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FINAL EXAM

CIVIL PROCEDURE I
SPRING 2007
PROFESSOR GÓMEZ

Wednesday, May 9, 2007
1:30 p.m. - 5:00 p.m.
3 1/2 hours

Instructions

1. Exams are graded anonymously (by number). Before grades are posted, be sure to avoid making any marks (e.g., signing your name), written remarks, or oral remarks that might jeopardize your or anyone else's anonymity.
2. This is a semi-closed book exam. You may consult **only** the following two items: (1) your copy of the Federal Rules of Civil Procedure; (2) an outline you have prepared yourself.
3. References to the "Rules" in the exam are to the current version of the Federal Rules of Civil Procedure. Unless otherwise stated, assume the Federal Rules are in effect, in their entirety, in the jurisdictions involved in the exam questions.
4. This exam has three parts. Questions will be weighted in accordance with the suggested time allocations for each part, as follows: part I (issue-spotting essay), 75 mins.; part II (short answer questions), 75 mins.; part III (reflective essay), 30 mins.. **I recommend that, before you begin writing for any section, you read the entire examination (and I have allotted extra time for you to do so).**
5. If you hand-write your exam, please do the following: use ink (not pencil), use only one side of the page, and, if your handwriting is difficult to read, skip every other line of your blue book.

PAT: PLEASE MAKE SURE PART I (NEXT PAGE) BEGINS AT THE TOP OF PAGE 2 OF THE EXAM.

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I.
Issue-spotting & Analysis
(75 minutes)

After graduating from Cornell University in 1984 and on her 22nd birthday, Liza Zubulake accepted a job as an analyst for Stanley Morgan, an investment bank in Manhattan. In 1999, she began working for the Asian international banking unit in the Manhattan office of UBS, Europe's largest bank. Initially, Zubulake enjoyed the work at UBS and felt confident she would soon be promoted to head the Asian banking desk. By late 2000, however, Zubulake began to feel she was being mistreated and closed out of deals at UBS.

Things worsened considerably when a Francois Chapin was hired to head the Asian desk in early 2001. Chapin berated Zubulake in front of her fellow bankers. One time he said, in front of many other bankers, that she was "too old and too ugly and just couldn't do the job." Zubulake said she was denied lucrative accounts because Chapin excluded her from outings with clients such as baseball games, golf rounds, and socializing at strip clubs. Chapin's first formal evaluation of Zubulake suggested her job performance could be improved by "smiling more" and "being softer" in work settings. Shortly after this review, Chapin moved Zubulake's desk from the cluster of mostly male bankers' desks to the other side of the office, alongside the desks of the mostly female secretaries.

Zubulake made numerous complaints to Chapin and UBS human resources executives over the course of 2000-2001. Chapin repeatedly derided her concerns as whining and sour grapes due to not having been promoted to head the Asian desk. In August 2001, around the time of Zubulake's 40th birthday, she filed a complaint with New York state's Equal Employment Commission (EEC). Exactly two months later, UBS terminated Zubulake.

At around the same time she was fired by UBS, Zubulake's mother was diagnosed with terminal lung cancer. Since Zubulake at this point did not have a job, she decided to move to Florida to care for her mother (her mother had retired there five years earlier). In order to save money, Zubulake moved out of her Park Avenue apartment and put her furniture and most other possessions into storage in Jersey City, New Jersey. Once in Florida, she rented a post office box and obtained a Florida driver's license (she had not had one in New York).

Chapin was born in France but has lived in New York since 1997. Currently he is a legal permanent resident of the U.S. (i.e., an alien admitted for permanent residence, a green card holder). For the past year, Chapin has had a 1/4 ownership in a South Beach (Florida) vacation rental condominium. He has visited Florida twice in the past year, once to finalize the property ownership and once for a one-week vacation.

Part I, continued

UBS is incorporated in Switzerland and has its principal place of business in the state of New York. Although UBS does not do any business specifically in Florida, it advertises in several national publications that do substantial business in Florida. Additionally, because so many New Yorkers have retired in Florida over the past three decades, four percent of UBS's client base consists of individuals who are citizens of Florida.

(1) You have been hired as a summer associate by Paula Pushyplaintiffslawyer, and she has asked you to draft a strategy memo describing the pros and cons of where (which states and which courts) Zubulake COULD file a lawsuit against Chapin and UBS. Assume she has federal and state law claims: at the federal level, Title VII of the Civil Rights Act; at the state level, Title VII of the New York State Human Rights Act. Your memo should include discussion of the strategic issues involved in forum selection, from the plaintiff's point of view. (Note this memo should NOT be an exhaustive discussion of the potential defense challenges under Rule 12(b)-- for that, see below.)

* * *

When she was fired by UBS, Zubulake was earning an annual salary of \$500,000 along with annual bonuses exceeding \$150,000. In January 2002, Zubulake filed a lawsuit in the federal district court in Florida, seeking combined compensatory damages (back pay and lost salary) and punitive damages exceeding \$13 million. She alleged that Chapin and UBS violated Title VII of New York state's Human Rights Act which prohibits, among other things, discrimination in employment on the basis of gender. She alleged gender discrimination in the failure to be promoted at UBS and in the allocation of work assignments; she alleged a hostile work environment; and she alleged that UBS had illegally retaliated against her (by firing her) for filing the EEC complaint. Assume UBS and Chapin were properly served, in person, in New York.

(2) You have been hired as a summer associate by Donald Defensefordummies, who is representing UBS and Chapin. Write a memo analyzing the nature and likely success of the pre-answer motion challenges defendants can bring under Rule 12(b)(1) and 12(b)(2). In your memo, discuss the likely responses of the plaintiff and the trial judge to your motions.

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Part I, continued

Although it was a close call for the trial judge, assume that Defendants UBS and Chapin have won their 12(b)(1) motion; in other words, the trial judge has ruled that there is no subject matter jurisdiction in federal court and so has dismissed Zubulake's complaint. Zubulake then chooses to file a second lawsuit, again in the federal district court of Florida, this time alleging violations of Title VII of the Civil Rights Act of 1964, based on the same alleged incidents of gender discrimination in her employment at UBS.

(3) What result if the Defendants respond by filing a 12(b)(1) motion? [provide no more than a one paragraph answer]

(4) What result if the Defendants move for change of venue (transfer) under §1404 of the U.S. statutes? [provide no more than a one paragraph answer]

(5) If the Defendants have not yet filed an answer to Zubulake's second complaint, may she amend the complaint (under Rule 15) to add the state law claims (under New York's Human Rights Act), arguing that the federal court has supplemental jurisdiction over the state claims under §1367? Or does the trial judge's ruling in the first lawsuit preclude such amendment? [provide no more than a one paragraph answer]

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II.
Short Answer Questions
(75 minutes)

*For each of the following assertions (in which “P” refers to plaintiff and “D” refers to defendant), do the following: (1) state whether the assertion is **true or false** (worth half credit for the question), and (2) provide a one sentence explanation for your answer (worth half credit for each question). There is no in-between: if the assertion is not true in every instance, then it is false; a statement that is true but that “doesn’t tell the whole story” is nevertheless true. Your explanation may include reference to a rule, statute, or case; it may include an example or counter-example; or it may consist of a simple statement of why you believe the assertion is true or false.*

1. After Shaffer v. Heitner (1977), whether an out-of-state D owns property in the state seeking jurisdiction over D is irrelevant in determining personal jurisdiction.
2. Under Rule 4(k)(1), the federal court's personal jurisdiction always flows from the state court's personal jurisdiction in the state where the federal court is located.
3. In a case involving L.L. Bean (2003), the Ninth Circuit Court of Appeals had to decide what kind of systematic and continuous contacts sufficed to establish *general* personal jurisdiction; the only factor they considered was the percentage of L.L. Bean's sales in California (the state seeking personal jurisdiction).
4. In Reyno v. Piper Aircraft (1981), D challenged P's choice of forum by using, in succession, the strategies of removal, transfer, and forum non conveniens. Since plaintiffs decide where to file the lawsuit initially, all three strategies are tactics limited to use by defendants.
5. P is a citizen of New Mexico and D is a citizen of Texas and so P's lawsuit against D for \$75,000.00 for breach of contract can be filed in federal court.
6. The doctrine of supplemental jurisdiction of federal courts initially arose as a common law doctrine but later became codified in §1367 of the U.S. statutes.
7. Prior to Erie R.R. v. Thompkins (1938), corporate litigants frequently used the Supreme Court's ruling in Swift v. Tyson (1842) to their advantage by filing suits in federal court or seeking removal from state to federal court.
8. One defense technique for getting rid of a case during the pleading stage is to file a motion to dismiss under Rule 12(b)(6), in which D contests the facts alleged by P, and which, if D wins, results in a final judgment.

Part II, continued

9. The justification for Rule 8(e)(2) -- that parties can allege alternate and even contradictory claims or defenses -- stems from the fact that, in keeping with the broader spirit of the Federal Rules, relatively little factual development occurs during the pleading stage of litigation.
10. In 1993, Rule 11 was significantly modified in the hopes that more parties would utilize the rule as a way to deter their opponent's abuse of litigation strategies; previously, the rule had been used only sparingly.
11. Rule 11 sanctions may be imposed only against attorneys, since it is lawyers' behavior that is implicated in Rule 11(b)(1)-(4).
12. Rule 9(b) overrides Rule 8(a)(2)'s requirement of the P that she present "a short and plain statement of the claim" in the complaint.
13. In Gomez v. Toledo (1980), the Supreme Court held that, in the context of §1983 litigation, qualified immunity arising from D's "good faith" actions must be pleaded by D (not P) as an affirmative defense.
14. If D has agreed to P's request to waive service of process under R.4(d), D has 60 days in which to answer P's complaint; given the time consuming nature of finding an attorney, an attorney's conducting an investigation, and drafting an answer and/or pre-answer motions, this extension of time operates as a substantial incentive for D to waive service of process.
15. In two Rule 15(c) relation back cases, Moore v. Baker (1993) and Bonerb v. Richard J. Caron Foundation (1994), the outcomes can be harmonized by emphasizing the contrasting stages of litigation during which P requested leave to amend the complaint.
16. The major categories of required initial disclosures under R. 26(a) are, first, the names and contact information of persons likely to have relevant information about claims or defenses; and, also, a list of all documents and other tangible things in the possession of the party that might be used by it to support its claims or defenses.
17. Under Rule 26(b), information that may be discovered is limited to that which could be admitted into evidence at trial.
18. Rule 26(b) allows relevant information to be discovered, but privilege trumps relevance such that privileged information is not discoverable.

Part II, continued

19. We studied only three major discovery techniques: asking written questions (interrogatories); asking questions of a witness in-person, under oath (depositions); and examination of persons.
20. One of the chief purposes of Rule 36, regarding admissions, is to improve efficiency by reducing the length of trials.

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III.
Reflective Essay
(30 minutes)

The question in Part I was based on a real case, *Zubulake v. UBS*, that resulted in five published opinions by federal District Judge Shira Scheindlin of the Southern District of New York. After three years of litigation, Zubulake won \$29 million in a jury verdict (\$20 million in punitive damages, \$9 million in compensatory damages).

The five district court opinions centered on the parties' discovery disputes. One of the chief issues was which party (the party seeking discovery or the party responding to a discovery request) would pay the potentially considerable costs of retrieving e-mails from stored back-up tapes (at one point, UBS estimated the cost of restoring nearly 100 such tapes [in order to find relevant e-mails] would be \$300,000). Judge Scheindlin devised a set of factors to decide when cost-shifting should occur--that is, when the party seeking discovery should be required to pay all, part or none of the cost of obtaining the information she sought from the opposing party.

"Marginal utility factors":

- The extent to which the request is specifically tailored to discover relevant information;
- The availability of such information from other sources;

"Cost factors":

- The total cost of production, compared to the amount in controversy;
- The total cost of production, compared to the resources available to each party;
- The relative ability of each party to control costs and its incentive to do so;

Write a persuasive essay in which you evaluate the public policy implications of these sets of cost-shifting factors. In your essay, you may draw upon a variety of themes that we have focused on over the course of the semester, such as the nature of the adversary system, party asymmetry, and the like. Or you may ground your evaluation of the factors in the facts of the Zubulake case, as presented in Part I and III of this exam. Either way, your objective is to write a essay that makes an argument about the cost-shifting context and attempts to persuade the reader of the strength of your position. As always, your position is stronger if it is backed by evidence (understood in the broadest sense) and if you rebut obvious counter-arguments.

END OF EXAM