

Fall 1990 Final Essay (Civil Procedure A)

Fall 1990
Mr. Brill

1. Questions 1-4 are each worth 15 points. Answer three of them. - 45 points
Multiple choice - 18 points
Quizzes - 7 points
Dobbins v. Skyways - 10 points
80 points for semester

2. This examination is designed for three hours. However, you may have three and one-half hours to answer it. The additional time is to permit better organization, more careful thinking and neater handwriting. (No credit is given for illegible answers.) The questions will be graded on the quality of analysis, thought and conclusions, not on the number of words.

3. Read the questions carefully. Particularly note whether you are to be a judge, advocate, adviser or dispassionate scholar.

4. The multiple choice questions are to be answered on the scantron. Failure to `return` the multiple choice questions will result in failure in the course.

5. You may use the Supplement and the Arkansas supplement (with any comments written in them) to complete this examination.

6. You must take this examination in Room 328, the official typing room, or the official smoking room, but in no other location.

7. In answering the essay questions:

- a) You may answer the questions in any order you wish.
- b) Begin the answer to each question on a new page of the bluebook.
- c) Write on each line, but only on one side of the page. (The other page may be used for corrections and belated additions to your answer.)
- d) On the front of each bluebook, put the number of each question answered within.

8. Turn your bluebooks, multiple choice questions, scantrons, pencils and qualification sheet in to Room 328 by 5:00 p.m.

9. Your grade on the essay questions is based upon the context of your answers and the manner in which you communicate your knowledge. Grades may be lowered for essays that so violate fundamental rules of grammar and style that the reader's ability to comprehend the content is impaired.

10. You may keep the essay questions.

The defendant, Carnival Cruise Lines, is a Panamanian corporation with its principal place of business in Miami, Florida. Carnival is not registered to do business in the State of Arkansas. It owns no property in Arkansas, maintains no office or bank account in Arkansas and pays no business taxes in Arkansas. It has never operated ships which have called at Arkansas ports. It has no exclusive agent in Arkansas. Carnival does, however, advertise its cruises in local Arkansas newspapers. It also provides brochures to travel agents in Arkansas, which in turn are distributed to potential customers. Carnival also periodically holds seminars for travel agents in the State of Arkansas to inform them about, and encourage them to sell, Carnival cruises. Carnival pays travel agencies a 10% commission on proceeds from tickets sold for Carnival cruises.

The plaintiffs, Mr. and Mrs. Shute, who are Arkansas residents, purchased tickets through Smokey Point Travel in Pine Bluff, Arkansas for a seven day cruise on a Carnival Cruise Lines ship, the TROPICALE. The appellants were to embark in Los Angeles, California, sailing from there to Puerto Vallarta, Mexico. The

tickets were purchased through the travel agent, who forwarded payment to Carnival in Miami. The tickets were issued in Florida, then forwarded to Smokey Point Travel, which delivered them to the Shutes.

The plaintiff's cause of action arises from injuries suffered by Mrs. Shute when she slipped on a deck mat while on a guided tour of the ship's galley. This incident occurred in international waters off the coast of Mexico. The Shutes allege that the fall was due to the negligence of Carnival. They have sued for \$75,000 in federal court for the Eastern District of Arkansas. The attorney for the Shutes made service on Carnival by sending the summons and complaint to its Miami office by registered mail.

You represent Carnival Cruise Lines. You have filed a Rule 12(b)(2) motion. You are standing in front of the federal judge. Make the best argument you can. Be sure to anticipate and refute the obvious arguments of the plaintiffs.

2. Peter Potter, a citizen of Florida, filed an action in United States District Court for the District of Georgia against Debbie Davis, a citizen of Georgia. In his action, Potter sought \$75,000 in damages due to an alleged breach of contract by Davis. Davis answered the complaint, but then, one week before trial, filed a motion under Rule 12(b)(1) seeking dismissal of the action because the contract that was allegedly breached contained a liquidated damages clause providing that "in the event of a breach of contract by either party to this contract, damages shall be limited to \$5000.¹¹ After taking a day of testimony and considering this motion, the federal court determined that, although by its terms this clause appeared to limit damages, the parties did not intend the clause to apply in a case such as the present. The court therefore denied Davis' motion and, after a short trial, ultimately entered judgment for Potter for \$75,000. Potter then filed a motion (labeled A) under Rule 11 of the Federal Rules of Civil Procedure, seeking sanctions against Davis due to Davis' unsuccessful jurisdictional motion. Potter argued that he is entitled to Rule 11 sanctions because "not only was Davis' motion untimely, but the court determined that jurisdiction was proper in this federal court." Potter also filed a motion (labeled B) for attorneys' fees as prevailing party in the action. This attorneys' fees motion was based upon decisions of the Georgia Court of Appeals (Georgia's intermediate appellate court), holding that in such contract cases a prevailing party is entitled to attorneys' fees.

In response to (A), Davis pointed out that Georgia considered, but declined to adopt, a state counterpart to Federal Rule 11 out of concern that such a state rule would chill attorneys in the assertion of their client's positions and also would create the need for state courts to devote limited judicial time to Rule 11 disputes. On the other point (B), Davis conceded that the Georgia Court of Appeals has upheld a common law right to attorneys' fees in cases such as this, but she noted that there is no Georgia statute providing for such fees and that a mere common law rule such as this should not control in the federal courts.

You are the federal trial judge. Decide each of the following:

(A) Whether the federal court should apply Rule 11 sanctions in this case? (10 points)

(B) Whether the federal district court should apply the Georgia common law rule to award attorneys' fees to Potter? (5 points)

3. Billy Bob Barnes, a citizen of Indiana, saw an advertisement in a supplement (which was circulated in Indiana, Ohio and Michigan) in a Sunday newspaper, indicating that for 5 coupons from a pizza box and \$5, he could obtain a videotape of the movie "Hoosiers" or "Highlights of the Careers of Magic Johnson and Larry Bird." He immediately went to the supermarket, bought 5 pizzas and consumed them while watching NBA and NCAA basketball games on television. The following day he mailed in the coupons and his check for \$5.00 to the home office of Hoosier Pizza Inc. (HPI) in Indianapolis, Indiana, selecting (after great agony) "Hoosiers."¹¹ Two weeks later, he received a package from HPI. Opening it with great anticipation, he was dismayed to find a note: "Thank you for your interest. Unfortunately, our supply of videotapes was rapidly exhausted. We are instead sending you a copy of "Tall Story", a humorous and romantic look at college basketball starring Jane Fonda and Tony Perkins. We appreciate your interest and your support of Hoosier Pizza." Billy Bob was not amused or satisfied. He has come to your law office in Indiana for advice. Your senior partner is convinced that he can establish a case for common law fraud and statutory consumer fraud under the law of Indiana. Your Senior partner wants your opinion on whether a class action is appropriate and possible. He has asked for a memo that is objective and an overview of issues, problems and options. He reminds you that Indiana Rule 23 is identical to Federal Rule 23.

4. Barbara Mathias owns an advertising agency in Memphis, Tennessee. From September through April,

Richard Ellman was a salaried employee under a written employment contract. Mathias (a citizen of Tennessee) fired Ellman (a citizen of Arkansas) in April, 1990. He has filed an action against her in Federal District Court in Memphis, seeking relief in 4 counts: @1) damages of \$40,000 for slanderous comments made in March;12)@damages of \$700 for personal injuries suffered in the course of employment;@3) damages of \$15,000 for breach of the employment agreement; 4) an injunction to bar Mathias from notifying other advertising agencies of his dismissal. You are the federal trial judge. Rule on each of the following motions with a "Granted" or "Denied", followed by a sentence or two of explanation. Each sub-part stands alone.

- (A) Defendant moves to dismiss the entire lawsuit for lack of subject-matter jurisdiction. (1 point)
- (B) Defendant moves to dismiss Count I because it does not arise out of the employment relationship. (1 point)
- (C) Defendant moves to dismiss Count IV because it seeks equitable relief which the federal court has no power to grant. (1 point)
- (D) Defendant answers the lawsuit. A month later, she seeks to amend her answer to allege that the plaintiff had executed a written release, absolving her of all liability.
- (E) Defendant Mathias files a counterclaim against the plaintiff for \$5000 that was loaned to the plaintiff for the purchase of a personal boat, but has not been repaid. Plaintiff moves to dismiss the counterclaim. (2 points)
- f) Assume that a note for \$1 in connection with the advertising agency was signed by Richard Ellman and his brother Jerry Ellman. Mathias files a counterclaim in federal court. Mathias also files a third party action against Jerry in federal court. Jerry moves to dismiss. (2 Points)
- (g) Mary Manager had responsibility for operating the agency. Mathias impleads Manager. She then files a complaint against Ellman for \$11,000 for injuries based on the theory that Ellman failed to control his vicious German Shepherd. Plaintiff Ellman moves to dismiss. (2 points)

The employment agreement was drafted by Attorney will Volunteer of Memphis. Defendant Barbara Mathias contends that he is an indispensable party and should be added as a party defendant for Count III. (2 points)

Because all advertising agencies in the Memphis area have the same language in their employment agreement, the Memphis Association of Advertisers moves to intervene as of right in the lawsuit as to Count III. (2 points)