

**UNIVERSITY OF HOUSTON
LAW CENTER**

Fall, Semester, 2002

Civil Procedure I

Friday, December 13, 2002
Professor Hoffman

Time: 9:00 a.m. - 1:00 p.m.
Hours: 4

GENERAL INSTRUCTIONS

All checked () items apply to this exam:

<input type="checkbox"/> <input type="checkbox"/> Open Book <input type="checkbox"/> Closed Book <input type="checkbox"/> Partial Open Book <i>(see specific instructions)</i> <input type="checkbox"/> Scantron needed <input type="checkbox"/> Bluebooks needed <input type="checkbox"/> Supplemental Materials <i>(separate from exam)</i> <input type="checkbox"/> TURN INTO REGISTRAR when finished <input type="checkbox"/> <input type="checkbox"/> Collected by Proctor	
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?? If you have any questions during the exam, see Catherine Wright in 40 TUII.

**In the Space Below, write your exam number and place the mark
“/s/” next to it. This will acknowledge that you attended at least
80% of the scheduled classes this semester for this course.**

DO NOT WRITE OR SIGN YOUR NAME IN THIS SPACE.

PROCEDURE I**PROCEDURE II****Instructions**

This examination is open book. You may bring any materials in with you.

The examination is worth a total of one hundred points. The first section contains five short answer essay questions. The section is worth a total of fifty percent of your grade, so each question is worth ten percent. The second section contains two longer essay questions. They are worth 25% each.

You will not need any blue books for the examination. You will write on—and *only* on—the exam pages that I give to you. You must only write on the lines that I have given. Write on every line (do not skip lines) but do not write on the back, between the lines, on the side or any place else. Be sure to write as legibly as you can. For students who will type: I will provide you with the word limit for each question. If you exceed the word limit on any question, I will treat it just as I would a student who handwrites outside of the lines I have given on the exam. Finally, for all students, remember to write your examination number on the top of every page of your exam copy.

I have tried to write an exam that will enable you to spend time thinking about your answer, drafting or outlining your answer, and then finally writing your final answer, all within the time limit given. I will have scratch paper in the room for you. The point is to encourage you to think and to analyze the question carefully; not merely to provide me with the first thought that comes to mind and to write as fast as you possibly can, for as long as time permits. The goal should be short, clearly articulated ideas -- not heaps and heaps of words. The amount of time you spend on any question is entirely up to you, but I would strongly suggest that you allocate your time to correlate with the relative values of the questions

I have handed out this instruction page to you before the date of the final examination, because I wanted to try to reduce—as much as possible—uncertainty and anxiety on test day about how the examination will look, and what is expected of you. I encourage you to read the instructions over carefully, and make certain that when you finally sit down to take the examination, you have already familiarized yourself fully with all of these instructions so that you do not have to spend any time re-reading the instructions on exam day.

Good luck.

Short Answer Essay Questions

(There are five questions in this section and each is worth 10% of the total grade)

1. In May 2001, Mary Lou Scott was badly injured when a car in which she was a passenger crashed. Ms. Scott filed suit against XYZ Company, the manufacturer of the tire, alleging that defects in the tire design caused the accident. She has noticed the deposition of XYZ's general counsel for next month. You are an associate in a private law firm retained by XYZ. In interviewing the general counsel of the company you learn that he plays golf once a month with the company's chief of engineering and has done so for the last ten years. You learn further that at their last outing together, the chief of engineering informed the general counsel that he, the chief of engineering, had raised questions with a now-deceased XYZ vice-president concerning the safety of the company's X-12 tire in 1998, two years before the product was sold to the public.

Is the general counsel's conversation with the Chief of Engineering privileged from disclosure? Must the general counsel testify about his conversation if he is asked about it at the deposition? Write a memorandum to the file addressing these questions.

- 2. What are all of the reasons that explain why motions under Rule 12(b)(6) are granted infrequently, relative to Rule 56 motions?

Lined area for writing an answer to question 2.

the heater and the company now refuses either to fix the heater and/or to refund her money.

In November 2002, Ms. Chillingsworth, an ever-faithful customer of Sears (notwithstanding her legal spat with them over the water heater) buys a washer and dryer set to replace her old ones. She buys these products directly from her neighborhood store and they are delivered later that same month. In December 2002, Ms. Chillingsworth seeks to amend her lawsuit to assert a new claim for damages as a result of what she alleges is a defective dryer design that has ruined many of her best clothes.

Ohio’s state rules of civil procedure are identical to the federal rules of civil procedure and for purposes of this question you may safely cite any federal cases interpreting a federal rule of civil procedure as though they were decisions by an Ohio state court. If you are the state district court judge, would you allow or disallow Ms. Chillingsworth’s December 2002 amendment? Give a full explanation of your reasoning.

4. Joan was born and raised in New York City. After graduating from college in 2001, she moved to Detroit, Michigan, where she lived at the time of her accident. In May 2002, she was visiting friends in New York. While walking down Broadway Avenue, she was hit by a passing bicyclist. The bicyclist was employed by the Peter Pan Delivery Service. Peter Pan was incorporated in Delaware in 1991 as a package delivery service for pick up and delivery entirely within the five boroughs of New York City. The company did well enough for about eight years, but by the early months of 2000 business had slowed substantially and the company found itself on hard times. To remain afloat, it bought some passenger vans and diversified its business to include transport of customers between the Newark Airport in New Jersey and New York City. It continued to provide package delivery to customers within New York City, but on a reduced scale from the volume it had done before .

Joan brought suit in the United States District Court for the District of Delaware (there is only one federal district in Delaware) against the bicyclist, individually (New Jersey resident), and against Peter Pan. The company has filed a pre-answer motion under Rule 12(b)(3) challenging venue in the federal district court in Delaware. A month after filing this motion, but before the Court rules on it, Peter Pan files another motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction over it in the Delaware federal court.

How should the Court rule on these motions?

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5. You are a member of a distinguished committee of the Association of the Bar of the State of Never-Never Land that has been considering a proposal to amend its state rule of civil procedure governing pleading requirements. Its existing rule is identical to Rule 8(a) of the Federal Rules of Civil Procedure. The proposed pleading rule would read:

“(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross -claim, or third -party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already had jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, **which statement shall contain the facts constituting a cause of action**, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.”

You note that the only difference between the proposed rule and current Rule 8(a) of the Federal Rules of Civil Procedure is the additional language, highlighted in bold. Assume that all other Never-Never Land rules of civil procedure are identical to the existing Federal Rules of Civil Procedure. Prepare a report recommending adoption or rejection

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of the proposed amendment, dealing with all of the arguments—pro and con—that you believe are significant.

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Long Answer Essay Question No. 1
(worth 25% of the total grade)

A group of Armenian citizens designated John Doe 1 - 22 have brought a civil lawsuit in Federal District Court for the Central District of California against the XYZ Oil Company, Inc., the Democracy Restoration Council ("DRC"), and individuals Ms. Joan Smith, the President of XYZ, and Mr. Girn Blanston, the Chief Executive Officer of XYZ. All of the plaintiffs are citizens and subjects of the nation of Armenia. They are currently residing as refugees in Houston, Texas, and are awaiting decisions by the US Immigration and Naturalization Service on their applications for asylum. If they are granted asylum, the plaintiffs intend to remain in Houston and eventually to apply for United States citizenship. XYZ is a Delaware corporation with its principal place of business in Los Angeles. Smith and Blanston are citizens and residents of Los Angeles. The DRC is a military junta that seized control in Armenia in 1988 and is currently the only governing authority in that nation. Acting through its ministry of energy, the DRC produces and sells energy products such as oil and natural gas on the international market.

The plaintiffs' complaint seeks compensatory and punitive damages under federal law (the Torture Victims Protection Act or TVPA). The TVPA was enacted by Congress in 1991. The preamble to the Act provides that it was passed "to carry out obligations of the United States

under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”

Under the TVPA, any individual who subjects another individual “to torture shall, in a civil action, be liable for damages to that individual.” For purposes of the Act, torture is defined as “any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted on that individual for such purposes as [i] obtaining . . . information or a confession, [ii] punishing that individual for an act that individual or a third person has committed or is suspected of having committed, [iii] intimidating or coercing that individual or a third person, or [iv] for any reason based on discrimination of any kind.”

In this case, the Plaintiffs seek damages for torture, forced labor, false imprisonment, rape, assault, battery, and intentional infliction of emotional distress. Defendants allegedly perpetrated these acts on plaintiffs in connection with a joint venture to construct a port and pipeline for the transportation of natural gas through the Chocata region of Armenia to Turkey. Specifically, the complaint alleges that the plaintiffs, who were agricultural workers residing in the Chocata region in Armenia prior to their relocation to Houston, were forced by DRC soldiers to relocate their villages to the pipeline construction project, and then to clear forest, level the pipeline route, build headquarters for pipeline employees, prepare military outposts, and carry supplies and equipment. The specific torts for which plaintiffs seek relief were allegedly perpetrated by DRC soldiers as part of a program of violence and intimidation that the defendants jointly pursued in order to effectuate their forced labor practices.

Three weeks into discovery, the plaintiffs move to amend the complaint to join a new defendant, David Pullman, under Rule 20(a). The proposed amendment alleges that Pullman is a citizen and resident of Houston. Until June of 2000, he resided in California, where he was employed as XYZ’s director of human resources. The proposed amendment alleges that on a number of occasions while he was a XYZ employee, Pullman conferred with DRC officials by phone, fax, e-mail, and in face-to-face meetings in Amsterdam and Singapore, for the purpose of making detailed plans for relocating Armenian agricultural workers to the pipeline construction site and securing their forced labor on the joint pipeline enterprise. The plaintiffs seek relief against Pullman under the TVPA and under state common law for battery and wrongful imprisonment.

If Defendants XYZ, DRC, Smith and Blanton move to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, how should the Court rule? If Defendant Pullman moves to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, how should the Court rule?

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Long Answer Essay Question No. 2
(worth 25% of the total grade)

Jacob Pasternack files suit in state court in Oregon on November 1, 2002 against David Dunlop, a Texas resident, alleging that Dunlap breached a contract that he entered with Pasternack, on an on-line auction website. According to Pasternack's complaint, Dunlap was to pay \$12,000 for a rare coin that Pasternack owned. Pasternack claims that he mailed Dunlap the coin but Dunlap has returned it and now refuses to pay. Dunlap maintains that the coin is a fake and, thus, refuses to pay for it. On November 4, Dunlap is served with citation by regular mail.

What option(s) are available to Dunlap now under the Federal Rules of Civil Procedure? Discuss the advantages and disadvantages of each procedural option you raise. Do not, however, spend any time talking about the merits of the substantive contract claim or on his likelihood of success on the merits of any procedural option he might pursue. In other words, I have intentionally given you insufficient facts to be able to assess the likelihood that Dunlap would succeed with any argument he might make. The main purposes of this question are for you to (i) list all of the options available to Dunlap, and (ii) analyze the benefits and detriments of employing any of the available options you list.

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Lined writing area consisting of 24 horizontal lines.