

BAGS # 4

Grading Key: Civil Procedure, Fall 2005

Raw score 70
Final score A-

Question 1 (3 points each)

- 1(a) 2.5 True. Pursuant to R. 56, a party is entitled to prevail on a motion for summary judgment so long as there are no material issues of disputed fact, such that no reasonable jury could find for the opposing party and such that the movant is entitled to prevail as a matter of law. Here, although Priscilla may fervently believe Dan is the culprit, contra to Celotex she has no actual evidence beyond the bare allegations of the complaint, particularly as Abe's comments to her are inadmissible hearsay.
- 1(b) 3 False. It is true that the Due Process clause has been useful to defendants more frequently than to civil plaintiffs, in protecting their procedural rights against deprivation of property without notice (Fuentes), excessive punitive damages awards (BMW v. Gore) and occasionally providing a right to an attorney (Lassiter). However, plaintiffs have also benefitted from the Due Process Clause as in Boddie, in which the Court held that court costs were excessive as applied to an indigent couple seeking a divorce.
- 1(c) 2 False. While it is true that the availability of compensatory damages depends on the depth of defendant's pockets, it is not true that injunctive relief is "final" in the sense that it can never be revised by the court. Thus, the choice as to which type of relief is desirable depends on the litigants' needs and circumstances and certainly one cannot say that either form of relief is always superior to the other.
- 1(d) 2 True. R 18 allows a plaintiff to bring as many claims as they may have against a defendant, even if they are totally unrelated, so Andrew can certainly bring his two claims against the law school simultaneously. On the other hand, because R. 20 only allows multiple plaintiffs to join their claims together if those claims arise out of the same transaction and occurrence and involve common questions of law or fact, Andrew's claims can not be joined with Barb's or Carl's unless it could be shown that a common policy underlay the law school's negligence towards Andrew & Barb, or the limits placed on the speech of Andrew & Carl.
- 1(e) 1.5 False. R. 34 opens to discovery all documents which are in an opposing party's "possession or control" and thus MMLV would presumably have to turn over its own financial information albeit physically located in the accountant's office. Moreover, R. 45 gives party the option to subpoena information held by third parties.
- 1(f) 3 True. Because Plaintiff is only making a motion for partial summary judgment, and not summary judgment as to the entire case, Plaintiff need only show that Defendant lacks evidence to prove its affirmative defense of assumption of the risk. In contrast, if Plaintiff were seeking summary judgment as to the entire case Plaintiff would have the burden to show that a reasonable jury must find for Plaintiff on all points and could not find for Defendant as to any of its defenses.

1(g) 0

False. This Answer would seem to be the perfect candidate for a R. 12(h) motion to strike, as the answer is a combination of insufficient, impertinent and scandalous. The R. 11 motion seems plausible, but somewhat less desirable, both because Plaintiff would have to comply with the 21 day safe harbor and also because given the lack of factual or legal claims it may be difficult for Plaintiff to show such claims were not well founded.

1(h) 3

False. The R. 12(b)(5) defense of improper service of process is a disfavored defense which is generally waived if, as here, it was not included in a pre-answer motion or in the Answer. Defendant's only hope is to ask the court to permit an amendment of the Answer "as justice so requires" (arguing the defense was not waived because it was not "then available"), and certainly the R. 15 motion to amend as a "matter of course" won't work because a Reply to the counterclaim has been filed and more than 20 days have passed since the filing of the Answer.

1(i) 2.00

True. Under R. 13 Bartolomy can bring any counterclaim against Alfred, even though it was totally unrelated to the original claim, and under R. 13(h) Bartolomy can simultaneously add Candace as a new party and bring a claim against her that rises out of the same transaction and occurrence of Bartolomy's claim against Alfred, per R. 20. But, per R. 42(b) it is likely that the court would order separate trials for the breach of contract and tort claims.

1(j) 1.5

False. Although an impleaded party is allowed to implead another party, per R. 14(a), the proposed impleader is improper both because one can only implead a person who is not already a party to the suit and because Security is really raising a defense, and not a claim that Penelope is liable. On the other Security can raise the defense of Penelope's drunkenness, even though that defense was not raised by Dan, and Security could also bring a claim against Penelope, if it had one, so long as that claim arises out of the same transaction and occurrence as Penelope's claim against Dan.

20.5

Question 2 (50 possible points)

2(a) 9 possible points total

(1.5) while it would be nice to raise this defense pre-answer, e.g. as a motion to dismiss per 12(b)(6) for failure to state a claim, this seems not to be possible because the pleadings to date make no mention of the mediation requirement

2.5

(1.5) a good way to handle this would be to call up opposing counsel, who may be unaware of mediation requirement; perhaps this can be worked out amicably

(1) if opposing counsel won't agree to mediate, BBI must answer, include the mediation requirement as a defense, and deal with this issue post-Answer

1.5

injunctive / counterclaim

_____ (3) best way to deal with this post-Answer would be a motion for summary judgment per R. 56; can argue that BBI is entitled to judgment as a matter of law because plaintiff's claim fails because plaintiff has failed to meet the mediation requirement; to support this motion would basically just need to provide a copy of the contract, including the mediation requirement, and also provide case law supporting idea that mediation requirements are meaningful and enforceable

_____ (2) conceivably this point could also be made in a R. 11 motion, but that seems less on-point because the problem is not so much that plaintiff's claims are not factually or legally supported but that the mediation agreement is a defense; also R. 11 motion is a bit more of a headache with the 21 day safe harbor requirement

_____ other

2(b) 13 possible points total

_____ (2) mediation can vary quite a bit, so it will be important to do some research on how mediation works in this particular context; best ways to research include calling the Mag. Judge's office, asking around your own office, and looking at local rules

_____ (2) in typical mediation of this sort, both parties and attorneys are likely to attend, though with settlement conferences sometimes it is just the attorneys; assuming parties are present, mediator will often ask them to speak (Mag. Robert Johnston explained)

_____ (2) mediation will typically take place in a conference room, not a court room; some mediators keep all the disputants together, and some use a caucus model, and some use a combination; this is something to research so that we can be prepared

1 (1) evidence will not be given in any formal sense, though disputants or their lawyers will discuss their perspectives on the dispute; e.g. no swearing of witnesses and no rules of evidence

2 (3) the essence of mediation is that the mediator does not "decide" anything about the dispute, but rather only works with disputants to help reach a settlement; many mediators try to help the parties think about their broader interests, as opposed to just legal arguments

1 (1) if we were to reach an agreement in mediation the result would be a settlement contract that would be binding; the litigation would then be dismissed

1 look at contract

1 benefits

_____ (2) usually mediation is confidential, though the specifics of this will depend upon local law and any agreement the magistrate asks us to sign; this is something to research, as it is important to know whether or not the things said in mediation are privileged from future use in court

_____ other

2(c) 19 possible points

5.5

(8) The most obvious and desirable possible claim is a counterclaim against Kings County, per R. 13, for breach of contract. To the extent that BBI's claims against Kings County arise out of the same transaction and occurrence as KC's claims against BBI, this would be a compulsory counterclaim, meaning that if BBI does not bring it now, it won't be able to bring it later in federal court, and may not in state court either due to res judicata. Also, by bringing the counterclaim BBI will likely make itself look better in the eyes of the judge/jury. Also, it will not add a lot of cost to bring such a claim because the basic facts need to be litigated anyway, to respond to KC's claims. Ideally BBI would have filed this counterclaim earlier, when it filed its answer. Because we did not, we now need to file a motion to amend the answer to add a counterclaim, per R. 15. Given that the trial is not scheduled to occur for another 11 months, and given that the discovery needed on this counter claim should overlap significantly with the discovery that has already been done or will be needed on KC's claim, it is likely the judge will permit the amendment under the liberal "as justice so requires" standard of R. 15.

2
(3) We could also consider trying to implead a number of parties under R. 14 to the extent we believe they are responsible "in whole or in part" for our own alleged liability. The most likely candidates for impleader would be Arturo Artist and the various sub-contractors we claim have acted negligently. Conceivably we could also try to implead the vandals, arguing their vandalism has hurt our ability to fulfill the contract, but as we don't know who they are we can't really implead, except possibly with Doe Defendants if those are allowed. The decision as to whether to implead any of these parties is less clear than the decision, above, to counterclaim against Kings County.

2
(3) In favor of impleading, to the extent we can convince the judge/jury that a party other than ourselves is responsible we will be able to set off our possible liability, if KC prevails against us. Also, if we implead and then KC brings claims against the impleaded third parties, the judge/jury may find that they are liable and we are not. Impleading additional parties will make the litigation more complex, and conceivably if the county is on a tighter budget than we are this could work to our advantage.

2 R. 19 v and ch

2

(3) On the other hand, impleader could hurt us (as it did Cheeseman in A Civil Action) to the extent we (a) create another adversary for ourselves, including the possible concern that such persons will counterclaim against us; (b) substantially increase our own costs of litigation; (c) undermine our ongoing working relationship with Arturo and the subcontractors, especially assuming that we are still trying to get this job done.

(1) Even if we don't implead we will have the option, later, of filing a separate claim for contribution to the extent we lose to KC and to the extent there are no statute of limitations issues. This is something to research.

1

(1) In sum, we should think carefully before impleading any of these folks and only implead if our claim is quite strong. Perhaps it makes more sense to implead those persons with whom we no longer need an ongoing working relationship.

other

2(d) 9 possible points

1

(1) Intro/good advocacy:

1

(2) We recognize that R. 18(a) permits joinder of any claims, even if they are unrelated, and that KC could have joined these claims in the first instance. But the problem here is that the motion to amend is being made late in case and would not be in the interest of justice as set out below .

2

(2) Although the R. 15 standard for permitting amendment of complaints is "liberal," it is not infinitely liberal. The court may only permit amendments "as justice so requires."

3

(4) Here, it would be unjust to permit this amendment at this time, given the timing and the nature of the claim. The new claim is entirely different from the original time and will require all new discovery. Discovery is supposed to end in just 4 months, and that is not enough time to learn about the new claim and defenses. Similarly, the expert deadline and trial deadlines are too tight. Yet, postponing the trial is also a bad option, as defendant wants to get this claim beyond it. Given the differences in these claims, there would be few if any synergies to doing pretrial on two sets of claims simultaneously. Would ask court to bifurcate trial, per R. 42, in any event – to avoid confusion and prejudice. Defendant will be prejudiced by having to defend two claims simultaneously – won't be able to focus as much on original claim. And, plaintiff always has option to bring this claim separately, either in federal or state court. Barring amendment won't prevent plaintiff from getting day in court.

3) -

Question 3 (20 possible points)

6

(3) In part this is taking R. 11 back to where it was, prior to the 1993 amendments, i.e. making it tougher by: (a) eliminating the 21 day safe harbor; changing the "may impose" to "shall impose"; requiring award of attorney fees and costs to prevailing party; requiring that sanction shall be sufficient to deter and compensate, rather than limiting to that which is sufficient to deter repetition

3

(3) Can say this restoration is good, if you believe that lawyer and client misconduct is a serious problem and that the current R. 11 is not sufficient to deter; the 1993 changes to R. 11 were controversial, and some saw them as a watering down; those who view current R. 11 as too wimpy will be glad that judges will be forced to toughen up again, and be required to sanction and award fees more often

2

(3) But, those who favored the 1993 amendments will/should oppose this bill, arguing that the old stricter R. 11 led to bad results including over-sanctioning in some cases such as civil rights cases, too much use of R. 11 sanctions to abuse other side or extort settlements, too much satellite litigation re: R. 11; too much judicial time and energy devoted to sanctions; too little emphasis on disputants working out their own problems

2

(3) Proposed statute also adds some new things, e.g. mandating suspension for 3 strike attorneys, and mandating R. 11-type sanctions and contempt of court for persons who destroy documents, even where the document destroyers are not lawyers or litigants in case

(2) Those who favor these provisions will say that they appropriately get tough, and will ensure crackdowns on those lawyers and litigants and others who are misbehaving.

2

(4) Those who oppose will say that these extreme measures have not been shown to be needed, and that it is inappropriate/unnecessary for Congress to jump in and rewrite the rules. There is a whole process that is normally used for drafting the rules, where two levels of committees consider the rules, which are then forwarded to Congress and ultimately the Supreme Court for implementation. By making such changes legislatively Congress is arguably interfering with the judicial function, and may also be acting in an area in which Congress has less expertise than the judges/lawyers who normally write the rules.

3

(2) own opinion

other

18