

Civil Procedure Final Exam
Professor Sternlight
December 8, 2007

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.

Check this exam for completeness at this time. It should be seven pages long. 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 me with 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.

I am going to assuming that you are referring to the version of the Federal Rules of Civil Procedure ("FRCP") that we used in this course, i.e. the Rules valid as of August 2007. If you prefer to refer to the amended rules that came into effect December 2007 you may do so, but please preface your use of such rules by the phrase "2007" or "07.

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 thoroughly address any portion of the essay questions.

Question 1 True false questions (48 points total; 3 points each)

RED Sun Inc. (“RSI”) is a Chinese company that manufactures and exports a variety of products to the United States. In 2005 RSI sold boxes of small colored magnetic balls to its exclusive U.S. distributor, PlayThings. PlayThings, in turn, sold boxes of the product to toy stores throughout the United States. A number of young children ingested two or more of these small magnetic balls. Because the balls are highly magnetic children who ingested two or more of the balls sometimes suffered serious injury to their internal organs as the balls tried to unite with one another. One child who suffered serious injuries as a result of swallowing Red Sun magnetic balls was then five year old Esther Tragon. Her parents purchased the Red Sun magnetic balls at a store called Tot Toys, in Las Vegas, Nevada.

With respect to each of the following propositions, 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.

Note that the following propositions are independent of one another. While each proposition builds on the basic facts set out above, the propositions do not build on one another, and should be read separately from one another.

A. The attorney for Esther Tragon is considering filing a class action for damages in federal court against PlayThings on behalf of Esther and other similarly situated children in the United States. Even though Esther’s attorney does not have the names of the other victims nor know how many other victims exist, class certification may be appropriate so long as all putative class members are given a chance to opt-in to the litigation.

B. The attorney for Esther Tragon plans to sue PlayThings and RSI for damages in an individual action in federal court. Such damages would cover medical costs, pain and suffering, and emotional harm. Ideally Esther’s attorney would also like to secure a permanent injunction preventing PlayThings from selling any more of the Red Sun Inc. magnetic balls in the United States. However, if Esther secures damages the PlayThings attorney has a strong argument that she should not also be able to recover injunctive relief, so it would be unwise for Esther’s attorney to seek both damages and injunctive relief in the same lawsuit.

C. Red Sun Inc. manufactures a variety of products in addition to magnetic balls. Esther’s best friend, Lucia Choo, has been playing with a Red Sun Inc. toy train for several years. Lucia’s family believes that the train was painted with lead paint that has caused Lucia to suffer mild brain damage. The train was distributed by PlayThings and purchased at Tot Toys, in Las Vegas. Lucia’s family seeks to bring a claim with respect to the train against Red Sun Inc. and

PlayThings for strict liability and negligence in federal court. Esther's family is planning to bring a suit against Red Sun Inc. and PlayThings in federal court for strict liability and negligence with respect to the magnetic balls. Lucia's claims against RSI and PlayThings regarding the train can not be brought in the same federal court lawsuit as Esther's claims against RSI and PlayThings with respect to the magnetic balls.

D. Esther Tragon brought a claim in federal court against PlayThings for negligence and strict liability with respect to the magnetic balls. PlayThings filed its Answer on a timely basis. Two months after it filed its Answer PlayThings' attorney realized that she had inadvertently failed to include two defenses in her Answer that she now wishes she had included: (1) a defense that Esther Tragon's contributory negligence contributed to her injuries; (2) a defense of lack of personal jurisdiction. It is now too late for PlayThings to add either defense to its Answer.

E. Esther Tragon brought a claim in federal court against PlayThings for negligence and strict liability with respect to the magnetic balls, and PlayThings implead Red Sun Inc. If Red Sun Inc. then filed a counterclaim against PlayThings for PlayThings' alleged failure to pay for shipment of 1,000 parasols in 2006, PlayThings could implead the former PlayThings treasurer who allegedly embezzled the money that should have been used to pay for the parasols, so long as the court in its discretion approved the impleader, and so long as jurisdiction existed for all these claims.

F. Esther Tragon brought a claim in federal court against PlayThings for negligence and strict liability with respect to the magnetic balls. PlayThings believes that even accepting as true the facts of the Complaint, Esther's claim was not filed on a timely basis, and that it is in fact barred by the relevant two year statute of limitations. PlayThings could raise this defense using either Rule 11 or Rule 12 of the Federal Rules of Civil Procedure.

G. Esther Tragon brought a claim in federal court against both PlayThings and Tot Toys for negligence and strict liability with respect to the magnetic balls. PlayThings seeks to bring a claim against Tot Toys and Tot Toys' manager, Mark Mervin, for failing to comply with Tot Toys' contract with PlayThings to adequately advertise and place safety notices on PlayThings toys. PlayThings can bring the claims against Tot Toys and Mervin in the same suit as Tragon's claim against PlayThings.

H. Esther Tragon brought a claim in federal court against both PlayThings and Tot Toys for negligence and strict liability with respect to the magnetic balls. Esther's lawyer conducted a series of interviews with prospective witnesses and maintained records of the interviews in her files. As part of its discovery, PlayThings requests, under R.34, that Esther produce all records of interviews of persons with knowledge relating to the dispute. Esther need not produce the interview records because, although Esther's lawyer has records of such interviews, Esther has no such information in her personal possession.

I. Esther Tragon brought a claim in federal court against both PlayThings and Tot Toys for

negligence and strict liability with respect to the magnetic balls. Tot Toys believes it has no liability for selling the product, and that any liability is held by distributor PlayThings and manufacturer Red Sun Inc. Tot Toys believes PlayThings and Red Sun Inc. ought to indemnify Tot Toys for any liability it is assigned by the judge or jury. Tot Toys can file claims against both PlayThings and Red Sun Inc., in the same suit as Esther has brought her original claims, but only if Tot Toys can argue that its claims against PlayThings and Red Sun Inc. arise out of the same transaction and occurrence as Esther's claims against Tot Toys.

J. Assume that Esther Tragon brought a claim in federal court against both PlayThings and Tot Toys for negligence and strict liability with respect to the magnetic balls. PlayThings implead Red Sun Inc. alleging that assuming that the balls caused harm, the harm was substantially due to a defective design for which Red Sun Inc. was responsible. Esther and PlayThings have reached a monetary settlement of Esther's claim and Esther has therefore voluntarily dismissed her claims against PlayThings. Assuming Red Sun Inc. files a R. 12(c) motion to dismiss the court must now dismiss PlayThing's impleader claim against Red Sun Inc. as moot.

K. The federal court in which Esther Tragon filed her claim against PlayThings has ordered the parties and attorneys to participate in mediation. Ms. Tragon's attorney believes participating in mediation would be a waste of time and money. If Ms. Tragon's attorney files a motion arguing that the mandatory mediation would violate her client's Due Process rights under the Fourteenth Amendment of the U.S. Constitution she and her client will likely be able to avoid having to participate in mediation.

L. Plaintiff Esther Tragon has filed a complaint in federal court against PlayThings for negligence and strict liability with respect to the magnetic balls. Her complaint asserts an entitlement to compensatory and punitive damages. PlayThings believes that the demand for punitive damages is inappropriate, in that the conduct alleged by Tragon would not (according to PlayThings) support an award of punitive damages. PlayThings can seek to have the claim for punitive damages dismissed prior to filing its Answer.

M. Plaintiff Esther Tragon has filed a complaint in federal court against defendants PlayThings and Red Sun Inc. with respect to the magnetic balls. Tragon wants to send a set of 30 interrogatories to defendant PlayThings, and a set of 20 interrogatories to defendant Red Sun Inc. Plaintiff Tragon must secure permission of the court before she sends these interrogatories to the defendants.

N. Plaintiff Esther Tragon has filed a complaint in federal court against defendants Red Sun Inc. and PlayThings with respect to the magnetic balls. Plaintiff has learned of the existence of Miguel Marketer, a former employee of PlayThings who designed the PlayThings advertising campaign for the magnetic balls. Plaintiff would like to obtain obtain relevant documents from Miguel Marketer and also take his deposition. Because Marketer no longer works for PlayThings and thus is not a party to the suit, Plaintiff will need to seek the documents informally and also interview Marketer informally, rather than seek the information under the auspices of the Federal

Rules of Civil Procedure.

O. Plaintiff Esther Tragon has filed a complaint in federal court against defendants Red Sun Inc. and PlayThings with respect to the magnetic balls. Her complaint asserts claims for both compensatory and punitive damages. The jury finds for Tragon against both defendants. It awards just \$15,000 in compensatory damages, reasoning that most of Tragon's alleged injuries were in fact due to a preexisting congenital condition. Nonetheless the jury also awards Tragon \$3 million in punitive damages against Red Sun Inc. The jury awards no punitive damages against PlayThings. Red Sun Inc. can use the Due Process clause of the Fourteenth Amendment to attempt to set aside the punitive damages award.

P. Plaintiff Esther Tragon has prevailed, after a jury trial, in her case for negligence and strict liability against defendants Red Sun Inc. and PlayThings with respect to the magnetic balls. The jury awarded Tragon \$3,015,000 in joint and several liability against the two defendants. The appellate court set aside the 3,000,000 in punitive damages, leaving Tragon with just \$15,000 in actual damages. Tragon's attorney handled the case under a retainer agreement that provided her with a right to 35% of the amount awarded by the trial court. As the prevailing party, Tragon is entitled to have these attorneys fees and costs paid for by the defendants.

Question 2 (32 points total)

All-American Performer is a show, run by All-American Inc., that purports to select the best amateur performer based on audience participation. Competitors perform their various acts (singing, dancing, gymnastics, juggling, etc.) on television, and audience members vote for their favorite and least favorite performers. Over time, competitors are eliminated, leaving one competitor to be named the All-American Performer. The competition winner is provided with a check for \$100,000 and also supported in making a five city tour showcasing his/her skills.

Felicity Flame competed in the show during the spring of 2006. Her act, high wire trapeze in a skimpy outfit, won lots of verbal praise from most of the judges. However, Felicity was eliminated in the competition in the second round (of ten rounds) based on unfavorable ratings relative to other contestants from both judges and audience members.

Felicity filed a claim, in federal court, against All-American Inc. on October 1, 2007. Felicity has alleged that the show is liable for both fraud and breach of contract. She claims, in particular, that whereas assurances were made that competitors would advance (or not) based on the success of their performance, as judged by the judges and audience members, instead the spring 2006 competition was determined based on other factors. In particular, Flame claims that in the spring of 2006 at least one competitor advanced based on his having engaged in a sexual liaison with a competition judge. She alleges that other competitors advanced because public relations consultants for the show told All-American Inc. that certain competitors were better for the show ratings and should be kept on the show as long as possible. The complaint does not

specify which of the five male performers in the spring 2006 allegedly slept his way to victory. Felicity has alleged that she was eliminated from the show too early because she neither slept with the judges nor exhibited the sort of flamboyance that appealed to the public relations consultants. She asserts that had she not been improperly eliminated she would have won the competition. She seeks damages in the amount of \$500,000.

Felicity held a press conference on the day she filed her complaint. Numerous television and radio programs as well as newspapers ran stories discussing Felicity's allegations. A spokesperson for All-American, Milt Moneybags, denied all the allegations and stated that a trial in the case would reveal that Felicity's allegations were unfounded. Indeed, Milt Moneybags implied that Felicity is just another overly egotistical flaky performer, who perhaps has fallen on her head one too many times. He noted that after losing a prior competition, sponsored by another company, Felicity had asserted but never proven that she was sabotaged by another competitor's having put pepper in Flame's performance outfit. Nonetheless, All-American is concerned about the allegations and fears that they may negatively affect their show's ratings and thus earnings.

All-American Inc. filed an Answer denying Felicity's claims on November 6, 2007. The Answer denies the allegations that contestants advanced or not based on sexual liaisons. The Answer also denies that contestants advanced or not based on the recommendations of any public relations consultants. The Answer states that Felicity was voted out fair and square, according to competition rules, by judges and audience members. The judge has not yet held a Rule 16 conference in the case nor set a trial date or any other dates in the case. Discovery has not yet commenced in the case.

A. (12 points) You represent All-American Inc. To date there have been no settlement discussions in the case. The district in which the claim was filed has a court-connected mediation program. All civil cases filed in the district (except habeas corpus, social security, prisoner claims, and administrative appeals) are scheduled for mediation in front of a court-employed mediator. This mediation typically takes place within a couple months after the filing of the Answer. However, disputants who believe that their claim is not well-suited to mediation can file a request for exemption from mediation.

Write a letter to your client explaining what the court-connected mediation program is, and whether you think you ought to request exemption, on their behalf, from the court-connected mediation program. If there is information you don't have that you think would be relevant to your decision, please explain what information you would want and how you might seek to obtain that information.

B. (20 points) You no longer do and never did represent All-American Inc. Instead, you are an associate at the law firm representing Mario Mendoza, a magician who competed in and won the All-American Performer contest in the spring of 2006. Mario's act, including wild animals, music, and lots of scantily clad showmanship, won rave reviews from both judges and audience

members. Mario feels that he has been maligned by Felicity Flame's allegations that she rather than he should have won the contest. He is very bothered that his victory has now been tarnished with the accusation that he may have slept his way to victory. Mario has asked your firm to consider what if any steps he can or should take with respect to Felicity's lawsuit against All-American Inc. The partner in charge of the case has asked another associate to draft a memorandum discussing whether or not it would be wise for Mario to try to intervene in the lawsuit. The partner has asked you to write a memorandum discussing whether, assuming Mario decides he wants to try to intervene in the suit, the judge is likely to grant such a request.

Question 3 (20 points)

It has often been stated that the Federal Rules of Civil Procedure ("FRCP") are "liberal" or reflect a "liberal ethos."

- A. What do people mean when they say that the FRCP are "liberal"?
- B. Do you believe the Supreme Court's recent decision in Bell v. Twombly (SS 144) threatens to change the "liberal" nature of the FRCP?
- C. Do you think that the impact you predict Bell v. Twombly will have will be good for dispute resolution in the United States?