

Civil Procedure Final Exam
Professor Sternlight
May 4, 2006
1:00 P.M. - 4:00 P.M.

Exam # _____

INSTRUCTIONS

This is an open book exam. You may consult any notes, commercial or personal outlines, hornbooks, etc. However, you may not share your materials with any other person during the exam nor access substantive information on a computer or from a live person.

Please check this exam for completeness at this time. It should be 8 pages long. Please write your Exam number on this exam and make sure the Exam number also appears on any blue book or printed exam answer you turn in. Please also number the blue books if you use more than one.

Read (don't skim) each of the questions carefully before drafting your answers. Also, be sure to provide the reasoning underlying your answers. That is, tell me why you came to the conclusions you did. If you consider but ultimately reject certain options or arguments, please explain why. In general you should not add or make up any facts. However, if you find a particular question is ambiguous, or if you believe that I have omitted essential information then explain any such ambiguity or problem and supply any additional information or assumptions you believe to be necessary to permit you to answer the question.

Put all of your answers in a blue book or in your printed exam answer. I will not give credit for information written on the exam itself. Also, I ask that you write only on one side of the page. You may use abbreviations so long as they are obvious or you define them. I will look at outlines if you ask me to. However, it is difficult to thoroughly set forth reasoning in an outline.

Please use only your Exam number to identify yourself. Do not attempt to identify yourself by, for example, referring to personal characteristics or to remarks made in class. Also, please refrain from including any personal notes in your exam.

You have three hours to complete the exam. I have indicated the point value for each question and you should allocate your time accordingly. Given my scoring system you will be sharply penalized for failing to answer any of the questions.

Question 1 True false questions (30 points total; 3 points each)

Named Plaintiffs Andrews, Beta and Chang, three long-time users of Sparkle contact lens solution, brought a putative class action against Sparkle Corp. (manufacturer of Sparkle) in state court in Nevada. Andrews and Beta are both citizens of Nevada, and Chang is a citizen of California. Sparkle Corp. is incorporated in Delaware and has its principal place of business in California. Plaintiffs' suit alleged that Sparkle Corp. violated state law negligence principles by selling a contact lens solution that was defective, in that it was easily subject to contamination that could cause serious injury to users' eyes. Scientific experts do not agree on how long it takes for contaminated solution to cause eye injuries, and some say that injuries may not become evident for as long as a year following the use of contaminated solution.

Named Plaintiffs suffered a range of alleged injuries. Plaintiff Andrews, a 33 year-old attorney, alleges that she used contaminated Sparkle solution in 2004, and that the contaminated solution caused her to go permanently blind in both eyes. She asserts that her damages exceed a million dollars. Plaintiff Beta, a 47 year-old secretary, alleges that he used contaminated solution in 2005, and that the contaminated solution caused him great pain and suffering for a week. He suffered no permanent injury, to his knowledge, but claims damages based on his pain and suffering for a week and based on his fear that he may still suffer further injuries. Plaintiff Chang claims that she has regularly used Sparkle since 2002, and that while to date she is not aware that any of the lens solution became contaminated, she fears that she may unwittingly have used contaminated solution. Chang, a 63 year-old retiree, asserts that she lives in constant fear that she may begin to exhibit symptoms as a result of the use of contaminated solution. She presents claims for pain and suffering.

Plaintiffs seek to represent a class of all persons in the United States who used Sparkle at least one time during the period January 1, 2002 through December 31, 2005. They estimate that there are 5 million members of this class. In addition to the damages, discussed above, plaintiffs also seek punitive damages and an injunction preventing Sparkle Corp. from continuing to sell Sparkle.

With respect to each of the following propositions, as to the scenario above, state whether the proposition is true or false. Then, explain in one or two sentences why you believe the proposition is either true or false. You will receive no credit at all unless you provide an explanation for why the statement is true or false. You will also receive no credit unless you come to a conclusion as to whether the statement is true or false. Finally, I will not read any material in excess of two sentences. You will also do yourself a disservice by writing extremely long "sentences" because these questions are each only worth three points each.

A. Sparkle Corp. removes the putative class action to the Federal District Court for the District of Nevada. Named Plaintiffs file a motion to remand. Assuming that the Class Action Fairness Act (discussed in B below) does not apply, the federal court must grant plaintiffs' motion.

B. The 2005 Class Action Fairness Act ("CAFA") purports to allow federal courts to hear any class action in which any plaintiff is diverse from any defendant, and the amount in controversy in the aggregate exceeds \$5 million and involves 100 or more class members. For purposes of this sub-part, assume that CAFA applies and that Sparkle has cited CAFA in opposing plaintiffs' petition for remand. Plaintiffs concede that their claims exceed \$ 5 million. However, Plaintiffs have argued that CAFA is unconstitutional under Article III, and that the claims are non-removable. The court should reject plaintiffs' argument and refuse to remand the matter to state court.

C. Assume for purposes of this and all subsequent sub-parts that Plaintiffs' claim has been removed to the Federal District Court for the District of Nevada. Defendant Sparkle Corp. would prefer to defend itself in federal court in California, rather than in Nevada. Sparkle's best course of action to have the matter transferred is to file a motion to dismiss on grounds of forum non conveniens.

D. Assume for purposes of this and all subsequent sub-parts that the case remains in federal court in Nevada. Plaintiffs are now preparing a motion for class certification. They are best off seeking certification under Fed. R. Civ. P. 23(b)(3).

E. Assume that Nevada has a statute prohibiting the use of class actions for personal injury claims. Sparkle argues that this statute should preclude the federal court from certifying plaintiffs' class action. Plaintiffs argue that the statute is irrelevant. Plaintiffs have the better argument on this point.

F. Assume that after certifying the class action the trial court orders the class action to mediation, before a local attorney. The judge informs the mediator that she thinks plaintiffs claims are weak, and that the case really ought to settle. Taking her responsibilities as a mediator seriously, the local attorney orders the Plaintiffs' attorneys to accept Sparkle's settlement offer (\$20 in coupons per plaintiff who registers to participate in the settlement). The attorneys communicate the offer and order to the Named Plaintiffs, who conclude that the settlement is not desirable. The Plaintiffs' attorneys may legitimately reject the settlement offer.

G. Assume that the class action finally goes to trial, in federal court in Nevada. Plaintiffs lose, in a jury trial, having failed to convince the jury that defendant acted negligently. The court enters judgment for the defendant. Six months after the entry of judgment, Plaintiff Andrews learns from a former Sparkle employee that Sparkle engaged in a massive cover-up, prior to his trial, to make sure that all documents supporting Plaintiffs' claims were destroyed. Andrews' best course of action is to file a new claim against Sparkle in state court.

H. Assume that Andrews does file a new claim against Sparkle in state court. This time Andrews files an individual claim, rather than a class action. In his complaint Andrews asserts that he is entitled to a jury trial. Defendant Sparkle files a motion to strike Andrews' jury demand, arguing that contact lens solution did not exist in the eighteenth century and that Andrews is thus not entitled to have a jury hear his tort claim that the contact lens solution was defective. Under the Seventh Amendment of the U.S. Constitution the court should deny Sparkle's motion.

I. Derkowitz is a person who used Sparkle contact lens solution every day during 2005. Derkowitz lives, and at all relevant times lived, in a very small community in Alaska. She has gone blind in one eye, and her doctor tells her that her blindness was probably caused by using contaminated Sparkle contact lens solution. Derkowitz has retained you as her attorney, and she would like you to file a negligence claim on her behalf. Knowing that the plaintiffs lost the Andrews class action, brought in federal court, you are concerned that Derkowitz' claims may be precluded by res judicata and/or collateral estoppel. Your best way of avoiding preclusion problems is to file Derkowitz' claims in state rather than federal court.

J. Assume the facts set forth in I, above. You have decided to file a claim on behalf of Ms. Derkowitz against Sparkle, in state court. You want to make sure that the defendant, Sparkle, cannot remove her claim to federal court. Your best strategy to prevent Sparkle from removing the claim to federal court is to allege that Derkowitz suffered at most \$74,000 in damages as a result of Sparkle's tortious actions, and to not seek punitive damages.

Question 2 (56 points)

Bebida Rica ("BR") is a Mexican company that manufactures and sells liquor throughout the world. Since 1987 BR has conducted a joint venture with a U.S. company, Fiesta Inc., that is incorporated in Delaware and has its principal place of business in San Diego, California. In particular, Fiesta stores all the liquor BR exports to the U.S. in a warehouse in San Diego and then ships that liquor around the country to supermarkets and liquor stores. Fiesta also does all the U.S. marketing on behalf of BR. BR does no marketing on its own behalf in the United States. In addition, Fiesta also imports liquor produced by other manufacturers, in other countries, and sells and markets those products. Approximately 10% of Fiesta's profits are derived from its sale of BR liquor.

One of the products manufactured by BR and sold on its behalf by Fiesta Inc. is the liquor tequila. BR's tequila is called Gusano Especial, and every bottle sold in the U.S. always contains a worm. Many U.S. tequila drinkers believe that only the best tequilas contain worms. In fact, this is a myth. No tequilas bottled in Mexico contain worms. Nevertheless, playing to the American market, BR and Fiesta have developed a process whereby Fiesta opens every bottle of BR tequila it receives and inserts a worm. BR is aware of what Fiesta is doing and has approved of the process. U.S. Consumers are then charged approximately \$50 per bottle for the BR Gusano Especial.

All bottles of Gusano Especial are essentially identical, except that Fiesta uses a series of different labels depending upon the part of the country to which the Gusano Especial is being shipped. In particular, bottles being directed to the West Coast of the U.S. are labeled with a surfer; bottles directed to the East Coast are labeled with a banker; bottles directed to the Northern states are labeled with a fisherman; bottles sent to the South are labeled with a cowboy; and bottles sent to the Center of the country are labeled with a farmer. Of course all of these figures are depicted as drinking tequila. (Fiesta uses this same marketing approach for selling its other BR liquors, e.g. showing a person from the region drinking that particular kind of drink). The labels on the bottles of Gusano Especial also contain two interesting statements, in small print. One statement says "Tequila is powerful and all persons, especially pregnant women, should drink it only at their own risk." The other statement says "By purchasing this bottle of Gusano Especial you agree to resolve any and all claims that may arise between you and either Bebida Rica or Fiesta Inc. in Mexico, and according to Mexican law."

Plaintiff Bobbi Borracha has filed a class action against both Fiesta Corp. and BR in federal court in Nevada. Both Fiesta Corp. and BR were served by first class certified mail, at their respective corporate offices in Mexico and California.

Bobbi claims to represent the class of all United States purchasers of Gusano Especial in 2005. Her claim is for violation of the federal Fair Trade Practices Act, and for common law fraud. She alleges that had she known that the worm was an aftermarket addition, and not authentic to Mexican tequila, she and the other class members never would have paid more than \$15 a bottle for Gusano Especial. She also asserts a claim for emotional distress, based on having been harmed by the fact that the manufacturer and retailer of one of her favored products deceived her. Bobbi is a citizen of Nevada. However, she buys all of her (many) bottles of Gusano Especial on her yearly trips to Washington D.C. The prices in D.C. are somewhat cheaper than the prices in Nevada, because D.C. does not impose any liquor taxes. Also, Bobbi prefers the label with the banker to the label with the farmer that is available at stores in Nevada.

Fiesta markets all of its liquors through ads placed on the internet, and through ads purchased in magazines. The internet and national magazine ads rotate the various regional labels. To the extent that the ads depict bottles of BR products, the regional magazines use the label of the geographic region to which the magazine is targeted. The entire annual marketing budget for all of Fiesta's liquor products in the United States is \$ 2 million.

Fiesta and BR are both quite profitable companies. Fiesta sells 100,000 bottles of Gusano Especial tequila every year, in the United States. Fiesta and BR share the \$1,000,000 in profits made on these sales on a 50/50 basis. Fiesta and BR together also sell \$200,000,000 worth of other products BR in the U.S., and make a total profit (which they split 50/50) of \$20,000,000. Around the world BR sells \$2,000,000,000 worth of liquor per year, and its worldwide profits are \$200,000,000 per year.

Fiesta sells 1,500 bottles of Gusano Especial annually through stores based in Nevada. Fiesta also sells \$500,000 worth of other BR products in Nevada, annually. Presumably Nevada consumers see ads placed on the internet and in national magazines. In addition, Fiesta spends \$20,000 per year placing ads in a Nevada regional magazine, The Nevada Lawyer.

A. (7 points) For purposes of this sub-part you are an associate in a law firm representing the U.S. Chamber of Commerce. The Chamber of Commerce is outraged at the filing of what it sees as a blatantly frivolous case brought by Bobbi Borracha against BR and Fiesta Corp. The case was just filed two weeks ago, and the defendants have not yet filed their answers. Nor has the judge set any dates in the case. The partner you work for has asked you to write a memo explaining whether you think it would make sense for your client, the Chamber of Commerce, to try to intervene in the suit.

B. (35 points) For purposes of this sub-part you are an associate in the law firm representing Bebida Rica (“BR”). The partner you work for has instructed you to draft a motion to dismiss for lack of personal jurisdiction, on behalf of BR. Apart from its relationship with Fiesta, BR markets no products in the United States, does no marketing in the United States, and owns no property in the United States. Excerpts from the Nevada jurisdictional statutes, should you need to refer to them, are attached to the end of this exam. Assume that BR was properly served with process as required by relevant federal and Nevada law.

C. (6 points) For purposes of this sub-part you are an associate in the law firm representing Bobbi Borracha. The district court judge has granted BR’s motion to dismiss for lack of personal jurisdiction. Fiesta remains in the case, at least for now. The partner you work for has asked you to draft a short memo explaining when it would be appropriate to file an appeal from the district court’s ruling dismissing BR.

D. (8 points) For purposes of this sub-part you are an associate in the law firm representing Fiesta Inc. BR has been dismissed from the case, and the plaintiff has decided not to appeal at this time. The partner for whom you work has asked you to write a memo addressing whether Fiesta might be able to use the fact that BR has been dismissed to secure its own dismissal from the case, and what your chances of success might be on such a motion. However, the partner has also told you that she thinks it would be pointless to file a motion to dismiss, on behalf of Fiesta, arguing lack of personal jurisdiction.

Question 3 (14 points) (Write on one or the other of the sub-parts below, not both!)

Pick an issue we studied this semester in civil procedure, and as to which you think the U.S. Congress ought to make a change in the law. Then, explain what change you think ought to be made and why.

Alternatively, if you think no changes need be made, or if you don’t want to pick an issue on your own, discuss the extent to which you believe parties ought to be able to use contracts, in

advance, to modify the laws or rules that would otherwise apply in court.

**Excerpts Nevada Revised Statutes relevant to service of process
(most recently amended 6/17/05)**

14.020. Foreign corporations, limited-liability companies, limited-liability partnerships, limited partnerships, business trusts and municipal corporations doing business in state to appoint resident agents; service of process, demand or notice

1. Every corporation, miscellaneous organization described in chapter 81 of NRS, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust and municipal corporation created and existing under the laws of this State, any other state, territory or foreign government, or the Government of the United States, doing business in this State shall appoint and keep in this State a resident agent who resides or is located in this State, upon whom all legal process and any demand or notice authorized by law to be served upon it may be served in the manner provided in subsection 2. The corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation shall file with the Secretary of State a certificate of acceptance of appointment signed by its resident agent. The certificate must set forth the full name and street address of the resident agent. A certificate of change of resident agent must be filed in the manner provided in title 7 of NRS if the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation desires to change its resident agent. A certificate of name change of resident agent must be filed in the manner provided in title 7 of NRS if the name of a resident agent is changed as a result of a merger, conversion, exchange, sale, reorganization or amendment.

2. All legal process and any demand or notice authorized by law to be served upon the foreign corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation may be served upon the resident agent personally or by leaving a true copy thereof with a person of suitable age and discretion at the address of the registered office shown on the current certificate of acceptance filed with the Secretary of State.

3. Unless the registered office is the home residence of the resident agent, the registered office of a corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation must be staffed during normal business hours by:

(a) The resident agent; or

(b) One or more natural persons who are:

(1) Of suitable age and discretion to receive service of legal process and any demand or notice

authorized by law to be served upon the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation; and

(2) Authorized by the resident agent to receive service of legal process and any demand or notice authorized by law to be served upon the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation.

4. A corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation that fails or refuses to comply with the requirements of subsection 3 is subject to a fine of not less than \$100 nor more than \$500 for each day of such failure or refusal to comply with the requirements of subsection 3, to be recovered with costs by the State, before any court of competent jurisdiction, by action at law prosecuted by the Attorney General or by the district attorney of the county in which the action or proceeding to recover the fine is prosecuted.

5. Subsection 2 provides an additional mode and manner of serving process, demand or notice and does not affect the validity of any other service authorized by law.

6. As used in this section:

(a) "Registered office" means the office maintained at the street address of the resident agent.

(b) "Street address" means the actual physical location in this State at which a resident agent is available for service of process.

Sec. 50. NRS 14.030 is hereby amended to read as follows:

14.065. Exercise of jurisdiction on any basis consistent with state and federal constitutions; service of summons to confer jurisdiction

1. A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the constitution of this state or the Constitution of the United States.

2. Personal service of summons upon a party outside this state is sufficient to confer upon a court of this state jurisdiction over the party so served if the service is made by delivering a copy of the summons, together with a copy of the complaint, to the party served in the manner provided by statute or rule of court for service upon a person of like kind within this state.

3. The method of service provided in this section is cumulative, and may be utilized with, after or independently of other methods of service.

Thanks for being a fun class to teach. Best wishes on the rest of your exams.