

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Each of the four questions will be weighted equally for grading purposes. If there are individual parts within a question, each part within the question will be weighted equally.

Please write legibly, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your social security number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your social security number is on each one, and insert all others into the first one. The Federal Rules of Civil Procedure apply to all questions. You may assume, if relevant, that any American state has a long-arm statute identical to that of Illinois which is printed at pages 697 and 703 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

FINAL EXAMINATION

CIVIL PROCEDURE
Mr. Martin
December 11, 2000

All is not well at Millard Filmore School of Law ("Filmore"), a small law school located in an unattractive city in upstate New York, within the territorial jurisdiction of the United States District Court for the Northern District of New York. Answer each of the following sub-questions "Yes" or "No," followed by a brief explanation. Your one-word answer, "Yes" or "No," counts as forty per cent of each sub-question. Your brief explanation counts as the remaining sixty per cent of each sub-question.

1. Five students from Massachusetts sued Filmore in the United States District Court for the Northern District of New York claiming that Filmore's in-state tuition differential unlawfully burdens interstate commerce in violation of the Commerce Clause of the United States Constitution. Filmore charges in-state students \$20,000 per year. It charges out-of-state students \$25,000 per year. Filmore filed a pre-answer motion to dismiss under Rule 12(b)(1). Should the judge allow this motion?

2. In 1998 the course in Constitutional Law was taught by Visiting Professor Direkt S. Toppel, a citizen of Sweden who is a renowned authority on comparative constitutional law. Unfortunately, Professor Toppel lectured in Swedish which none of the students understood. There was no examination in the course. Instead, each student was required to turn in a book report. All of the students received grades of "A." Sixteen out-of-state students sued Filmore for breach of contract and educational malpractice, seeking refunds

QUESTION ONE

are from New York).

District of New York? (Ninety per cent of the students at Filmore
tuition. Can this class action be maintained in the Northern
demanding refunds to all students of all of the spring term
States District Court for the Northern District of New York
of the class of all Filmore students, sued Filmore in the United
grades. McSwiney, a resident of Massachusetts, as representative
term examinations were given and students received no spring term
for coffee in the faculty lounge. Because of the strike, no spring
strike to protest the Dean's decision to start charging by the cup
5. In the spring semester, 2000, the entire faculty went on

the United States District Court for the District of Rhode Island?
and emotional distress damages. Can Filmore now remove the case to
Rhode Island state court for \$100,000 in educational malpractice
of your actual answer. Salem counterclaimed against Filmore in the
4. Assume that the answer to question 4 is "no," regardless

Island?

to the United States District Court for the District of Rhode
brought in a Rhode Island state court. Can Salem remove this case
a fire started by Salem in the student smoking lounge. Suit was
Rhode Island, seeking to recover \$100,000 in damages on account of
3. Filmore sued Winston Salem, a student and resident of

United States District Court for the Northern District of New York?
Constitutional Law course). Can their claim be maintained in the
of \$5000 each (the fraction of their tuition attributable to the

44

7. Professor Felicia Scattergood is suing the Dean for specific performance of a contract. The Dean promised Professor Scattergood that she would be the first professor to hold the newly-endowed Bill Clinton Chair in Family Law. Professor Scattergood, who lives in Vermont, recently entered into a Vermont civil union (equivalent to marriage) with her long-time same-sex partner. Conservative members of Filmore's Board of Trustees forced the Dean to rescind Scattergood's appointment, insisting that no openly gay person could be permitted to teach Family Law at Filmore. Can the Filmore students' gay, lesbian, bisexual and Middlesex Alliance intervene in Professor Scattergood's suit against the Dean?

6. Ray's Judicata is a bar and grille next to the Filmore campus. Students often repair to Ray's after the library closes for the evening. On a recent night members of the Green Student Caucus ("GSC") got into a rumble with members of the Millard Filmore Capitalist Club ("MFC") over global warming. Tempered and furniture flew. Flo Fogbound, a GSC member, was severely injured when Herb Headstone of the MFC broke a chair over her head. Flo (from Connecticut) is suing Herb (from New York) in the United States District Court for the Northern District of New York claiming damages in excess of \$75,000. Can Herb plead all of the members of the GSC and the MFC who were at Ray's that night, seeking their *pro rata* contributions to any judgment that may be entered against him?

"New Kids on the Block," or present a concert under the name rights of exclusive use. If you record an album under the name names. The law treats these names as trademarks and recognizes Performing groups litigate aggressively to protect their draws audiences to clubs and concert halls.

that sells records, sells associated merchandise of all sorts, and asset that the performer or group will ever own. It is the name tainer's or group's name is probably the most important individual word, is "profits." In the entertainment business, an enter- "What's in a name?" Shakespeare asked. The answer, in one

QUESTION TWO

those students. Must Rankle produce this information? in Extremely Complex Litigation and all of the grades awarded to production of all of the examinations taken by all of the students statement was the grade of "F." In discovery, Burke demanded reputation) in a New York state court. The allegedly libellous Rankle for libel (written false statement that is injurious to Bart Rankle's class on Extremely Complex Litigation: Burke sued 9. Student Dirk Burke received a grade of "F" in Professor the chair?

interlead and determine, between themselves, who is entitled to rid of this problem, require Scattergood and Stentorian to the new chair to Professor Stentorian. Can the Dean, hoping to get rescinding Professor Scattergood's appointment, the Dean promised Chair in Family Law and its assured \$150,000 salary. After 8. Professor Turgid Stentorian also covets the Bill Clinton

"Boston Symphony Orchestra," you can expect to receive a summons and complaint for injunctive relief and damages.

The Ohio Blue Tips were a mediocre rock group that performed local club dates in the Boston area in the nineteen-nineties. The group consisted of Smith, a bass player, Smythe, a keyboard player, Smoother, a saxophone player and Smathers, a drummer. In 1995 the Ohio Blue Tip Match Company, owner of the match trademark "Ohio Blue Tips," sued Smith, Smythe, Smoother and Smathers in a Massachusetts state court seeking an injunction to forbid the group from using this name. (Like many performing groups, the Ohio Blue Tips never formalized their relationship by adopting a corporate form of business organization or even a written partnership agreement. Therefore the match company had to, and did, sue each member of the group individually). The match company's request for an injunction was denied on orthodox trademark law principles because, the court found, the two users of the mark were not competing in the same marketplace. Final judgment was entered against the match company. This case is called Match Co. v. Smith, et als.

In 1997 the Ohio Blue Tips added a lead guitar and vocalist, Bobby Stonefinger. Bobby had two talents that were to raise the Ohio Blue Tips to the top of the top 40's charts: first, effortlessly command of the obscene lyrics that rock fans increasingly want to hear and, second, excellent contacts in the entertainment industry. Soon the Ohio Blue Tips were playing in larger and more lucrative venues. They started talking about recording a CD.

Smoothie, the sax player, said he didn't want to be associated on a CD with the words that came out of Bobby's mouth. Bobby invited Smoothie to leave the group. Smoothie left. Smoothie recruited three other musicians with whom he started playing gigs under the name "The Real Ohio Blue Tips."

Smith, Smythe and Smathers, as individuals, sued Smoothie and the members of the Real Ohio Blue Tips seeking an injunction against the latter group's use of the name. The Court's final judgment permanently enjoined Smoothie and his group from using the name. This decision was also based on orthodox trademark law principles because, between competitors, the first in time to use the mark has the right to exclude others from using it. The judge found that the band name "Ohio Blue Tips" was first put in use by Smith, Smythe, Smoothie and Smathers in July, 1991. This case is called Smith, et als, v. Smoothie, et als. (Smoothie's group then changed its name to the Rhode Island Red Hens).

Bobby recognized that Smith, Smythe and Smathers were not able to produce the heavy metal sound that modern rock fans demand for the better impairment of their hearing. He told the three that they could leave the band, or he would. Smith, Smythe and Smathers chose to leave the band. Bobby replaced them with three heavy metal musicians named Brown, Braun and Bruno. Bobby then hooked the group up with a great record producer. They recorded a CD under the name "Ohio Blue Tips" that sold ten million copies and made everybody rich.

result? why?

plaintiff's motion for summary judgment in the New York court, what sought summary judgment against the New York group. On the business to use the name "Ohio Blue Tips." On this assertion they conclusively established their exclusive right in the music als, v. Smothe, et als. They asserted that these final judgments other relevant papers in Match Co. v. Smith, et als, and Smith, et their complaint they attached copies of the final judgments and injunction to prevent the New York group from using the name. To the New York group in a state court in New York seeking an of New York." Bobby, Brown, Braun and Bruno sued the members of alike music at clubs in Brooklyn under the name "The Ohio Blue Tips Bobby heard about a group in New York that was playing sound-

Part B.

result? why?

et als. On the defendants' motion for summary judgment, what final judgment and other relevant papers from Match Co. v. Smith, defenses. Attached to their motion for summary judgment were the collateral estoppel. They moved for summary judgment on these answered raising the affirmative defenses of res judicata and injunction against use of the name and damages. The defendants The match company sued Bobby, Brown, Braun and Bruno seeking an scale use of its name in association with Bobby's dirty lyrics. The Ohio Blue Tip Match Company grew concerned about large-

Part A.

1. There are so many of these organizations and circuits that it is possible for quite a few boxers to be simultaneously world champions in a given weight class.

Mike Spiker is a professional boxer from Ghana. At least some of the organizations and circuits that control professional boxing recognize Spiker as world champion in the upper-middle weight class. In 1993, in Ghana, Spiker entered into a management agreement with Ghanaian boxing manager Abdul Al-Anon, in

QUESTION THREE

Meanwhile Smyth, Smythe and Smathers went back to playing gigs in Boston clubs under the name "The Original Ohio Blue Tips." Bobby, Brown, Braun and Bruno sued Smyth, Smythe and Smathers in a Massachusetts state court seeking an injunction to prevent the later's use of the name. Smyth, Smythe and Smathers answered raising the affirmative defenses of res judicata and collateral estoppel. Smyth, Smythe and Smathers also counterclaimed seeking an injunction to prohibit Bobby, Brown, Braun and Bruno from using the name. Bobby, Brown, Braun and Bruno replied to the counterclaim raising the affirmative defenses of res judicata and collateral estoppel. Each side moved for summary judgment in its favor on these claims and defenses. Each side asserted that the final judgments and necessary findings in Match Co. v. Smyth, et als, and Smyth, et als, v. Smothe, et als, supported its own claims and defenses. On the cross-motions for summary judgment, what result? why?

turn, entered into a co-management agreement with American boxing manager Tee Total of Maryland. According to the terms of the co-management agreement, Total was to receive a percentage of Spiker's earnings from prizefighting and from Spiker's lucrative endorsement contracts. Spiker consented to these arrangements.

In 1996 Spiker fired Total and hired a new manager. Total recognizes that a personal service contract cannot be specifically enforced. Total, however, claims that his firing was a breach of the co-management agreement, and that he is entitled to damages for breach of his contract as for any breach of contract. He claims as damages the percentage of Spiker's earnings which he (Total) would have received had the contract not been breached, amounting to \$250,000.

How to assert this claim against a Ghanaian defendant? In 1999 Spiker successfully defended his world title in Atlantic City, New Jersey. Spiker earned \$1,000,000 for the defense of his title and, in the aftermath of his success, he extended his endorsement contracts to several new American clients. Spiker also fought three other bouts in the United States after firing Total, in Florida, Nevada and California.

Total sued Spiker in the United States District Court for the District of New Jersey. Spiker was served with the summons and complaint, in Ghana, by a Ghanaian bailiff in the manner prescribed by the law of Ghana for service of process in the courts of general jurisdiction of Ghana. (Service of process in this manner complied with F. R. Civ. P. Rule 4[f][2][A]).

GO ON TO THE NEXT PAGE

Spiker engaged an American lawyer to represent him in the federal court in New Jersey. The lawyer filed a pre-answer motion under F. R. Civ. P. Rule 12(b) (2) asserting that the court lacked jurisdiction over Spiker's person. The lawyer also filed a motion to dismiss the complaint on forum non conveniens grounds.

To the court, Spiker's lawyer argues that the contract was made and breached (if it was breached) in Ghana. Ghanaian law, with which the American court will be unfamiliar, will control the decision. Also, most of Spiker's witnesses are Ghanaians who will have to come to the United States for any trial, at great and unfair expense to the defendant. Spiker has no assets in the United States and any judgment that Total may secure against him will be uncollectible in this country. The court should not participate in an exercise in futility. Finally, Spiker's lawyer argues, not only is the defendant Spiker a citizen and resident of a foreign country but, also, Total is not even a resident of New Jersey. New Jersey therefore has no interest in the outcome of the dispute.

What arguments will Total's lawyer make in opposition to Spiker's motions to dismiss? In addition to responding to Spiker's arguments in the previous paragraph, you should consider all of Total's grounds for asserting that jurisdiction is proper in the United States District Court for the District of New Jersey.

Mr. and Mrs. Malarkey bought a recreational vehicle called a Fat Boy made by the Overwate Coach Co. ("Overwate") of Overwate, West Dakota. The Fat Boy was nothing but trouble. First the air conditioning wouldn't work. Then the pressurized water tank de-pressurized and the Malarkeys couldn't take their showers. The refrigerator wouldn't keep the beer cold. The sofa bed jammed in the open position. The handle fell off the dishwasher. Every week, it seemed, the Malarkeys were taking the Fat Boy back to the dealership to have some new glitch fixed. Overwate denied all responsibility for the defects. In addition, Overwate's customer service representatives were surly and unresponsive. Finally the Malarkeys could take it no longer. They sued Overwate in the United States District Court for the District of West Dakota under the federal Magnusson-Moss Warranty Act, 15 U.S.C. 2301 et seq. To their complaint they added West Dakota state law claims of negligence, strict product liability and breach of warranty. The state law claims are within the federal court's purview (now called "supplemental") jurisdiction. A jury trial was demanded.

The Malarkeys thought that they should teach Overwate a lesson about the consequences of poor customer relations. In addition to compensatory damages for breach of warranty on their state law and Magnusson-Moss Warranty Act claims, the Malarkeys sought punitive damages on their negligent negligence and strict product liability claims.

2. Massachusetts is one of the exceptions.

44

No claim for punitive damages shall be accepted in any court of this state until the plaintiff shall have filed in court a statement on oath of facts which, if proven, would entitle the plaintiff to recover punitive damages, and the court shall have found that there is a reasonable basis for the plaintiff's claim.

(Note that the requirement for a statement "on oath" means that a plaintiff can be prosecuted for perjury if he or she files a statement containing unfounded or exaggerated claims).

In its 1998 Tort Reform and Insurance Act, West Dakota limited punitive damages to three times actual damages, imposed restrictions on discovery relating to defendants' net worth, and introduced the following special requirement:

Punitive damages in tort are available in all but four or five American states.² Abolition or curtailment of punitive damages, especially in product liability actions, is high on the tort reform agenda that has been promoted for the past decade by American manufacturing and insurance interests. Economists argue that punitive damages are dysfunctional. The United States Supreme Court has found that there are constitutional Due Process limitations on the states' laws authorizing punitive damages, although it hasn't said exactly what those limitations are. Several American jurisdictions have enacted legislation in recent years restricting punitive damages. One of these jurisdictions is West Dakota.

4

END OF EXAMINATION

Mr. and Mrs. Malarkey have not filed this statement in the federal district court nor, on the facts set out above, can they do so. Overwaite moves to dismiss the Malarkeys' pendent state claims for want of this statement. The Malarkeys argue that the Court should deny this motion because the West Dakota statute amounts to a special pleading requirement that is contrary to F. R. Civ. P. Rules 8(a)(2), 8(a)(3) and 9(g).

(The argument for Overwaite's motion to dismiss is a precursor to other arguments that lie down the road in this or other federal court cases in West Dakota, specifically that restrictions on discovery of defendants' net worth contravene F. R. Civ. P. Rule 26[b][1], and that restrictions on awards of punitive damages abridge the right to trial by jury as guaranteed by the Seventh Amendment).

How should the judge rule on Overwaite's motion to dismiss the Malarkeys' pendent state law claims? Why?