

CIVIL PROCEDURE – SECTIONS C&D Assistant Professor Jeffrey Addicott

FINAL EXAM FALL 2002

## INSTRUCTIONS

- 1. This examination consists of 20 pages, including this page as the first.
- 2. You will have three (3) hours in which to complete the examination. Please write on the exam paper itself in the space provided for each question. No blue books are to be used. This exam consists of three parts. Part I consists of longer questions worth 90 points, Part II consists of short answer and multiple guess worth 65 points, and Part III consists of true/false worth 24 points.
- 3. St. Mary's Law School prohibits the disclosure of information that might aid the professor in identifying the author of an examination. Any attempt by a student to identify himself or herself in an examination is a violation of this policy and of the Code of Student Conduct.
- 4. A student may not remove a copy of the examination from the room during exam time.
- 5. This is a closed book examination. No notes or books are allowed. Your answers to the longer discussion questions should be organized and responsive. Do not simply quote general principles of law, but rather analyze the facts and the question and direct your response to the question. If there is more than one reasonable outcome on any given issue, you should analyze all reasonable conclusions.
- 6. At the end of the examination, return your completed examination to the front of the room and place it in the marked box. Be sure that your **exam number is on the examination.**
- 7. After reading the oath below, place your exam number in the space below. If you are prevented by the oath from placing your exam number in the space below, notify the proctor of your reason when you turn in the examination.

I HAVE NEITHER GIVEN NOR RECEIVED UNATHOURIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

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## PARTI

1. Plaintiff, Tic Tac Corporation ("Tic Tac"), has filed a three count complaint against Tic Tac Dot Com, Inc., ("Tic Tac Dot Com") in the U.S. Federal District Court for the Eastern District of Virginia (Virginia is divided into two Federal Districts - Eastern and Western) alleging trademark dilution, infringement, and false designation under the Federal Trademark Act. Tic Tac is a Virginia corporation with its principal place of business in Richmond, Virginia. Tie Tac produces the well-known Tic Tac mints. Tic Tac Dot Com is a California corporation with its principle place of business in Atherton, California. The Chief Executive Officer (CEO) for Tic Tac Dot Com is a Mr. Sherck. Tic Tac Dot Com operates an Internet web site and an Internet news service and has obtained the exclusive right to use the domain name "tictac.com" on the Internet. (Per agreement with the National Science Foundation once a domain name is registered with Network Solutions, it may not be used by another user.) Tic Tac Dot Com maintains no offices in Virginia and its contacts with Virginia have occurred exclusively over the Internet. Tic Tac Dot Com's advertising for its Internet news service involves posting information about its services on its web page, which is accessible to Virginia residents (and the general public) via the Internet free of charge. However, Defendant has approximately 250,00 paving subscribers to its news service worldwide. Approximately 5,000 of those subscribers are Virginian residents who contracted to receive Tic Tac Dot Com's services by visiting its web site, filling out an application, and paying a fee of \$29.99 per year via credit card.

The basis of the trademark claims regard Tic Tac Dot Com's use of the words "Tic Tac" in the domain name it holds, in numerous locations in its web site and in the heading of Internet messages posted by Tic Tac Dot Com subscribers. In a pre answer motion, Tic Tac Dot Com has moved to dismiss for lack of personal jurisdiction and improper venue pursuant to Fed. R. Civ. P. 12(b)(2) and (3) or, in the alternative, to transfer the case pursuant to 28 U.S.C. §1404.

Virginia's long-arm statute provides:

A court of this State may exercise jurisdiction over a party on any basis not inconsistent with the U.S. Constitution.

1. (20 points) Ho Why?	ow should the Judge	e rule on the pers	onal jurisdiction	motion?
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2. On September 12, 1999, Plaintiff Lisa Parks, a resident of Alabama, was injured in Birmingham, Alabama (in the Northern District of Alabama) when a leaf blower she was operating malfunctioned. Lisa believes her injuries were caused by defects in both a widget and a bolt used to assemble the leaf blower. Lisa files a products liability action in the U.S. Federal District Court for the Northern District of Alabama against ABC, Inc., (the manufacturer of the leaf blower) and Bob's Bolts, Inc., (the maker of the bolt used in the leaf blower). ABC, Inc., is a Delaware corporation and has its principle place of business in Detroit, Michigan (in the Southern District of Michigan). It also has a large manufacturing operation in Nashville, Tennessee (in the Middle District of Tennessee). Bob Bolts, Inc., is a Tennessee corporation and all its operations are in Memphis, Tennessee (in the Western District of Tennessee). 2(a). (10 points) Bob Bolts, Inc., files a pre answer motion under 28 U.S.C. § 1406, objecting to venue. How should the Court rule? Why?

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District of Texas. Two months after filing his complaint, Hudson wants to join Jane Jones, a co-worker, who actually engaged in various acts of harassment against Hudson. Texas State tort law is the basis of Hudson's claim against Jones.

However, because Jones is not Hudson's employer, the claim against her does not

arise under federal law.

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3 (a). (10 points) You are the attorney for Hudson. Assume that the claim against Jones presents sufficiently common issues to satisfy FRCP 20 (permissive joinder of parties). Does the Court have jurisdiction over the State claim? Explain.		
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3(b) (10 points). Pursuant to FRCP Rule 26(b)(3), the law firm representing Smit Widgets, Inc., requests that Hudson's lawyers produce "all mental impressions, conclusions, opinions, or legal theories" that they have which are related to the ca citing that the Defendant has a "substantial need" of these materials in the preparation of the case and that Smith Widgets is "unable without undue hardshi to obtain the substantial equivalent of the materials by other means." Must Huds comply with this Discovery request? Why or why not?		
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4. Peter Piper, a resident of Texas, travels to Dr. Donald Sutherland's San Diego, California, clinic for cosmetic surgery to his jaw, which was injured in a car accident. Dr. Sutherland is a California resident who regularly advertises his services in a Texas newspaper. The surgery produced unsatisfactory results. Peter Piper alleges that Dr. Sutherland failed to inform him of the risks associated with the surgery. There is a two-year statute of limitations in Texas for lawsuits associated with medical malpractice. Just two days before the statute of limitations would have barred the action, Piper sues Sutherland in the U.S. Federal District Court for the Southern District of Texas under a Texas State informed consent law Sutherland files a pre answer motion objecting only to lack of personal jurisdiction The judge denies the motion.			
4(a). (10 points) In the answer, Sutherland makes a motion objecting to venue under FRCP 12(b)(3) arguing under 28 U.S.C. § 1391(a) that he does not reside in Texas and that the medical procedure took place in California, not Texas. How doe the judge rule on the motion? Why?			

4(b). (10 points) One day after Discovery has closed, Peter Piper files a motion to amend the complaint under FRCP 15 to add a medical negligence claim against Dr. Sutherland. Piper argues that new information was obtained in Discovery. How does the judge rule on the motion? Why?		
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5. (10 points) You graduate from St. Mary's University School of Law and are hired by an Arkansas law firm. The senior partner in your law firm wants to challenge an existing Arkansas State law regarding standard of care owed by the railroad to trespassers. She tells you that she has a client who can satisfy the diversity requirements and wants to take the case into the Federal District court it Arkansas against the S&L Railroad but is worried about FRCP 11 problems. You do a little research and discover that the said standard of care has never been codified by the State legislature, but is purely a product of Arkansas case law. Furthermore, the last time the Supreme Court of Arkansas ruled on the issue was 20 years ago. Outline and briefly explain the basic requirements of FRCP 11 regarding bringing a lawsuit against the S&L Railroad challenging the existing Arkansas law. (S&L Railroad is incorporated in Arkansas)		
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PART II	

- 12. (5 points) <u>Eire v. Thompkins</u>, the U.S. Supreme Court reversed the long-standing precedent of <u>Swift v. Tyson</u>. Although the Court gave several reasons in <u>Erie</u> for its belief that <u>Swift</u> was incorrect, the Court said that its decision to overrule <u>Swift</u> was based primarily on which of the following reasons?
  - a. The ruling in <u>Swift</u> had led to inequitable administration of the laws to the extent that parties who were not residents of a State could discriminate against residents by suing them in Federal court subject to different laws.
  - b. Historical research showed that, contrary to the holding in <u>Swift</u>, Congress intended for the Rules of Decision Act to apply to State judicial decisions as well as State statutes.
  - c. Swift did not lead to a more uniform, national common law as had been hoped.
  - d. The Swift decision violated the Rules of Decision Act.
- 13. (5 points) Lee sues Grant in Federal District court for negligence. Grant defends by denying negligence. The case goes to trial and Lee wins. Grant then sues Lee in Federal Court for his (Grant's) injuries sustained in the same accident. Which of the following is most correct?
  - a. Grant is not precluded from bringing the second action, because his obtaining relief would not nullify Lee's judgment.
  - b. Grant is not precluded from bring the second action, because he did not litigate his negligence claim in the first action.
  - c. Grant may bring the second action, but he will be estopped from relitigating the issue of his (Grant's) negligence under the doctrine of collateral estoppel (issue preclusion).
  - d. Grant is precluded from bringing the second action by FRCP 13 (which pertains to counterclaims and cross claims).

8. (5 points) The descendents of French citizens Pierre Custou and Andre T. Giant file a law suit in the U.S. Federal District Court for the Western District of Virginia against Otis Elevator, Inc., for the deaths of the two French citizens in an elevator accident on the ski slopes of Austria. The elevator was manufactured by Otis Elevator, Inc., a Missouri corporation with its principle place of business in Oklahoma. The elevator in question was operated and maintained by a French Company named Corsant Transports. Lawyers for Otis Elevator make a motion for dismissal under the doctrine of forum non conveniens. What will the Federal Judge most likely do if she grants the motion? Why?
9. (5 points) In 1999, Milton a resident of Ohio, purchased a home from Samuels Builders, Inc., a Florida corporation with its principle place of business in Georgia, and gave a promissory note for \$150,000, payable on June 2, 2002 for the unpaid balance of the purchase price. In July 2002, alleging numerous defects in the house, Milton sues Samuels Builders, Inc., for breach of contract and breach of warranty. Is Samuels Builders', Inc., claim on the unpaid promissory note a compulsory counterclaim? Why?