

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted for grading purposes in accordance with the amount of time that is suggested for each question. 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 8, 2003

house where faculty and students smoked marijuana. Voice of conference, Stentorian accused the Dean of hosting parties at his reporter for the student newspaper Voice of Filmore. At the press person to attend was Dirk Burke, a second-year student who was a Professor Stentorian called a press conference. The only news salary. The Dean fired Stentorian.

assistant professor to do Stentorian's job at half of Stentorian's observed that, if he fired Stentorian, he could hire a new reason of over one million dollars in tuition money. The Dean also that the loss of sixty-five students would create a crisis by The Dean consulted his chief financial officer who advised to give full recognition to their transfer credits.

State University law school at Stony Broke which had already agreed not fire Stentorian, all sixty-five students would transfer to the The students' demand went on to threaten that, if the Dean did the yawning gates of hell."

such as admonishing female students to cross their legs and "close the demand, was guilty of unacceptable sexist statements in class Professor Turgid Stentorian from the faculty. Stentorian, stated a written demand to the Dean calling on the Dean to dismiss close of the last academic year, sixty-five law students presented school located in an unattractive city in upstate New York. At the All is not well at Willard Filmore School of Law, a small law

PART "B" OF THIS QUESTION BEGINS ON THE NEXT PAGE

3. I have hired a private detective to check out Stentorian and Burke and I expect that he will come up with some dirt that we can use to impeach their testimony. Will Stentorian and Burke be able to discover the existence and contents of the detective's written report to us? Explain.

2. I would like to have Stentorian tested to determine if he really can recognize the odor of marijuana, especially when it is mixed with other party odors such as alcohol, tobacco and perfume. There must be a scientist or a doctor somewhere who would know how to conduct such a test. How do we do this? Explain.

1. I would like to get the names of the sources for Burke's story (other than Stentorian) and the names of people who refused to speak to Burke about the story. How can we get them? Explain.

I'm anticipating a battle for discovery. Please tell me the best way to get the following information:

Professor Rankle. He sends you the following memorandum:  
defamation suit. You are a third-year student assistant to The Dean has asked Professor Bart Rankle to represent him in the United States District Court for the Northern District of New York. Dean being a resident of Vermont, suit will be brought in the defamation (false statement which is injurious to reputation). The Dean decided to sue Stentorian and Voice of Filmore for

Part A.

The Dean decided to sue Stentorian and Voice of Filmore for defamation (false statement which is injurious to reputation). The Dean being a resident of Vermont, suit will be brought in the United States District Court for the Northern District of New York. The Dean has asked Professor Bart Rankle to represent him in the defamation suit. You are a third-year student assistant to their names be used.  
confirmed marijuana use at the Dean's house, but had refused to let on several occasions. The story stated that other witnesses as saying that he smelled marijuana upon entering the Dean's house Filmore reported this as a news story. The story quoted Stentorian

Handwritten notes: "25" and "26" with arrows pointing to the questions.

Phoebe B. Beebe of Andover, Massachusetts, was driving on Essex Street in Andover when her vehicle's steering mechanism failed. She collided with a utility pole which broke off and fell. Phoebe was seriously injured. Also injured was Rex Dexter, a pedestrian, who was knocked down and crushed by the falling utility pole. Dexter has a home in Maine but resides during the school year in Andover where he attends a certain well-known law school. Phoebe was driving a popular new sport-utility vehicle called a Rangebuster. Phoebe had just bought the Rangebuster from State Line Auto ("State Line"), a retailer that is incorporated in New Hampshire and has its only place of business in Salem, New Hampshire, just over the Massachusetts state line. At the time of the purchase, Phoebe was on a brief business trip to New Hampshire.

QUESTION TWO

Early in your researching you discover a New York statute which creates a qualified "shield" for the news media:

Before any editor, reporter or other writer for any newspaper, or any publisher of any newspaper, shall be required to disclose the identity of any person who was a source of information for an article appearing in such newspaper, the person seeking such identity shall make a special showing, on evidence, that the article was published in bad faith or with malice.

You show this statute to Professor Rankle. "This shoots the hell out of discovery from Burke," he exclaims. "Will the federal court apply this law, which seems directly contrary to Federal Rules 9(b) and 26(b)(1)? Write me a memo." Write the memo.

1. Massachusetts will collect the sales tax when Phoebe first registers the Rangebuster in Massachusetts, but the salesman didn't tell her this.

Rex Dexter, the pedestrian, filed suit in federal court in Massachusetts seeking to recover from his injuries. As defendants he named Phoebe, whom the complaint accuses of negligent driving, and Albion-Bulwark, which the complaint accuses of manufacturing and selling a defective vehicle. Albion-Bulwark filed motions to dismiss and at the same time brought a third-party complaint under F. R. Civ. P. Rule 14 against Tournez, seeking contribution and/or indemnification for any amounts Dexter might recover. Tournez

Albion-Bulwark is its only customer.  
Belgium. Albion-Bulwark is its only customer. The Rangebuster is manufactured by Albion-Bulwark, Ltd. ("Albion-Bulwark"), a corporation which is incorporated and headquartered in England. Albion-Bulwark has advertised the Rangebuster extensively throughout the United States. The Rangebuster's steering mechanism is manufactured by Tournez, S.A. ("Tournez"), a corporation incorporated and headquartered in Belgium. Albion-Bulwark is its only customer.

\* She visited the State Line showroom to look at a new Rangebuster. When she told State Line's salesman that she lived in Massachusetts, the salesman said that she should buy a Rangebuster from State Line rather than from a Massachusetts dealer because New Hampshire has no sales tax.<sup>1</sup> Phoebe bought the vehicle. She traded in her 1994 Ford Escort and switched her Massachusetts license plates from the Escort to the Rangebuster. She then returned to Andover where the accident occurred.

Phoebe learned to her dismay that her Massachusetts motor vehicle liability insurance carrier was disclaiming coverage because the Rangebuster was not listed on the policy as an insured vehicle and was not at the time of the accident properly registered in Massachusetts. Alarmed, she consulted a lawyer, Gail Kale of the firm of Collards & Kale. Gail told Phoebe that she (Gail) would represent Phoebe without a fee as a defendant in Dexter's case if Phoebe would engage Gail on a contingent fee basis to sue the vehicle seller and manufacturer. Reassured, Phoebe agreed and the two executed a written contingent fee agreement.

On behalf of Phoebe, Gail filed a third-party complaint against Old Faithful Insurance Co. ("Old Faithful"), Phoebe's motor vehicle liability carrier, seeking a judgment that Phoebe was covered under the policy. Old Faithful is a Massachusetts corporation with a principal place of business in Springfield, Massachusetts. Old Faithful responded with a motion to dismiss Phoebe's claim against it on jurisdictional grounds.

Gail also filed suit in federal court in Massachusetts against State Line, Albion-Bulwark, and Tournez, seeking to recover for Phoebe's personal injuries and property damage to the Rangebuster. On these claims, also, the defendants filed motions to dismiss. Albion-Bulwark repeated its third-party complaint against Tournez, seeking contribution and/or indemnification for any amounts that Phoebe might recover, and Tournez repeated its motions to dismiss this new third-party complaint.

Pursuant to the federal district court's local rule on related cases, Phoebe's suit was assigned to the same judge, Judge W. T. Bulkhead, who had previously drawn Dexter's suit. Judge Bulkhead now has before him all of the motions to dismiss. The judge asks you, his law clerk, for a memorandum containing an analysis and recommendation as to each motion. To the extent that your analysis of one motion is applicable to another, you may so indicate without needlessly repeating the analysis. Please write the memorandum. (You may assume that all defendants, including overseas defendants, have been correctly served with process under Federal Rule 4).

QUESTION THREE

Bonzai Theatres, Inc., of Virginia is in the business of operating a family drive-in movie theater, one of the few remaining in the United States. Bonzai rents movies from one or another of the four movie distributors in the United States that specialize in such films. All four distributors use an identical movie rental form agreement. The agreement provides for a rental payment by the theater to the distributor based on a percentage of the theater's ticket sales. The agreement also provides that the distributors may periodically audit the theater's books to ensure compliance. Pursuant to this agreement, the distributors hired the accounting firm of Mobie, Kurley & Lassie ("MKL") to perform the audit of Bonzai's books.

During the summer of 2003 Arnold Strongarm, the MKL partner in charge of the Bonzai audit, hired several local teens to count the cars at the drive-in each night. His final audit revealed no discrepancies in Bonzai's books. However, on the basis of the actual car count, Strongarm estimated that Bonzai was understating its gate receipts by approximately \$240,000 a year. Representatives of Bonzai strenuously denied this allegation. Ultimately, after extensive negotiations between the parties, Bonzai settled the controversy by executing a \$70,000 promissory note in favor of the distributors.

When Bonzai defaulted on the first payment, the distributors sued Bonzai in a Virginia state court. In its answer, Bonzai raised two affirmative defenses: the note was void because (1) it was signed under duress, and (2) it was obtained in violation of federal antitrust laws. Also, Bonzai counterclaimed setting forth federal antitrust claims against the distributors. The state court judge, however, dismissed the counterclaim and struck Bonzai's second affirmative defense for lack of subject matter jurisdiction, on the grounds that Congress had given the federal courts exclusive jurisdiction over cases arising under the federal antitrust laws.

As to the remaining defense, Bonzai was required to prove that (1) a threat was made, (2) the threat was unlawful under state law, and (3) the threat was sufficient to overcome the will of a person of ordinary firmness. By Virginia law, the defense of duress must be proven by "clear and convincing evidence." At the non-jury trial, Carate Kidd, Bonzai's president, testified that Strongarm,

In 1998, officers of the FBI arrested Larry Dean Dusenberry at a house trailer in Ohio. Later that day they obtained and executed a search warrant, seizing drugs, drug paraphernalia, several firearms, a knife, an automobile registered in Dusenberry's name, and various other items of personal property. Among these was \$21,939 in cash. Two months later, Dusenberry pleaded guilty in federal court to a charge of possessing with intent to distribute 823 grams of cocaine. He was sentenced to twelve years

QUESTION FOUR

acting on behalf of the distributors, procured the promissory note by threatening Bonzai with a group boycott if Kidd did not sign it. (A group boycott, meaning that none of the four distributors would agree to rent movies to Bonzai, would be illegal under the federal antitrust laws). Strongarm denied that he had ever used such tactics. Without stating why, the trial judge ruled in favor of the distributors and entered judgment against Bonzai in the amount of the note, plus interest and attorneys' fees.

Bonzai now files, in federal district court, a civil antitrust action against the distributors, against MKF, and against Strongarm individually. In the present action, Bonzai must prove (but only by a "preponderance of the evidence") that the defendants threatened a group boycott and that Bonzai suffered economic harm as a result. The defendants answer that Bonzai is foreclosed from re-litigating the matter of the alleged threat. Discuss the issues raised by this defense, and assess its chances of success.

he never received any notice whatsoever of the proposed forfeiture. Dusenberry asserted in his civil complaint that recover from the United States the money and the proceeds from the sale of the car. Dusenberry later, Dusenberry commenced a civil action to

administratively forfeited. These facts are undisputed. notices within the time allotted, and so declared the items Dusenberry's mother. The FBI received no responses to these residence where Dusenberry was arrested; and to the address of the Michigan, where he was then incarcerated; to the address of the care of the Federal Correctional Institution ("FCI") in Milan, to forfeit the cash and the car by certified mail to Dusenberry published accordingly and sent letters notifying of its intention the judicial district in which the property was seized. The FBI intention for three weeks in a newspaper of general circulation in have an interest in the property, and to publish notice of its intent to forfeit the seized property to each person who appears to The statute requires the FBI to send written notice of its property.

of its intention to forfeit and sell or otherwise dispose of the the property within 20 days after the government publishes notice does not exceed \$100,000, and if no person claims an interest in without initiating judicial proceedings if the property's value pursuant to the controlled substances Act, 21 U.S.C. s. 801 et seq, Federal drug laws permit the FBI to dispose of property seized

administratively forfeiting the automobile and the cash. imprisonment. Two years later the FBI began the process of

PART "C" OF THIS QUESTION BEGINS ON THE NEXT PAGE

summary judgment.

Write the argument in support of Dusenberry's motion for

(Part B counts as forty per cent of this question)

Part B.

for summary judgment.

Write the argument in support of the United States's motion

(Part A counts as forty per cent of this question)

Part A.

related property and therefore should not be forfeited.

he could have proven that the cash and the car were not drug-

lawyer) to contest the forfeiture, and (3) given the opportunity,

been notified, he would have taken appropriate steps (through his

he never received any notice whatsoever of the seizure, (2) had he

Accompanying his motion is Dusenberry's own affidavit stating (1)

Dusenberry cross-moves for summary judgment in his favor.

destroying the logbooks one year after they are closed.

exists because of the federal Bureau of Prison's policy of

inmates. But, says Lawson's affidavit, a paper trail no longer

accepting, logging and delivering certified mail addressed to

Dusenberry. He also explains the procedures within FCI Milan for

(Lawson) signed the certified mail receipt for the FBI's notice to

Milan at the relevant time. Lawson's affidavit stated that he

is an affidavit from James Lawson, the inmate mail officer at FCI

moves for summary judgment in its favor. Accompanying its motion

After answering and appropriate discovery, the United States

END OF EXAMINATION

Part C. (Part C counts as twenty per cent of this question)  
Federal law provides no right to jury trial in a claim of this  
type against the United States. For this reason, and because a  
trial will not bring out any more evidence than is already in the  
record, the judge hearing the two motions (called "cross-motions"  
for summary judgment is going either to allow the United States's  
motion and deny Dusenberry's motion, or else allow Dusenberry's  
motion and deny the United States's motion. Which motion should  
the judge allow and, in your opinion, why?