

University of Illinois College of Law

Examination Cover Sheet

Business Associations

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Number of Pages: 5 (including this page)

Exam Instructions

1. **Accessing and submitting the exam**
 - a. The exam form will be e-mailed to you by my administrative assistant, at 10am CST on Tuesday, Dec. 7 (Reading Day).
 - b. Save your exam answer as a Word (.doc or .docx) file, with the file name being your 4-digit exam number.
 - c. Submit the exam by e-mailing it as an attachment to my administrative assistant Kelly Downs (kdwns@illinois.edu). **You must submit the exam before 10am CST on Monday, Dec. 13.**
2. **Permissible material:** This is an open book exam. Subject to Instruction 3 (confidentiality), you may use any written materials you want, whether in hardcopy or electronic format.
3. **Confidentiality:** Once you receive this exam form, you are not allowed to discuss the exam with anyone until after the last day of the exam period. Students enrolled in this course are not allowed to solicit or receive information about the exam if the source of the information (directly or indirectly) is a person who has seen the exam.
4. **Anonymity:** The exams are graded anonymously. Do not put in your exam answer anything that may identify you, except for your 4-digit exam number.
5. **Length limit:** The total length of your answer may not exceed 1,000 words. For every 10 words in excess of the length limit (rounded up), 1 point will be taken off the exam's raw score.
6. **Answering the exam:** Cite relevant case and statutory authority. Subject to the length limit, answer all relevant issues that arise from the fact pattern, even if your conclusion on one of the issues is dispositive to other issues.
7. **Assumptions:** Unless the exam question specifies otherwise, assume that -
 - a. The relevant jurisdiction applies the Restatement (Third) on Agency, Delaware corporate law, UPA, and U.S. securities law.
 - b. Each business entity's charter states that: the entity is a stock corporation, has limited liability and perpetual existence; the entity may conduct any lawful act or activity; director fiduciary duty is limited to & director/agent right to indemnification is extended to the maximum degree allowed under DGCL §102(b)(7); the board may amend the bylaws.
 - c. Each business entity's bylaws state that: the chairperson of the board is authorized to call a board meeting; and the board is authorized to call both annual & special shareholder meetings.
8. **"Fact" patterns are fiction:** The "facts" presented in this exam are not necessarily true in real life.

Janus Consulting, Inc. (“Janus”) is a Delaware corporation that provides businesses with computer-related services, such as setting up or modifying a client’s computer system with new hardware, custom-written software, etc. In Janus’ business, potential clients solicit bids from multiple consulting firms, and then select a winning bid. Naturally, the estimated price specified in each consulting firm’s bid is important in selecting the winner, and it is important for the reputation of a consulting firm that the actual price of a project does not end up very different from the estimate it made in its bid.

Janus’ CEO, founder and controlling shareholder is Jennifer. Jennifer loved the technical challenges that each consulting project brought but had very little patience for the process of estimating the cost of a project and the paperwork involved in submitting a bid. Jennifer’s first hires were “techies” like herself, who were good at the technical work of setting up computer systems and writing code but were not good at estimating costs. Janus quickly developed a reputation for having some of the best technical talent in the business, and for having a competitive culture that valued brilliance in programming. However, after a couple of jobs in which Janus’ estimates were off and had to be done at a loss, Jennifer decided to hire an expert in cost estimating.

Todd was the most promising applicant. He had a degree in computer science. Early in his career, he discovered that he liked working in a techie environment but hated doing techie work, so he shifted from programming (in which he was mediocre at best) to doing cost estimates for internal projects in a large tech company. He loved the challenge of getting the estimates right and became so obsessed with perfecting this art that he would spend his free time looking at other companies’ bids to learn from their mistakes. Todd was hired and committed to staying with Janus for at least two years.

With Todd on board, Janus developed a process for bidding on projects. It was not Todd’s job to look for projects or decide which projects to bid on. Rather, other Janus employees were assigned to scan potential clients’ bid solicitations, and they forwarded to Jennifer the projects they thought Janus should bid on. Jennifer would then decide whether Janus should bid on each project. She would inform Todd when there was a project Janus decided to bid on. Todd would do a cost estimate and write up Janus’ bid, then receive Jennifer’s approval before submitting the bid to the potential client.

This process worked well. Todd proved to be very accurate in his estimates and punctual in getting the bids ready in time. Jennifer was able to rid herself of the aspects of the business that she hated and spend more time finding ever more efficient solutions to clients’ tech problems. To improve its capabilities, Janus signed a joint venture agreement with Fortress Computer Solutions, Inc. (“Fortress”), a Delaware corporation that specialized in protecting computer networks against hacking. The relationship between the companies began when a few Janus employees tried to hack into Fortress’ network as a display of their computer prowess. As one star employee after another failed, it drew more Janus employees into the challenge. But no one succeeded, and Jennifer concluded “These people are brilliant! We need to work with them.”

The joint venture involved Janus licensing Fortress' cybersecurity software for a fixed fee and including it as an element in the projects Janus would bid on. Fortress did not trust the security of Janus' computer systems, so it insisted that any information involving Fortress' software will be stored on Fortress' own computer network. To allow Janus employees to access this information, Fortress configured a connection between a handful of Janus' computers (including Todd's computer) and Fortress' network, and gave Janus a password that would allow them access only from those computers. Jennifer gave Todd the password and told him he could access Fortress' network from his work computer to read files relevant to his work, but he was not allowed to modify or delete any files on Fortress' network.

Meanwhile, Todd was feeling unappreciated. The culture at Janus valued technical prowess, not accounting. Todd barely understood the "war stories" the other employees shared about technical challenges they solved, and conversely, everyone's eyes would glaze over when Todd talked about the cost estimation problems that kept him busy. To Jennifer and her top employees, cost estimates and bid preparations were a necessary but boring aspect of the business, like janitorial services. They wanted the job done well, but they didn't want to hear about it.

Feeling alienated at work, Todd shifted to spending more time on personal matters, such as helping out at his kids' school. At one of the school events in which he volunteered, he met Michelle, another parent-volunteer. He recognized Michelle's name from his obsessive study of other firms' bids and cost estimates. Michelle was the founder and owner of Marvel Consulting Inc. ("Marvel") a consulting firm that sometimes bid on the same projects as Janus.

Todd, who was not very diplomatic, told Michelle that he'd studied Marvel's bids, and that they did a poor job in their cost estimations. Michelle was surprised that a stranger would study her company's bids, but admitted that she did the cost estimates herself, and was not very good at it. Todd told her of his work at Janus. Michelle immediately offered to hire him to do the same job at Marvel, but Todd said that he committed to staying at Janus for two years.

In the next few months, Todd and Michelle met several times at school events. Michelle would share with Todd her frustration with getting estimates right. Unlike at Janus, she respected Todd's expertise. Todd told her that while he could not leave Janus until the two-year commitment lapsed, he would be willing to do the bid preparation and submission for Marvel "on the side" while continuing to work for Janus. He made it clear that he would not divulge to Michelle any trade secrets or other information that he knew by virtue of his position at Janus, and Michelle replied that she is interested in hiring him solely for his expertise in cost estimation and bid preparation, not because of his position at Janus or information that he had by virtue of that position. They agreed that he would get a fixed fee of \$2,500 for each bid submitted on behalf of Marvel, and an additional bonus of \$20,000 for each project that was awarded to Marvel, if the project was completed within a 10% range of Todd's cost estimate.

From that point on, Todd would prepare and submit bids for both Janus and Marvel. Todd felt ethically obligated not to exploit Janus. Therefore, only when he was done with his work for Janus would he turn to working on Marvel's bids. On some days he worked on Marvel's bids at his Janus office using his work computer there, while on other days he worked on Marvel's bids from his home. Michelle was not aware that Todd sometimes used Janus' office and computer to work on Marvel's bids. She assumed (but didn't confirm) that he worked on all of Marvel's bids from home.

Todd didn't tell anyone at Janus that he was also working for Marvel. And while Todd frequently talked to Michelle to get her instructions on which projects she wanted him to prepare bids for, he would never tell Michelle any information about Janus, such as whether Janus was also bidding on that project.

In the following months, Todd submitted 12 bids for Marvel. Three of these bids were selected by the clients, and in all three, Todd's cost estimate was within 10% of the actual costs, and he earned bonuses for these. Todd worked on those three bids from home, and did not use Janus' office, work time or work computer for them. In total, Marvel paid Todd \$30,000 in fixed fees (\$2,500 for each of the 12 bids he submitted) and \$60,000 in bonuses (\$20,000 for each of the three projects it won and completed within 10% of the estimate).

As it happened, Jennifer was interested in some of the same projects that Michelle was, so Todd submitted bids from Janus to eight of the projects that he submitted bids from Marvel, and Janus won four of these projects. Jennifer did not ask Todd to bid on the three projects that Marvel won (so Janus did not bid on these three projects).

One day, Jennifer reviewed a bid that Todd had prepared for submission. The technical plans for the bid were created by a team led by Michael, who was a team leader at Janus. Jennifer thought the plans could be improved in a way that would cut costs and improve the bid, and wanted to consult with Todd about this. She texted Todd: "I need to talk to you urgently about your work for Michael. I'm travelling right now, but we need to talk first thing on Monday." However, Jennifer made a typo, so that her text referred to "your work for Michelle" (rather than Michael).

When Todd received this text, he thought Jennifer discovered that he was working for Michelle. In a panic, he purchased a "wiping program", which is software that erases computer files in a way that makes them completely unrecoverable. He installed the wiping program on his work computer and instructed the program to erase files that matched certain keywords. His goal was to erase from his work computer any files relating to his work for Marvel.

At one point, the program stopped and asked Todd for his Fortress password, with a prompt warning him that he should not proceed unless he is authorized to use Fortress' network. Todd was puzzled about this prompt but figured that Janus must have installed Fortress' cybersecurity software on his work computer. Luckily, he was given the password, which he entered, and the wiping software continued its work. After a few

more minutes, the software finished its work. Todd checked his computer and found no sign of any files related to his work for Marvel. He then e-mailed Jennifer to tender his resignation.

Unknown to Todd, the wiping software had also wiped hundreds of files from Fortress' network, containing valuable (and now irrecoverable) information worth \$2 million. Todd inadvertently succeeded in the challenge that had stumped all of Janus' elite programmers – hacking into Fortress' network.

Fortress was not pleased. It sued Janus for the \$2 million it lost due to the files that were erased. Fortress did not claim that Janus was negligent in selecting, retaining or supervising Todd (so do not analyze such a claim), but it did have conclusive evidence that Todd was liable to Fortress in torts for erasing their files.

Upon receiving Todd's resignation, and then Fortress' suit, Jennifer investigated and found out that Todd worked for Marvel. Janus then sued Todd for breach of fiduciary duty in preparing and submitting bids for Marvel, and sued Marvel for aiding & abetting Todd's breach. Janus has conclusive evidence that:

- The value of Janus' office space, work time and computer time that was used by Todd in his work on Marvel's bids is \$5,000;
- Marvel earned \$150,000 in profits from the three projects that it was awarded from bids submitted by Todd.

Discuss Janus' suits against Todd and Marvel (including the amounts Janus could recover from the defendants), and Fortress' suit against Janus.

Model answer for the Fall 2021 BA exam¹

1. Janus v. Todd:

- (a) Duty: Todd owes Janus a FD as an agent because he acts on Janus' behalf (e.g., submitting Janus' bids to potential clients), and is subject to Janus' control (e.g., Jennifer's instructions on which projects to bid & at what profit margins) (R3A §1.01).²
- (b) SoR: Agency SoR applies because Todd is Janus' agent (see 1a).
- (c) Application: Todd wasn't negligent because he prioritized his work for Janus and thus exerted reasonable care. Under Agency SoR, agent self-dealing always breaches FD. Todd self-dealt in two ways: receiving an unauthorized benefit derived from fiduciary position and undertaking work for Marvel that made him conflicted as Janus' agent.³
1. Benefit
 - a. Todd's use of Janus' office space, work time and computer to work for Marvel is an unauthorized benefit that he had access to solely by his fiduciary position, in violation of R3A §8.05(1). Todd is liable to Janus for \$5,000 of unauthorized benefit.
 - b. Todd's receipt of \$90,000 compensation from Marvel is a benefit and was unauthorized by Janus, but wasn't derived from his fiduciary position, since Michelle said she's "interested in hiring him solely for his expertise... not because of his position at Janus".⁴

¹ The exam fact pattern is loosely based on: *Triton Const. Co., Inc. v. Eastern Shore Elec. Services, Inc.*, (Del. Ch. 2009), 2009 WL 1387115.

² It is wrong to demonstrate that Todd is an agent by saying that "he is an employee of Janus, and an employee is a sub-type of agent". This relies on the colloquial use of the term "employee" for anyone who works for a company, rather than the much narrower legal definition of employee that we use in *Respondeat Superior* (which is indeed a sub-type of employee). Many people whom we would call, colloquially, employees, are not employees or even agents in the legal sense. Therefore, when establishing that someone is an agent, you must refer to facts from the fact pattern that establish that this person is acting on behalf of the beneficiary, and subject to the beneficiary's control. The proper evidence for working on behalf of someone is an aspect of their work in which they represent the beneficiary to third parties. Therefore, in Todd's case, it is his submission of bids to potential clients, on behalf of Janus, that is the strongest evidence that he acts on Janus' behalf (this is better evidence than aspects of Todd's work that do not represent Janus before third parties, such as drafting the bid forms or estimating costs for internal use).

³ One of the most common mistakes on the exam was combining different actions of Todd and analyzing them together, rather than analyzing whether each behavior amounted to self-dealing. If certain facts cause a particular behavior of Todd to be self-dealing, this does not mean that everything Todd does is tainted with self-dealing. For example, if the reason for self-dealing is that Janus and Marvel are competing (both are submitting bids for the same project), then this does not taint with self-dealing the payments Todd gets for the non-conflicted projects (so Janus cannot disgorge the latter). A similar mistake was made in Marvel's aiding & abetting analysis, in which some students, after finding that Marvel knowingly participated in Todd's bidding on conflicted projects, imputed this to find Marvel liable for Todd's use of Janus' resources (which Marvel did not know about), or for its profits from the bids it won (which were not conflicted bids).

⁴ Some students mistakenly argued that the fact that Todd gained expertise in cost estimation and bidding from working for Janus, and that that expertise was the reason he was hired by Marvel, made his payments derived from his position at Janus. This is incorrect because expertise gained while working (as opposed to learning proprietary secrets of the employer) belongs to the employee.

2. Conflict

- a. Todd was conflicted on 8 projects in which he submitted bids for both Janus and Marvel. Janus' interest was to win the conflicted projects, while Todd had a personal interest (even if he didn't act on that interest) that Marvel's bids would win to get a bonus.⁵ The conflict was connected to his fiduciary position of preparing and submitting Janus' bids, violating R3A§8.04, which prohibits acting on behalf of the principal's competitors.⁶ Janus didn't suffer damages from the conflict because Marvel didn't win any of the eight conflicted projects, but Todd must disgorge \$20,000 received from Marvel for preparing the 8 bids, so that he doesn't profit from actions that breached FD.
 - b. Todd wasn't conflicted in submitting the four Marvel bids for which Janus didn't bid (including the three projects Marvel won), since his personal interest in Marvel winning (and his FD as agent to Marvel) didn't conflict with Janus' interests on projects for which Janus did not bid. Therefore, Todd doesn't need to disgorge the \$10,000 Marvel paid him for submitting those four bids, nor the \$60,000 bonus Marvel paid for the three bids that it won.
- ## 3. Usurping corporate opportunities
- Todd didn't usurp a corporate opportunity in the 8 conflicted projects, because Janus pursued them (bid on them). He also didn't usurp the 4 non-conflicted projects because, under the *Guth* test, Janus did not have an interest or expectation in these projects: "It was not Todd's job to look for projects", so he didn't have a duty to tell Jennifer about a project that he learned of from Michelle. Jennifer chose not to bid on these projects, suggesting no Janus interest and possibly that the projects weren't in Janus' line of work. Todd didn't become conflicted by allowing Marvel to embrace the opportunities, so the only *Guth* factor that suggests breach is financial ability.

2. Janus v. Marvel:

- (a) Duty: Todd owed FD as an agent (see 1a).
- (b) Breach: Todd breached his FD by receiving an unauthorized benefit (see 1c2) and by acting with CoI (see 1c3).
- (c) Damages: The value of the unauthorized benefit is \$5,000. No damages were caused to Janus from the CoI because Marvel didn't win any of the eight conflicted projects.⁷
- (d) Knowing participation (Benefit): Marvel didn't know that Todd was working from Janus' office, so no knowing participation in the unauthorized benefit breach.

⁵ In demonstrating a conflict, it is not enough to find that Todd had an interest in earning money (or esteem) from Marvel. This does not conflict with Janus' interests. It is only when Todd earns money from outcomes that are averse to Janus (e.g., when Marvel bids against Janus on a project) that a conflict exists.

⁶ R3A §8.03, prohibiting A from acting as or on behalf of an adverse party, is not relevant here, because Marvel is not an adverse party to Janus. An adverse party would be the counterparty to a contract (e.g., a potential client negotiating a project with Janus). Here, Janus and Marvel are not interacting with each other. Rather, in projects on which both are bidding, they are competitors, and R3A §8.04 applies.

⁷ The \$2M damages to Fortress from Todd's inadvertent hacking should not be analyzed in either the Janus vs. Todd or the Janus vs. Marvel suits, because the fact pattern states that the suit against Todd was for "breach of fiduciary duty in preparing and submitting bids for Marvel" (not for his actions on Fortress' network), and the suit against Marvel was for "aiding & abetting Todd's breach".

- (e) **Knowing participation (Conflict):** Marvel also didn't know that the bids it asked Todd to submit were competing with Janus' bids, since Todd didn't tell Michelle which bids Janus was submitting. However, Marvel could expect that there would be some overlap given the history of bidding on the same projects (if this wasn't evident initially, it would be after seeing in the first few bids that Janus also participated). Marvel knew that by offering Todd a bonus if Marvel won (and if Todd's estimate was good), it caused Todd to be conflicted when bidding on the same project on behalf of Janus. So probably Marvel had knowing participation for the CoI. However, Janus didn't suffer damages from the CoI, so no liability.

3. Fortress v. Janus:

- (a) **Actual authority:** Jennifer manifested to Todd that he wasn't allowed to delete files on Fortress' network, so he couldn't reasonably believe he had actual authority to do so.
- (b) **Apparent authority:** Todd entered Fortress' network using apparent authority – specifically, access to the password and the specially connected computer were manifestations that Janus made to Fortress to signal which persons can access Fortress' network on Janus' behalf. Therefore, Janus is liable to Fortress for the \$2,000,000 damage Todd caused.
- (c) **Respondeat Superior**
1. Todd is probably Janus' employee. He is Janus' agent (see 1a). He has a specialty (cost estimation) that other Janus employees don't have, so Janus might not control the manner and means of his cost estimation. But Jennifer does review his bids before submission, and she gave him specific instructions on his accessing of Fortress' network, which suggest control over how he does those aspects of his job.
 2. Todd's tort is outside SoE. Under the control test, he wasn't assigned to delete files on Fortress' network, but he was subject to Janus' control over this activity (specifically, it was prohibited). However, under the purpose test, he didn't access the network with a purpose of serving the employer. He accessed the network accidentally (so, no purpose at all), and his general purpose for deleting files was to remove evidence of his FD breach (personal motive). The purpose test governs when it conflicts with the control test, so Todd's tort is outside SoE.