

Grading Key: Civil Procedure, Fall 2003

BAGS # _____

Raw score _____

Final score _____

Question 1 (3 points each)

- 1(a) _____ True. This is generally true, because by having failed to include the disfavored defense of lack of personal jurisdiction in the pre-answer motion, FRCP 12(g) & (h) provide that the defense is waived. Defendant might, however, be able to raise the defense of lack of personal jurisdiction if it could convince the court that the defense was not “then available” per 12(g) at the time it made the pre-answer motion, e.g. because no reasonable defendant would have been aware of the facts on which such a defense might be based.
- 1(b) _____ False. It is impermissible to appeal from a state court to a federal trial court whether on a federal or state issue (remember Rooker Feldman doctrine & Angle). The losing party might, however, be permitted by the U.S. Supreme Court through grant of a writ of certiorari to appeal the state supreme court’s ruling on federal law to the U.S. Supreme Court.
- 1(c) _____ True. Impleader, FRCP 14, covers derivative liability and thus cannot be used where a party (as here) is entirely denying responsibility and attempting to shift the blame to a third party. Mirage should, instead, amend its answer to respond in the alternative, such that one part of the answer recognized Mirage’s potential responsibility but stated that to the extent Mirage was responsible it should be fully reimbursed by Roy, who had ultimate responsibility for proper handling and training of the tiger.
- 1(d) _____ False. To the extent an agreement is reached in mediation, the results will be just as binding as any contractual agreement. While binding arbitration has the advantage, as compared to mediation, that a binding determination will assuredly be reached, mediation can be superior in other ways, such as that it can better foster the relationship between the disputants and allow them more control over the result of the dispute resolution process.
- 1(e) _____ False. Although our adversary system generally requires attorneys to be agents for their clients, it does not allow attorneys to violate rules of procedure simply because they are so instructed by their clients. In particular, R. 11(c) and R. 37(a)(4)(A) both apparently contemplate that not only attorneys but also on occasion the parties themselves may be sanctioned for violating these rules, though note that R. 11 can’t be used in connection with discovery problems.
- 1(f) _____ True. R. 13(h) allows a claim to be made against an additional party, in connection with a counterclaim, so long as Sleaze’s claims against Patsy and Paul are sufficiently related that the requirements of R. 20 are met. Here, as Patsy and Paul allegedly participated in the tire slashing together it would seem that the two claims arise from the same transaction and occurrence and involve common questions of law or fact such that the relationship between these claims meets the requirements of R. 20 and the addition of Paul would be allowed under R. 13(h).

- 1(g) _____ True. Rule 20 likely permits Susy’s claims relating to the ping pong incident to be brought against the three separate defendants, Larry, Debbie, & Boyd, because all those claims arise out of the same transaction and occurrence and involve closely relating law and fact. Then, R. 18(a) also permits Susy to sue Debbie for the totally unrelated dental malpractice claim, because R. 18(a) allows a party to bring as many claims as it has against an opposing party, even if the claims are totally unrelated. (Note: court might bifurcate trial of the unrelated matters per R. 42).
- 1(h) _____ True. Once matters have been admitted, in an answer, they cannot be contested at trial even if they are in fact false. However, if Defendant could win a motion under R. 15 to amend the answer to deny the allegations it could then deny the allegations in court. (Note that if Defendant is not able to deny and gets “stuck” with the admission it might have a viable malpractice claim against its attorney).
- 1(i) _____ False. Luxor should only bring a counterclaim against Pat if it has a claim against Pat for monetary or injunctive relief, which is not the case here. In this case Luxor should simply include in its answer defenses recognizing Pat’s responsibility such as denying Luxor’s acts caused the harm, denying Luxor had a duty to Pat, alleging Pat’s own contributory negligence, or asserting that Pat assumed the risk of injury by getting drunk or spilling the drink.
- 1(j) _____ False. The judge does not have unfettered discretion with respect to intervention, as R. 24 provides the standard judges are to apply. When the requirements of R.24(a) are met the judge *must* allow the intervention, and while R. 24(b) does allow for the exercise of discretion it sets out factors the judge should apply in determining whether or not intervention should be permitted.
- 1(k) _____ False. Based on the asserted facts, Plaintiff and her attorney violated R. 11(b)(2) by asserting a claim that was neither viable nor even based on a “nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” Nonetheless, pursuant to R. 11(c)(2)(A), while monetary sanctions can be awarded against Plaintiff’s attorney for this violation they may not be awarded directly against plaintiff herself.
- 1(l) _____ False. Mel Mouthpiece and GGI have a good argument under attorney client and work product privilege that the EPA cannot get transcripts of interviews conducted by Mel or copies of statements Mel may have collected. Nonetheless, these privileges do not protect GGI from having respond to EPA interrogatories inquiring as to chemical usage, but would merely mean that GGI did not have to give up any surveys or reveal specific content of surveys. in responding to the interrogatories.
- 1(m) _____ True. To cure an omission of an affirmative defense the defendant need only amend the answer per R. 15. In contrast, R. 12(h) provides that the omission of a disfavored defense cannot be cured by amendment, unless the amendment is made very quickly “as of course” as provided in R. 15(a).

1(n) _____ True. Because this class action would be brought under R. 23(b)(2), there is no requirement that the court give class members an opportunity to opt in or out. However, R. 23(d)(2) would permit a court to provide for opt-in or opt-out in non- 23(b)(3) class actions, to protect the interests of those absent class members

1(o) _____ False. While it is certainly true that informal discovery can be obtained from both parties and non-parties, it is also true that some forms of formal discovery can be obtained from non-parties. In particular, R. 45 document subpoenas can be directed to non-parties, and under R. 30(a) non-parties as well as parties can be deposed.

Question 2 (A)

Note: According to the facts of this question, plaintiffs do not have a viable claim against Station Casinos. Since their best claim is against Rouse and the builders, for fraud, there is no clear way to obtain injunctive relief from any party. So, those students who spent time discussing standards for obtaining injunctive relief were off track.

_____ (2) Pros of litigation. Although no claim could be brought immediately, potential advantage of threatening litigation is that a finding of fraud might indirectly stop the proposed construction. Although plaintiffs would be suing Rouse or HHC or builders for fraud, and not suing SC directly, finding of fraud could lead Rouse or HHC to try to prevent SC from building the high towers and thereby harming plaintiffs. Decision would be public and precedential thus could serve organization's goal of preventing building of high towers by SC or anyone else. Need to consider likelihood of success . Also, need to consider ethics of threatening litigation if won't actually bring it.

_____ (2) Cons of litigation. Potentially slow, costly, and may well not succeed. As will be discussed in 2(B), getting this certified as a class action may be difficult. But, if structured as an individual matter suit may be too costly to make sense. HHC and Rouse & individual builders are big players, with lots at stake. They will likely fight hard. Complex facts and law means big legal bills, which neither Emily Enviro herself nor SHATT can necessarily afford. Right now SHATT only has 50 members, and it is unclear how many will join or whether they would be willing to pay for a lawsuit. No construction has occurred, so possible standing problems. Taking this on contingent fee only makes sense if case involves lots of plaintiffs, which may or may not be possible, as discussed below.

_____ (2) Pros of mediation/facilitation. Mediation may make more sense. Perhaps by getting together and negotiating with the help of a trained mediator, parties can reach a mutually amicable settlement. One major advantage of mediation is that all the parties (SHATT, HHC, Rouse & SC) could be at the negotiating table. Maybe there are ways to compromise, such as building somewhat smaller towers or placing or designing them in ways that are less offensive to Emily et al. If it works, mediation could be a lot cheaper & quicker than this likely complex lawsuit.

_____ (2) Cons of mediation/facilitation. If mediation is tried and fails, Emily et al will have wasted whatever time and money they spent in the mediation process. Thus, need to

consider mediator's fee and attorney's fee. Also, there may be non-legal costs to Emily et al, not only potential of wasted time but also emotional costs and political costs, e.g. to organization. Mediation is less likely to work if HHC, Rouse, & SC feel they have nothing to lose by not mediating. Thus, pressure, from potential lawsuit or from political action, may be key to decrease "cons" of mediation.

_____ (2) Arbitration likely makes no sense. Potential defendants are not likely to agree with it. It does not have potential benefits of mediation/facilitation of bringing parties all together and working amicably. Not clear it would be real quick or cheap

._____ (2) Publicity. Should think about potential power of non-legal action, such as using press or bullhorns or boycotts or political tools such as influencing county commission. These are likely to be more effective and cheaper than legal methods in a case like this. SC does not want bad relationship with community.

_____ (3) Conclusion. I would recommend that litigation does not look like a great option. It might be worth delicately threatening litigation, as a way to get to mediation/facilitation, but probably it will be just as effective to use political/public pressure as a way to get to mediation. Mediation/facilitation would seem to be the form of dispute resolution most likely to yield good solution to this problem.

(?) Good suggestions for factual/legal research.

Question 2(B)

_____ (2) Pros class action. If it works, class action has many benefits. More efficient use of resources. More potential bang for buck. Fear factor may lead Rouse or builders to settle early on reasonable terms. Also, can gain publicity and clout that can help build organization. For attorney, class action can help build own reputation and potentially bring in nice fee.

_____ (6) Cons class action. It is not at all clear this is certifiable as a class. The R. 23(a) requirement of numerosity can easily be met, but commonality, typicality, and adequacy of representation could be problematic. We don't know that much about the facts, yet, but at least potentially different statements/documents were provided to different home owners. We know 4 different builders were involved. Even to extent all representations were from Rouse or HHC, they may have changed over time. Also, different plaintiffs may have very different damages claims. Some will some won't have obstructed views. Some will some won't have psychic harm. Some residents may want the big towers. Thus, could have problems showing plaintiffs have enough in common, that named plaintiffs' claims are typical, or that named plaintiffs would be adequate reps. Also don't know about adequacy of firm, in terms of funding/experience. As for R. 23(b), this would have to be certified under 23(b)(3), because it there is no real risk of inconsistent adjudications (23(b)(1) and this is not merely a suit seeking an injunction. For reasons discussed, court may not find common questions of law or fact predominate, and that class action is superior. Even if class is certified, it could be headache for plaintiffs, as they would have to deal with expensive slow processes such as certification, notice, and

approval of any settlement.

(4) Joinder of multiple plaintiffs' claims (as was done in Anderson) looks much more promising. This would be allowed so long as plaintiffs can meet requirements of R. 20, that they seek right to relief "arising out of the same t & o" and common questions of law or fact will arise. While it is not certain court would find this test was met, certainly it is a lot more likely than that court would certify class action. All homeowners in suit would be claiming fraud based on misstatements re: building of casino. While there might be variations among specific misrepresentations, if there were sufficient connections or instructions from the top, there would be common questions of law and fact. Court could permit joinder despite differences in damages. Advantage of joining is efficiency: more plaintiffs to pay fees; more potential damages from which attorney could take contingent fee. Also, bigger suit may increase likelihood of good speedy settlement. Attorney would have to sign up each plaintiff, as client, and get each plaintiff's approval of any settlement, which could be a pain, but this seems inevitable given slim odds of class certification. This is best approach of the three.

(3) Individual suit is in some ways the easiest way to go. No need to worry about getting court approval of joinder of claims etc. No need to worry about multiple plaintiffs with different views. But, case may not be feasible, economically, as individual matter. Though the houses in Summerlin are worth \$250,000 - \$700,000, clearly the value of a fraud suit would be far lower. What % of the house price has been taken? Even if 5% (probably a fairly high estimate) that is just \$25,000 on a house worth \$500,000. Nor is case a sure winner. Yet, case will be complex and hard fought, with odds of winning at best 50%. So, only the independently wealthy or crazy home owner or lawyer would probably want to take on this suit with expected winnings of just \$12,500, at most.

Question 2(C)

(3) Potential courses of actions: grant motion to compel in full per R. 37; deny motion to compel in full per R. 37; grant motion in part & deny in part; grant protective order in whole or in part per R. 26(c) (see R. 37(a)(4)(B), for example requiring that certain documents be disclosed only in part or blacking out names etc.; conduct an *in camera* review in order to decide how to proceed

(5) In deciding how to rule on this motion the court should look primarily at the relevancy standards set out in R. 26(b), together with the protective order standards set out in R. 26(c). R. 26(b) provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party..." It further states that "for good cause" court may order discovery of any matter relevant to the subject matter of the litigation. But, 26(c) also instructs the court to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." If the court decides to grant the motion to compel in whole or in part it should look to R. 37(a)(4) to consider whether sanctions are appropriate. Here, court could order loser to pay attorney fees if it felt they did not make arguments that were substantially justified. Parties must have attempted conciliation before filing motion.

_____ (4) My tentative recommendation is that the court grant the request for production as to the second set of documents but deny or at least narrow the first request. The second set looks to be highly relevant and not privileged or protected by work product doctrine. Clearly, to prove fraud, plaintiffs would need to get those kinds of documents. They are highly relevant. And, request does not seem burdensome. In contrast, first request seems overly broad: all kinds of irrelevant documents might discuss or mention casino plans, and not be pertinent e.g. to how large a structure was planned. This will be burdensome, because it will likely be huge numbers of documents. There also are no time limits. If plaintiffs won't narrow the request, I would suggest you narrow in your ruling (explain how).

Question 3

_____ (2) Kinds of rules that limit adversarial zeal are R. 11, R. 37, discovery rules requiring production, R. 16 (requiring conferences and urging settlement). (Explain how they can limit adversarial zeal).

_____ (5) Arguments (or countering arguments) agreeing with statement. Excessive adversarialness can be very costly and cause system to be too slow. Truth may not result, due to lack of access, slow speed, possible dishonest behavior. Plus, such an adversarial system may not lead to justice, whether defined in terms of results or fair process or amicable future relationships. Limits that have been placed on adversarialness can help but are ultimately bound to fail. Attorneys will keep looking for loopholes. Possible alternatives to adversarial system: inquisitorial (more like Europe or elsewhere), e.g. with court-appointed experts or judge playing more active role; more options for lawyers to represent both sides of a dispute; more use of adr

_____ (5) Arguments (or countering arguments) disagreeing with statement. Adversarial system may not be perfect but is better than alternatives. Can argue rules (which) don't really undercut adversarial system, but just set appropriate limits (explain). More reforms can be made (e.g. what) but need not/should not get rid of adversarial system. Possible restructuring is not feasible, at least in our culture. ADR alone can't work. Inquisitorial system gives too much power to judges.