EXAMINATION

CIVIL PROCEDURE II -- LAW 6213

Section 12 -- Siegel

Spring 2012

INSTRUCTIONS

1. This is an open book examination. You may use any written materials that you have brought with you (including handwritten, typewritten, printed, or published materials). The use of computers to type answers is permitted.

2. You have THREE HOURS to complete the exam.

3. The exam consists of this cover page and seven exam pages numbered 1 through 7. Make sure you have all the pages.

4. There are four questions, some of which have subparts. All students must answer all questions including all subparts. The questions are of equal weight and should take about 45 minutes each.

5. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam.

6. If you are writing your answers by hand, remember to write legibly.

7. If, with regard to any question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts and answer the question based on your assumption. Do not change the given facts.

8. Using good judgment, address all the issues presented and assigned by the questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.

9. Good luck.
QUESTION ONE
(45 minutes)

Pufferfish are highly poisonous, but some portions of them are safe to eat and are considered a delicacy, particularly in Japan. Obviously, it is very important to know how to prepare them.

Dazaifu, a restaurant in New York City, serves pufferfish. Dazaifu is owned by the Dazaifu Corporation, a corporation incorporated in New York with its principal place of business in New York.

In June 2012, Perry Phillips, a citizen of New Jersey, collapses and dies while eating pufferfish at Dazaifu.

Phillips’s widow, Paulina, brings suit against Dazaifu Corp. She alleges that the restaurant negligently prepared the pufferfish, which caused Phillips’s death. In its answer, the restaurant states that it prepared the fish properly and that Phillips must have died from an unrelated heart attack.

Paulina’s suit is based on the New York Wrongful Death Act, a state statute. The statute was passed because the common law of New York, like that of most states, did not recognize an action for wrongful death. (The common law permitted actions for tortious injury, but not death.)

Paulina’s suit is in the United States District Court for the Southern District of New York. Jurisdiction is based on diversity. She seeks $1 million in damages.

You are an associate at the law firm representing Paulina. A partner at the firm asks that you prepare a memo regarding several issues that have arisen during discovery:

- The plaintiff submitted this interrogatory to the defendant: “Have you made any changes to your methods of preparing pufferfish since Phillips’s death? If so, list them.” The defendant objected to this interrogatory on the ground that Federal Rule of Evidence 407 provides that remedial measures taken after an injury to reduce the risk of future injury are not admissible in evidence for the purpose of proving negligence. (This is a correct statement of Rule 407.) The partner asks whether Paulina should be entitled to have this interrogatory answered.

- The partner wants to physically inspect Dazaifu’s kitchen. She asks whether there is any way to compel Dazaifu to let that happen. She notes, “Dazaifu is extremely reluctant to let anyone see its kitchen because doing so would reveal certain things about its methods of food preparation that it regards as valuable trade secrets. How would that affect our ability to get in?”

- The partner has learned that, following Phillips’s death, Dazaifu hired Hideki Hironaka, a pufferfish chef from Japan, to observe Dazaifu’s methods of pufferfish preparation and prepare a report for the restaurant on any improvements it needs to make to its methods. Hironaka has visited Dazaifu, submitted his report, and returned to Japan. The plaintiff has requested a copy.
of Hironaka’s report, which Dazaifu has refused on the ground that it constitutes “work product.” Is the plaintiff entitled to a copy of the report?

Finally, the partner also says that she plans to move for a jury trial after the close of discovery and she asks whether this motion will be successful.

Write a memorandum addressing the partner’s questions.

(In case you missed them, be sure to read instructions 5-8 on the cover page.)
QUESTION TWO
(45 minutes)

One cause of the financial crisis of 2008 was the practice of “securitizing” home mortgages—i.e., combining numerous individual home mortgages into a single financial instrument and then selling shares in that instrument. When large numbers of securitized home mortgages went into foreclosure, there was considerable uncertainty as to exactly who owned the mortgages and who was entitled to sue on them. In numerous cases, after banks brought suit to foreclose on mortgages, it was determined that the plaintiffs did not own the mortgages on which they were suing.

To help protect against such unfair lawsuits, in 2012 the state legislature of Ohio passes the “Ohio Mortgage Litigation Improvement Act” (OMLIA). The OMLIA amends the Ohio Rules of Civil Procedure by creating a new rule that requires that, in any home mortgage foreclosure action, the plaintiff must, within 60 days after the service of process that initiates the lawsuit, serve upon the defendant a “Statement of Chain of Title,” which must explain, in “clear, simple language,” the detailed basis for the plaintiff’s claim that it owns the mortgage on which it is suing. The rule provides that if the Statement of Chain of Title is not served upon the defendant within the specified time limit, the case shall be dismissed with prejudice.

In 2013, Bank of America, a corporation incorporated in Delaware with its principal place of business in California, sues to foreclose on a mortgage on a home in Ohio owned by Diego Diaz, a citizen of Ohio. The unpaid mortgage balance on the home is $1 million. The suit is in the United States District Court for the Northern District of Ohio. Jurisdiction is based on diversity.

Bank of America claims to own the mortgage, and it complies with the initial disclosure requirements of Federal Rule of Civil Procedure 26(a), but it does not serve a “Statement of Chain of Title” upon Diaz. 90 days after receiving service of process, Diaz moves to dismiss the action with prejudice on the ground that the plaintiff has not complied with the Ohio rule created by OMLIA. The plaintiff opposes the motion. Both sides make all appropriate arguments.

Part A (25 minutes). You are the law clerk to the federal district judge assigned to the case. Write a memorandum advising the judge as to how to rule on the motion.

Possibly in accordance with your advice and possibly contrary to it, the district judge denies the motion to dismiss. Diaz asserts that Bank of America does not own his mortgage and that in any event he is not delinquent on his mortgage payments. The case proceeds to trial by jury.

During jury selection, the judge asks each potential juror if there is any reason he or she could not consider the case impartially and be fair to both sides. One potential juror says, “Well, I think banks are really hurting the economy. All these foreclosures are keeping the economy down. And can’t banks see that foreclosures are against their own interests? They should be working with homeowners to reduce the interest rates and the balances on mortgages. That would be better for everybody, including the banks, than all these foreclosures. But of course it’s up to each bank to
decide how to exercise its rights. We can’t force them to do what is in the national interest. So if I’m on the jury I will fairly and impartially decide the case on the basis of the evidence and the law.” Bank of America moves to strike this juror for cause. Your judge looks to you for some advice on this motion.

Part B (10 minutes). Advise your judge.

The jury is impaneled and the case is tried. The trial begins on a Friday, is recessed over the weekend, and concludes the following Monday. At the conclusion of the trial, the judge instructs the jury that the plaintiff bears the burden of proving that it owns the mortgage upon which it is suing, but that payment is an affirmative defense, and that the defendant therefore bears the burden of proving that he has made any mortgage payments that are due. The jury returns a general verdict for the plaintiff.

Ten days later, the defendant files a motion for a new trial. Attached to the motion is an affidavit from Sheila, one of the jurors. The affidavit states that Sheila (and, in Sheila’s opinion, the jury as a whole) reversed the burden of proof—the jury thought that the plaintiff had the burden of proving that the defendant had not made the mortgage payments, and the defendant had the burden of proving that the plaintiff did not own the mortgage upon which it was suing. Since the plaintiff’s evidence on the ownership issue was somewhat weak, Sheila states that this incorrect understanding probably made a difference in the outcome.

Sheila’s affidavit also states that Martin, one of the other jurors, told the jury during deliberations that over the weekend, while the trial was in recess, he had walked by Diaz’s house, just to get a “feel” for the case, and that, while there, he fell into conversation with a passing neighbor, who had said, “Oh yeah, Diego’s been behind on his mortgage for months—now he’s just trying to string things out so he can stay in the house rent-free as long as possible.”

The defendant moves for a new trial on the basis of Sheila’s affidavit. The plaintiff opposes the motion. Both sides make all appropriate arguments.

Part C (10 minutes). Advise your judge as to how to rule on the motion.
QUESTION THREE
(45 minutes)

Allison Albright is walking on a sidewalk near a construction site when a massive girder is accidentally released from a crane several stories high. The girder comes crashing down on the sidewalk. Although Albright is not physically injured or even touched by the girder, she suffers an extreme emotional shock and finds over the subsequent months that she is unable to work, leave her home, or carry on other basic life activities because she is paralyzed with fear of being killed in a similar accident.

Albright is a citizen of Arizona. The owner of the construction site is Better Building, Inc., a corporation incorporated in Colorado with its principal place of business in Colorado. The accident occurred in Colorado. In tort cases, Colorado applies the tort law of the state where the tortious injury occurred.

Albright sues Better Building in the United States District Court for the District of Colorado. Jurisdiction is based on diversity of citizenship. The action is a tort action and Albright seeks $1 million in damages.

Better Building moves for summary judgment. Better Building asserts that the law of Colorado does not recognize a cause of action for emotional harm in accident cases in which the plaintiff was not physically injured in the accident. Albright opposes the motion. She asserts that (1) the court should recognize such a cause of action as a matter of federal law, and (2) Colorado law does permit a remedy for emotional harm in cases in which the plaintiff was not physically injured in an accident, provided the plaintiff was in the “zone of danger” created by the accident.

Better Building presents affidavits from one of its own employees and from two random passersby who all witnessed the accident. Each affidavit states that Albright was walking on the opposite side of a wide street from where the girder fell. Better Building therefore asserts that, even assuming Colorado law permits suit by plaintiffs who were within the “zone of danger” created by an accident, Albright was clearly not within the zone of danger. Albright presents her own affidavit in which she states that the girder fell within ten feet of her, on the side of the street where she was walking, not on the opposite side of the street.

The district court rules that the case is governed by Colorado tort law, that Colorado tort law recognizes a cause of action for emotional harm for someone who was not physically injured in an accident provided the person was within the “zone of danger” created by the accident, and that a trial is required to determine whether Albright was within the zone of danger. The district court denies the motion for summary judgment.

Better Building appeals the denial of summary judgment to the United States Court of Appeals for the Tenth Circuit (which includes Colorado). The appeal is assigned to a panel of three Tenth Circuit judges, and you are the law clerk to one of the judges on the panel. Both sides raise
such arguments as might be expected on the above facts.

Your judge asks you to write a memorandum discussing the issues presented by the case and making a recommendation as to how to rule on each issue and on the overall case. In giving you the assignment, your judge says to you, “I’ve read the cases from the Colorado state courts on the key torts issue and they’re somewhat conflicting—I can see how someone might reasonably believe that Colorado recognizes a cause of action for cases such as this one. But my understanding of the cases is that Colorado does not recognize any cause of action for emotional harm to a plaintiff who was not physically injured in an accident, regardless of whether the plaintiff was within the zone of danger. But it’s a close call. So what should I do?”

The judge adds: “But of course I’m just one of three judges on this appellate panel, so be sure to brief me on the other issues as well, in case I have to reach the other issues because my vote does not prevail on this issue.”

**Part A (40 minutes): Write the requested memorandum.** [Hint: Remember that this exam is for your class in civil procedure, not torts. So your answer should be about civil procedure issues.]

After receiving your memorandum from Part A, your judge says to you, “I just discovered that the law of Arizona clearly recognizes a cause of action for a plaintiff who suffers an emotional harm even though not physically injured in an accident, provided the plaintiff was within the zone of danger. Does that change anything?”

**Part B (5 minutes): Answer the judge’s question.**
Bob Biddle, a citizen of Virginia, owns and operates a shop called Bob’s Ice Cream in Dupont Circle in Washington, D.C. The shop sells ice cream only, and only on a carry-out basis (i.e., it has no seating). In 2012, Ann Alden, a citizen of Maryland, buys Bob’s Ice Cream from Bob. She continues to operate the shop under the name Bob’s Ice Cream.

In 2014, Bob opens Biddle’s Coffee House on Capitol Hill in Washington, D.C. Biddle’s Coffee House is a sit-down coffee house that sells coffee, tea, salads, and a variety of desserts including ice cream. Ann promptly sues Bob in the U.S. District Court for the District of Virginia. She asserts that, when Bob sold her Bob’s Ice Cream, he promised not to compete with her, and he is breaking that promise. She seeks damages and injunctive relief. Jurisdiction is based on diversity.

In his answer to Ann’s complaint, Bob asserts (1) that he never made any promise not to compete with Ann, and (2) that assuming he did make such a promise, Capitol Hill is sufficiently far from Dupont Circle that there is no competition between Ann’s and Bob’s places.

The case of Ann v. Bob is tried to a jury, which returns a general verdict for Bob. In response to interrogatories posed by the court, the jury finds that Bob did promise Ann that he would not compete with her when he sold her Bob’s Ice Cream, but that given the distance between Dupont Circle and Capitol Hill, there is no competition in ice cream sales between the two locations. Judgment is entered on the verdict, and Ann takes an appeal.

While the appeal is pending, Bob opens another Biddle’s Coffee House. This second Biddle’s is just like the first except that it is located in Dupont Circle right next to the Bob’s Ice Cream shop now run by Ann. Ann brings another diversity suit against Bob in the U.S. District Court for the District of Virginia. She claims again that Bob is violating his promise not to compete with her. The only relief she seeks in this suit is an order that Bob not sell ice cream at the Biddle’s Coffee House in Dupont Circle.

In his answer, Bob asserts (1) he never promised not to compete with Ann, (2) a sit-down coffee house that sells many items including ice cream does not compete with a carry-out-only, ice-cream-only shop, and (3) Ann’s claim against him is barred by claim preclusion. Bob also demands a jury trial. Ann claims that Bob’s issues (1) and (2) are barred by issue preclusion and that the case is not subject to jury trial. While the appeal of the first case is still pending, each side moves for summary judgment on the preclusion issues. The parties also seek a resolution of the jury trial issue.

You are the trial judge considering this second case. Write a thoughtful opinion resolving the points raised by the parties. If you conclude that the case should go forward, inform the parties as to what issues are open for litigation.

END OF EXAM