regard to Carl's car? His credit card? His credit report?
- Can Hexetron collect from Carl for the hex wrenches?

A few important things to keep in mind:

Make sure you do not limit your analysis to the specific questions listed above as suggestions.

Be sure to provide legal analysis for all aspects of the story, not just Carl's. Look at things from the creditors' perspectives. What can they get? What are they in for? And look at things from the government's perspective. What enforcement actions can government agencies bring?

The subpart structure is provided for organizational purposes only. They are not intended to be equally weighted. Please be sure to put information where it belongs.

Also:

Feel free to tear pages out of this booklet if it would be helpful.

Feel free to use these suggested abbreviations (along with any other reasonable ones):

CC	Carl Carsel	LL	Lopri Limited (maker of generic test strips)
MM	Melinda Minvalensa	FF	foldazine fasnax (unpatented substitute for NN)
DD	Dr. Deborah Devane	PMB	Pacific Millennium Bank
SS	Sarnalander Syndrome	HT	Hexetrax
VV	Voralex (vlithiarid voralide)	ZAS	Zitrone Auto Sales
GG	Glorvan Group (maker of VV)	ZFC	Zitrone Finance Corporation
NN	Norala (noralastivan nalanthaporale)	ACE	ACE Aerospace
PP	Pharcaphrax Pharmaceuticals (maker of NN)	HE	Hexetron Electronics
HI	Hexetron Infolyzer	HTC	Hexetron Tool-of-the-Month Club
HHH	Hexetron Home Health (maker of HI)		