

Question 1 (48 points total, 3 points each)

- (a) \_\_\_ False. It is true that a class can potentially be certified even though plaintiff does not have names of victims, so long as plaintiff can convince the court that enough victims exist to meet the numerosity requirement of R. 23(a). However, opportunity for opt-in is not required, as R. 23(b)(3), which seems appropriate for this damages suit, requires opt-out rather than opt-in unless the latter is specially ordered by the judge.
- (b) \_\_\_ False. In general there is no problem in obtaining both injunctive relief and compensatory damages in the same action, so long as plaintiff can show that she is at risk for irreparable future harm, would lack an adequate remedy at law, and that the requisite balance of hardships, public interest, and administrability can be shown. Here, while the monetary relief would have compensated her for past harm, and while Tragon's parents are most unlikely to buy the ball again, Tragon is still at risk for irreparable harm absent an injunction because other parents or schools might buy the balls and expose Tragon to future injury.
- (c) \_\_\_ True. Under FRCP 20(a) two plaintiffs can bring claims against two defendants only if those claims arise out of the same transaction and occurrence and involve common questions of law or fact. Here, because a claim against PlayThings with respect to magnetic balls or trains would not seem to arise out of the same transaction or occurrence as a claim against RSI with respect to trains (lots of different evidence on nature of defect, nature of harm, nature of notice, etc.) it would not be appropriate for Lucia to combine claims with Esther.
- (d) \_\_\_ False. PlayThings has erred by omitting a R. 8 affirmative defense (contributory negligence) and a R. 12 disfavored defense (lack of personal jurisdiction). Still, while the disfavored defense has been lost, PlayThings can still file a motion to amend its Answer to include the defense of contributory negligence, and the court shall grant that motion per R. 15 "as justice so requires."
- (e) \_\_\_ True. Under FRCP 13 & 14 a "defending party" such as a party that has been sued in a permissive counterclaim is free to implead another party that it alleges is responsible in whole or in part for that wrong it is said to have committed. Here, because the treasurer can be said to be responsible in whole or in part for the lost payment, impleader is proper but as always under R. 14 leave of court must also be obtained.
- (f) \_\_\_ True. Using R. 11(b)(2) & 3 PlayThings could argue that Tragon's complaint lacks adequate legal and factual basis, perhaps thereby convincing Plaintiff to withdraw her Complaint or ultimately obtaining sanctions against Tragon. A more direct and probably better way to handle this situation would be for PlayThings to file a R. 12(b)(6) or 12(c)

motion to dismiss Tragon's complaint on the ground that even reading the Complaint in the light most favorable to Tragon it fails to state a claim upon which relief can be granted.

- (g) \_\_\_ True. Under R. 13(g) one defendant can bring a cross-claim against another defendant so long as the proposed claim arises out of the same transaction and occurrence as the subject matter of plaintiff's original claim. Here, it would seem that PlayThings' claim against Tot Toys about safety advertising does arise out of the same t&o as the original claim, and it is also permissible to add Mark Mervin as an additional defendant because R. 13(h) states that additional parties can be joined to cross claims where, as here, the new claim arises out of the same t&o and involves common questions of law and fact as the cross claim so that the requirements of R. 20 are met.
- (h) \_\_\_ False. Under R. 34(a) a party must produce all documents within its "possession, custody or control," and the mere fact that the attorney has the documents would not justify nondisclosure. However, the requested information seems to fall clearly under the work product doctrine, R. 26(b)(3), and thus Esther would be required to produce the interview records only if PlayThings could make a showing of "substantial need" and that it is unable without "undue hardship" to obtain the information by another means.
- (i) \_\_\_ False. It is correct that R. 13(g) permits Tot Toys to bring a cross claim for indemnification against PlayThings, and that this cross claim would need to arise from the same transaction and occurrence as Esther's original claim against Tot Toys. However, if Tot Toys wishes to bring a claim against Red Sun Inc., not yet a party to the suit, Tot Toys must use R. 14, impleader, and assert that RSI is liable in whole or in part for Tot Toys' liability to Esther Tragon.
- (j) \_\_\_ False. Even though the original claim has settled the impleader of PlayThings against RSI was initially allowed by R. 14 as a proper derivative claim, and the impleader can now go to trial so that PlayThings can try to recover the settlement it paid in whole or in part. The contrary conclusion would be very inefficient, and would require PlayThings to file a new claim against RSI to recover the money it alleges it is due.
- (k) \_\_\_ False. Because no party must agree to settlement in mediation, sending a case to mediation does not eliminate parties' right to get their day in court. Thus, courts have ruled that mandatory mediation does not violate the Due Process Clause or other constitutional rights and plaintiff is unlikely to avoid mediation by making such an argument.
- (l) \_\_\_ True. If, as PlayThings asserts, the conduct alleged in the complaint does not rise to the level of outrageousness to support punitive damages, then Playthings can file a motion under FRCP 12(b)(6) to dismiss the punitive damages claim for failing to state a claim for which relief can be granted. Such a "favored" defense can be raised pre-Answer, in the

Answer itself, or can also be raised later in a 12(c) motion or at trial.

- (m) \_\_\_ False. It is true that plaintiff must secure permission of the court to send 30 interrogatories to PlayThings, as R. 33(a) states that a party may only send 25 interrogatories including sub-parts to any other party. However, plaintiff can send the 20 interrogatories to RSI without getting permission from the court.
- (n) \_\_\_ False. Because Marketer no longer works for PlayThings plaintiff cannot use R.34 to request documents in his possession. While informal methods could work, plaintiff also has the formal option under the FRCP to use R. 45 to subpoena documents from a non-party and to use R. 30 to depose a non-party such as Miguel Marketer.
- (o) \_\_\_ True. In multiple decisions the Supreme Court has recently held that when punitive damages are too high, in light of a variety of factors, they may violate the defendant's Due Process rights under the Constitution. Here, citing such cases as Cooper and State Farm (MRS 81) Red Sun Inc. should argue that the punitive damages award for \$3 million was excessive considering that RSI's conduct was not all that reprehensible, that the ratio of \$3 million dollars to \$15,000 in compensatory damages was excessive, and that any available civil fines do not justify a \$3 million dollar award.
- (p) \_\_\_ False. In general the American Rule provides that each party is liable for its own attorney fees, and here the facts do not provide any reason to believe that this is a civil rights or other sort of case that would enable plaintiff to recover attorney fees from the defendant. Thus, while as a prevailing party plaintiff can recover some limited costs under R. 54(d) and 28 U.S.C. Section 1920, plaintiff in this scenario may well end up owing her attorney far more than she recovers in court.

Question2 (32 points)

A. (12)

- \_\_\_ (3) what is c-c mediation (neutral mediator, court employee, will help facilitate settlement, need not settle, if do settle, result is binding and enforceable)
- \_\_\_ (3) pros: can potentially settle early in case, saving time/money; potentially limit bad publicity coming out of suit; opportunity to apologize to Felicity, which may help yield quick/cheap settlement; inexpensive way to get some discovery e.g. re: Felicity, how wacky she is; cheap process, as mediator is free
- \_\_\_ (3) cons: settlement may not be best resolution of this case; we may need to more publicly clear our reputation in a trial given all the bad publicity we have received to date; mediation will still cost something, in attorney time, even if mediator is free; mediation will give Felicity free discovery of our positions; if Felicity is real wacky, apology etc

won't lead to settlement in any event

\_\_\_\_ (2) like more info: confidentiality of mediation (would not want any further problems revealed to get out into the public) ; some sense of whether Felicity or own client are amenable to early settlement because if they clearly aren't, mediation can be waste of time

\_\_\_\_ (1) conclusion

B. (20)

\_\_\_\_ (3) Rule 24 re: intervention (set out gist of intervention as of right and permissive intervention)

\_\_\_\_ (8 ) See no real strong argument re: intervention as of right (no reason to believe statute gives right; unclear based on current facts that Mario adequately "claims an interest" per 24(a) & that disposing of Felicity's claim would, as a practical matter, impede Mario's ability to protect his own interest, as we don't even know yet that Mario will be named in Felicity's claim; some question re: whether purely monetary losses are sufficient to claim an interest" (Cascade & Trbovich v. Donaldson & Allard); best is to argue that Felicity's suit may well reflect badly on his victory, especially if scoring is questioned; if he does claim an interest he would also have to show that All-American Inc. does not adequately represent his interests, in that they might be willing to settle out in ways that might harm his reputation or cost him shows; Mario has stronger interest than All-American does in defending his own victory; Mario's own interest is especially distinguishable from All-American's if he actually did sleep his way to the top, though likely he would not want to admit that

\_\_\_\_ (6 ) To intervene permissively would need to show either statute (we don't have) or that Mario shows common question law or fact with Felicity/AA dispute; could argue that he shares common legal questions as to whether AA followed its own rules and common factual questions whether the selection process was fair; Mario would also have to show that his entering into the case would not cause undue delay or prejudice, which probably is not hard given that case is still at very early stage; court would need to exercise its discretion to grant this intervention; court is more likely to grant Mario's motion if it thinks he is the only likely intervenor, as opposed to just the first of other contestants to intervene

\_\_\_\_ (3) Conclusion. It is unclear whether the judge will grant the request at this time. Mario may want to wait until it is clearer that his own victory is being challenged by Felicity's suit, e.g. because she is accusing him of winning for inappropriate reasons. Yet, waiting may also decrease Mario's chance of being permitted to intervene, as generally it is better

to intervene sooner than later to show there is no delay/prejudice

Question 3 (20 points)

- \_\_\_ (3) A. When people say FRCP are liberal they mean that the preferred disposition of cases is “on the merits, by jury trial, after full disclosure through discovery.” MRS 131. Per the liberal rules plaintiffs are only required to provide a “short and plain statement of the claim,” R. 8(a)(2). Amendments are to be liberally granted as justice so requires. The case is to be fleshed out through extensive discovery and the facts ultimately resolved at trial.
- \_\_\_ (2) B. Bell does at minimum shake up the ethos of liberal pleading. Ruling that plaintiff’s allegations were insufficient, in an antitrust case, the Court vacated the venerable Conley rule that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”
- \_\_\_ (2) Possible implications Bell. Where many cases had held for years that mere “notice pleading” was sufficient, and that the facts would be fleshed out in discovery, Bell may lead to many more cases being dismissed on motions to dismiss. Plaintiffs will have to find ways to be more specific and detailed at the outset of the litigation, or risk dismissal. Our system may start to look more like the civil law systems, where more disputes are resolved based on the paper record, rather than at trial.
- \_\_\_ (3) Too soon too tell how much Bell will shake things up. Perhaps Bell will be limited to its facts, or to the antitrust context. Erickson, a pro se prisoner case that was decided just a couple weeks after Bell, makes it clear that at least in the pro se prisoner context courts will not go to the extreme of requiring huge amounts of detail from plaintiffs at the outset. The Rules themselves have not been changed.
- \_\_\_ (5) Arguments Bell is good. Defendants will be pleased with Bell, as they often believe that plaintiffs’ complaints are too speculative and force defendants to spend a lot of time, money and reputation on lawsuits that are frivolous. Allowing plaintiffs to do the necessary discovery to try to support potentially frivolous claims is costly. From a societal standpoint, similarly, one can argue that plaintiffs should only be able to bring cases that are well founded, and that allowing speculative claims is expensive for society as well as unfair to defendants. Litigation should not be an opportunity for plaintiffs to go on fishing expeditions. Our society is too litigious and our courts are too overburdened. ADR has helped but not done enough to curb the excesses of litigation.
- \_\_\_ (5) Arguments Bell is bad. Plaintiffs will argue Bell is potentially bad, as it may force them to come up with more specificity sooner than is often possible. If plaintiffs are limited to bringing lawsuits only when they have substantial factual support at the outset,

fewer claims will be brought, and likely some defendants who ought to be held liable will not be. Often times the information needed to support a claim is in the possession of defendants and can only be obtained in formal discovery. From a societal standpoint it can be argued that limiting plaintiffs to such claims will prevent justice from being achieved in many cases, and return us to the more technical and limited litigation that preceded adoption of the “liberal” federal rules. Instead, as the FRCP drafters envisioned plaintiffs should be allowed to do discovery necessary to support their claims, and the validity of the evidence should then be tested at trial. Especially now that the addition of court-connected and independent ADR have been added to help disputants resolve cases more effectively and expeditiously, it would be a mistake to return to bad old days of resolving disputes on lack of evidence and technicalities.