

CIVIL PROCEDURE
Mr. Martin
October 22, 2004

Social security no. _____

MIDTERM EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. The three questions will be given equal weight and you should spend equal amounts of time on each. The Federal Rules of Civil Procedure apply to all questions. Please write legibly 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.), be sure that your social security number is on each one, and insert all others into the first one.

Your assignment for the class on Monday, October 25, is to re-read the book A Civil Action in the light of your newly-acquired knowledge of pleadings, discovery, Rule 11, and summary judgment. Study also the passages on directed verdict, JNOV and new trial. There are additional assignments in connection with A Civil Action on a separate handout which you should have before you leave at the end of the examination.

Because at least one student must take this examination on a deferred basis, you must fill in your social security number in the space above and turn in this white examination paper when you leave. This is a temporary measure for examination security only, and the examination paper will be returned to you.

QUESTION ONE

Review Rules 13(a), 13(b), 13(g), 13(h), 14(a), and 18(a). Then answer each of the following questions "YES" or "NO." After each "yes" or "no" answer, cite the relevant federal rule section and subsection. Your one-word answer, "yes," or "no," counts as 50% in each of the following questions. Your correct citation to the relevant federal rule section and subsection counts as 50%. Example: "YES. Rule 13(a)."

Podsnap purchased a new Ford Devastator sport-utility vehicle ("SUV") from Dogberry's Auto Sales. Dogberry's Auto Sales is a sole proprietorship owned by Dogberry. Podsnap made a small down payment. Podsnap and his wife Pauline signed a note for the balance of the purchase price payable to Dogberry. The SUV proved to be defective, in Podsnap's view, and Podsnap stopped making payments on the note. Podsnap sued Dogberry for breach of warranty.

1. Can Dogberry counterclaim against Podsnap for the unpaid balance on the note?
2. Must Dogberry counterclaim against Podsnap for the unpaid balance on the note, or lose this claim?
3. If Dogberry wants to counterclaim against Podsnap for the unpaid balance on the note, can Dogberry join Pauline as a co-defendant on the counterclaim?
4. Can Dogberry join the Ford Motor Co. as a third-party defendant, claiming that Ford is liable to indemnify Dogberry for

any damages Dan must pay to Podsnap because the SUV's defects, if any, existed when the SUV left Ford's factory?

5. If Dogberry joins Ford as a third-party defendant, can Dogberry also join a claim against Ford for Ford's failure to reimburse Dogberry for warranty work on cars other than Podsnap's?

6. If Dogberry joins Ford as a third-party defendant, can Ford set up as a defense that Dogberry improperly prepared the SUV for delivery to Podsnap, and this was the cause of the defect?

7. If Dogberry joins Ford as a third-party defendant, can Ford set up as a defense that Podsnap abused the car by allowing the cooling system to run dry and failing to maintain the oil level?

QUESTION TWO

Cohoe Salmon was seriously injured when a crane that she was operating at the Big Dig project in Boston collapsed and toppled into an excavation. She was employed by a subcontractor on the Big Dig, Colossal Steel Erection Co. Because of the workers compensation laws, Cohoe cannot sue Colossal Steel Erection. She commences an action in Massachusetts federal district court against Galactic Construction Co. ("Galactic"), the general contractor (and as such responsible for the overall safety of the worksite), and Whooping Crane Co., the manufacturer of the crane.

Pursuant to F.R.Civ.P. Rule 34(a), Cohoe requests production from Galactic of the following documents: (1) the signed statement which she, Cohoe, gave to an investigator hired by Galactic's

lawyer; (2) the signed statement given to the investigator by Brooke Trout, the groundsperson who was directing the crane's operation at the time of the collapse; and (3) Galactic's lawyer's notes of an interview with Darter, an unemployed onlooker who was an eyewitness to the crane's collapse. (Darter did not give a signed statement to Galactic's lawyer). Darter has darted away from Boston and is now of parts unknown.

Galactic objects to each request. Proper motions to compel production are before the judge. How should the judge rule on each request? Why? Cite the relevant federal rule section and, if applicable, subsection in each answer.

QUESTION THREE

University of Maryland basketball superstar Len Bias was drafted by the Boston Celtics in the first round of the National Basketball Association draft on June 17, 1986. Two days later he died. It is undisputed that the cause of his death was cocaine intoxication.

In April of 1986 Bias had entered into a sports agency management contract with a company called Advantage International, Inc. ("Advantage") for the services of a sports agent named Fentress. Prior to his death, Bias and his parents directed Fentress to secure a one-million-dollar life insurance policy on Bias payable to his estate in the event of his death. Advantage did not secure any life insurance policy for Bias.

Biaass's estate (the beneficiaries of which are his parents) sued Fentress and Advantage for one million dollars. The estate claims that Fentress represented that the insurance policy had been secured, and that in reliance on this information Bias and his parents did not procure any other life insurance.

After an appropriate period of discovery, Fentress and Advantage moved for summary judgment. In support of their motion for summary judgment they submitted deposition testimony from two of Bias's Maryland teammates in order to show that Bias was a cocaine user during the period prior to his death. The teammates both described numerous occasions when they saw Bias ingest cocaine. One of them testified that he was introduced to cocaine by Bias and that Bias sometimes supplied others with cocaine.

In response, Bias's estate offered affidavits from each of Bias's parents stating that Bias was not a drug user, and the deposition testimony of Bias's Maryland coach who testified that he knew Bias well for four years and never knew Bias to be a drug user at any time prior to his death. The estate also submitted the results of several drug tests administered to Bias during his college years which showed that, on the occasions on which he was tested, there were no traces in Bias's system of any of the drugs for which he was tested.

Fentress and Advantage also submitted, in support of their motion for summary judgment, affidavits from three experts on the insurance business who stated that every insurance company inquires about the prior drug use of an applicant for a million-dollar life

insurance policy (called a "jumbo" policy) and that no insurance company will issue life insurance, let alone a million-dollar policy, to an applicant who admits to recently using cocaine. This evidence was not seriously contested by Bias's estate.

Fentress and Advantage then argued that Bias's estate had suffered no damages as a result of their failure to secure a million-dollar life insurance policy on Bias, nor as a result of their alleged misrepresentation that a policy had been secured, because neither they nor Bias's parents would have been able to secure such a policy. Additionally, Fentress and Advantage argued, if Bias had lied about his cocaine use in the process of applying for life insurance, any policy issued would have been voided by the insurance company for fraud.

How should the judge decide Fentress's and Advantage's motion for summary judgment? Why?