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Examination Number _____

UNM School of Law
Professor Occhialino
Four Credits

Fall, 2002
Monday, December 9, 2002
9:00 a.m. to 1:00 p.m.

CIVIL PROCEDURE II

Final Examination

Instructions

1. Write your examination number on the top of this page in the space provided.
2. This is a four-hour examination.
3. This is a closed book exam except that you may bring into the exam any standard Federal Rules of Civil Procedure Supplement. The Rules Supplement may be annotated rule-by-rule but the volume may contain no course outlines and nothing related to the "Possible Exam Questions" you received on the final day of class.
4. This is a two-question examination. Question One is worth 75% of your final grade and Question Two is worth 25%. You should allocate your time accordingly.
5. Question One has ten subparts. I would appreciate it if you would try to answer the ten parts in the order they appear on the examination. This will make it easier for me to grade the questions.
6. *** **Please** begin Subpart 6 of Question One in a separate bluebook, as I plan to grade Subparts 1-to-5 together at one time and Subparts 6-to-10 together at a different time.
7. *** **Please** write on only one side of a page. Write only on every other line on each page.

Question One
Suggested Time: Three Hours

Part One
The First Lawsuit: Planning Stages

The University of New Mexico School of Law currently administers its student financial aid program by giving 50% of its scholarship money based on demonstrated academic achievement and 50% based on financial need with special consideration given to minority students. Ollie Oilcatter offered to give the New Mexico School of Law \$20 million for its financial aid program if the School of Law modified its financial aid program so that all future financial aid is given based on academic achievement and none is given based on financial need. Oilcatter's offer provides that if the School of Law does not implement the new financial aid program and condition in a reasonable time, the gift will be void and the \$20 million will be given to Regina University Law School, a private law school owned by a corporation incorporated in Virginia and with its sole place of business in Virginia. Regina University Law School does no business in New Mexico, recruits no students from New Mexico and has no New Mexico students enrolled at Regina.

The Law School Faculty voted to accept the gift with the condition and agreed to implement the program for all students, including those already enrolled and receiving financial aid, effective for the awards to be made next semester—i.e., for the semester starting in January, 2003.

The Byzantium-American Law Student Association (BALSA) is opposed to the Law School accepting the gift with the condition stated because BALSA believes that

many of its current and future members will lose existing and future financial aid if aid is given based solely on academic achievement. A study of current student members of BALSAs shows that of the sixty-two members, 30 would be unaffected by the change, 2 would benefit from the change because they would get increased aid based on academic achievement and 30 would lose financial aid because of the elimination of need-based financial aid. BALSAs has also learned that although there are equal numbers of men and women students at the School of Law, 75% of the top one-third of each class, based on cumulative grade point averages, is female and 55% of the middle-third of each class is female, while only 20% of the bottom third of each class is female. The result is that more women than men will benefit from elimination of need-based scholarships in favor of scholarships based on academic achievement.

BALSAs has hired the law firm in which you are an associate to represent it in litigation to prevent the University of New Mexico School of Law from going through with its decision to accept the Oilcatter gift with the condition attached. Your senior partner, Patricia Pardner, has done preliminary research and has concluded that the University of New Mexico School of Law will violate the due process and equal protection clauses of the New Mexico Constitution if it accepts and implements the Oilcatter gift and condition and will breach its contracts with students who are currently receiving scholarships based on financial need.

Pardner tentatively has decided that she will file suit against the University of New Mexico School of Law and Robert Desiderio, Dean of the School of Law in the New Mexico **State** District Court in the Second Judicial District. [You may assume that the relevant New Mexico Rules of Civil Procedure are the same as the Federal Rules of

Civil Procedure] She plans to ask that the University of New Mexico School of Law and Dean Desiderio be enjoined from accepting and implementing the Oilcatter gift and condition and that the Dean be ordered to continue to award financial aid as it had done before accepting the Oilcatter gift and condition.

Senior Partner has asked you to answer her questions and advise her on proposed strategies in the course of her representation. Do so.

Additional Facts

The president of BALSAs is Ana Mesic, a second year law student. She has received substantial financial aid based on financial need. Pardner is considering filing a class action in State District Court of New Mexico, naming as the Plaintiffs “BALSAs, an unincorporated association, and Ana Mesic, on their own behalf and on behalf of all other persons similarly situated—to wit all members of BALSAs and all present and future students at the University of New Mexico School of Law entitled to financial aid based on existing criteria currently applied by the School of Law.”

Question One: Is the action likely to be certified as a class action as proposed? Explain fully, discussing all issues and problems that might arise.

Additional Facts

Pardner anticipates that the Defendants, UNM School of Law and Robert Desiderio, will assert that Regina University Law School is a necessary and indispensable party to the litigation and asks you:

Question Two: If the defendants, UNM School of Law and Robert Desiderio, assert that Regina University School of Law should be joined pursuant to Rule 1-019, is the trial court likely to find that Regina is a party to be joined if feasible and an indispensable party? Explain fully.

Additional Facts

Pardner realizes that the Women's Law Student Association is likely to oppose BALSAMesic's lawsuit because its membership will be better off if financial aid is distributed solely based upon academic achievement rather than financial need, given the data showing that women are disproportionately numerous in the top of the class rankings. Pardner asks you:

Question Three: Can the Women's Law Student Association intervene in the BALSAMesic litigation of right? Explain fully.

Additional Facts

Pardner tells you that she has no interest in having additional parties in the litigation who will oppose the BALSAMesic request for relief and for this reason is planning not to join the Women's Law Student Association or its members as defendants and plans to oppose any attempt by the Women's Law Student Association to intervene.

Question Four: Advise Pardner whether Pardner should join the Women's Law Student Association as a defendant or should oppose its possible attempt to intervene if Pardner does not make it a party to the BALSAMesic litigation. Explain fully.

Additional Facts

Pardner's proposed complaint seeking an injunction alleges three claims: 1) Violation of the New Mexico Constitution Equal Protection Clause; 2) Violation of the New Mexico Constitution Due Process Clause; 3) Breach of Contract due to changing the basis for awarding financial aid from that contained in the catalog at the time current students were admitted to the law school to that implemented as a result of Oilcatter's gift and conditions. Pardner asks you:

Question Five: Are BALSAM/Mesic entitled to a jury trial of right if the proposed complaint is filed? Explain fully.

Additional Facts

Pardner informs you that Amy Associate has suggested that instead of filing a class action seeking an injunction, Pardner should file a writ of mandamus in the New Mexico Supreme Court, naming Mesic as petitioner and the University of New Mexico School of Law, Dean Robert Desiderio and all Faculty members as the respondents, seeking an order compelling the Law School, Dean and Faculty to reject the Oilcatter gift and condition, and to return to the pre-existing method for distributing financial aid. Amy Associate told Pardner that the writ was superior to a regular lawsuit for several reasons, including getting original jurisdiction in the Supreme Court and allowing for a more streamlined case with fewer necessary parties. Pardner asks you to:

Question Six: Evaluate Amy Associate's recommendation, addressing the issue of whether mandamus might lie, and commenting on each point raised by her together with any other matters that you think might be relevant to determining the wisdom of her suggestion.

**Part II
The First Lawsuit is Filed**

Assume for the remainder of the examination question that the following has occurred:

Pardner filed a class action lawsuit in the New Mexico **State** District Court against the University of New Mexico School of Law and Dean Desiderio with BALSAM and Mesic as the named plaintiffs. The trial judge has certified a class pursuant to Rule 1-023(B)(2), but narrowed the class membership from that requested in Pardner's complaint. Instead, the certified class is made up of "BALSAM members who would suffer diminishment of financial aid under the Oilcatter gift and condition and Mesic and all

other law students who would suffer diminishment of financial aid under the Oilcatter gift and condition.”

Defendants filed a motion to add Regina University Law School as a necessary and indispensable party. The trial court denied the motion. The Women’s Law Student Association chose not to attempt to intervene in the lawsuit.

Additional Facts

The defendants, UNM School of Law and Dean Desiderio, have been losing most of the pre-trial motions that they have filed. Their lawyer has been chastised twice by the judge for making frivolous motions. Also, at the hearing on the motion for preliminary injunction, after listening to the Defendants’ lawyer speak of the irreparable harm that would occur to students if need-based financial aid were cut off, Judge Judd stated from the bench that “I paid my own way through Duke Law School despite my great financial need and so I know it can be done without undue hardship especially at a law school with low tuition like UNM.” The Defendants made a motion to have Judge Judd disqualify himself from continuing to preside over the trial. Judge Judd denied the motion.

Question Seven: Pardner tells you that another associate is researching whether Judge Judd committed reversible error in failing to disqualify himself from the case. Pardner asks you to tell her whether and, if so by what means, she can immediately appeal Judge Judd’s ruling. Advise her, explaining fully.

Assume for the remainder of this examination question that:

The class action was tried and the result was a total victory for the Plaintiffs. The trial court determined that the New Mexico Constitution’s Equal Protection Clause prevented UNM School of Law from abandoning need-based scholarships in favor of scholarships based solely on academic achievement. Indeed, the court went on to rule that the New

Mexico Equal Protection Clause required all scholarships at the UNM School of Law to be given based solely on financial need and ordered that UNM School of Law immediately institute a policy of awarding scholarships based solely on need.

Additional Facts

The Defendants filed a timely notice of appeal. Months ago, the UNM School of Law deposited the \$20 million from Oilcatter into a savings account at the Bank of Albuquerque in Albuquerque. Regina University School of Law has made a demand on the Bank to turn over the \$20 million to it because the Oilcatter condition cannot be met due to court's ruling in *BALSA/Mesic v. UNM School of Law and Dean Desiderio*.

UNM School of Law has written to the Bank demanding that the Bank allow the Law School to withdraw the money, arguing that the *BALSA/Mesic* judgment will be reversed on appeal.

Question Eight: Pardner fears that the Bank will file an interpleader action in New Mexico Federal District Court and that the court will find that the interpleader is proper and will enjoin the parties from proceeding in the BALSA/Mesic case so that the Federal court can definitively determine whether UNM School of Law can keep the money because it can meet the Oilcatter condition. Pardner asks you to determine if her fears are likely to come to pass and to explain fully.

Part Three

The Second Lawsuit: *Reynoso et. al. v. UNM School of Law and Dean Scarnecchia*

Assume for the Remainder of the Exam that:

After determining that they would probably lose the appeal in *BALSA/Mesic*, UNM School of Law and Dean Desiderio abandoned the appeal so the trial court judgment in favor of *BALSA/Mesic* became final. One month after the appeal was dismissed, the UNM School of Law reformulated all scholarships this time basing all the

scholarships only on financial need as required by the *BALSA/Mesic* injunction. The School of Law sent out letters to all students telling them of their award for the following semester. Fifty women law students who had received scholarships based on academic achievement learned that they would no longer get any aid. None of these women is a member of BALSAs. One week after receiving the letters, the fifty women joined as named plaintiffs and filed a law suit in New Mexico State District Court (*Reynoso et. al. v. UNM School of Law and Dean Scarnecchia*) alleging that the UNM School of Law and its new Dean, Suellyn Scarnecchia, violated their rights of Equal Protection and Due Process as protected by the New Mexico Constitution when the law school abandoned scholarships based on academic achievement. The *Reynoso* plaintiffs added one new claim that had not been raised in the previous litigation---that UNM School of Law's abandonment of academic achievement scholarships unduly impacted women law students and thus violated the New Mexico Constitutional provision that states that "Equality of rights under law shall not be denied on account of sex of any person."

The answer of UNM School of Law and Dean Scarnecchia asserted as affirmative defenses the following: 1) law of the case, 2) res judicata, 3) collateral estoppel, and 4) stare decisis, all based on the decision in *BALSA/Mesic v. UNM School of Law and Desiderio*. Based on these defenses, UNM School of Law/Scarnecchia moved for summary judgment.

Question Nine: You are the clerk for the trial judge who must rule on the motion. Please draft a memo to the judge evaluating each of the defenses raised, providing a recommendation to the trial judge concerning the validity of each defense and stating your reasoning fully.

Additional Facts

The trial court in *Reynoso* denied the motion of UNM/Scarnecchia to dismiss. The court ruled that it would have granted the motion to dismiss based on one of the preclusion doctrines, except for one thing: BALS/Mesic filed suit against the wrong party when it named the Dean of UNM School of Law but not the Faculty of UNM School of Law as a Defendant. The court reasoned that because the Faculty voted to accept the Oilcutter gift and condition, only the Faculty could now act to reject the gift and thus the BALS/Mesic lawyers should have named each Faculty Member as a defendant in that action. In effect, the trial court ruled that every member of the faculty was an indispensable party and the judgment in their absence was worthless.

The court then heard the merits and ruled in favor of plaintiffs, Reynoso et. al.. The Court ruled that UNM School of Law violated the Gender Equality provision of the New Mexico Constitution when it rejected the Oilcutter gift and condition and then made financial aid awards based solely on financial need instead of solely on the basis of academic achievement. The Court ordered that UNM School of Law and Dean Scarnecchia follow the original faculty vote accepting the Oilcutter gift and condition and make all awards based solely on academic achievement.

BALSA and Mesic were furious that their attorney, Pardner, had made such a fundamental mistake.

Part Four **The Third Lawsuit: *BALSA/Mesic v. Pardner***

One week after the judgment was entered in *Reynoso*, and eleven months after the decision in *BALSA/Mesic* became final, BALSA and Mesic sued Pardner for legal malpractice for failing to join an indispensable party in their lawsuit.

Question Ten: Pardner admits to you, her associate, that she now knows that she should have joined each faculty member as a defendant in BALS/Mesic. She reminds you that she thought about this issue, sought discovery from the UNM School of Law and received from the Law School what she now knows was an out-of-date Law School Governance Manual which stated that the Dean had authority to override faculty decisions. In fact, a new Manual was then in effect which stated that only the Faculty could override a Faculty decision. She just learned of this new Manual when it was presented as evidence in the Reynoso case. She wonders if the UNM School of Law erroneously supplied her with the out of date Manual or whether it consciously did so. She asks you to determine if she can make and win a Rule 1-060(B) motion to reopen the BALS/Mesic judgment on one of more of the grounds listed in Rule 1-060(B)(1)(2)(3) or (4). Advise her, explaining fully.

Appendix to Question One

N.M. Const. Art. II, Sec. 12

The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.

END OF QUESTION ONE

Question Two
Suggested Time: One Hour

Potbelly, Inc. decided to build bleachers in its sports bar so that patrons watching sporting events on television could simulate the experience of rooting from the stands. Potbelly hired architect Arthur to plan the space and the bleachers. Potbelly then hired contractor Cornelius to install the stands. The city of Tucumcari approved the plan and issued a building permit authorizing Cornelius to begin construction.

Four months later the bar was packed with fans who were watching the Dallas Cowboys/New York Giants football game. All the patrons were rooting for Dallas except one, Petrone. Petrone was a loud, brash New Yorker who was passing through Tucumcari and stopped at the bar to watch the game. The bleachers reserved for Giants fans (which only Petrone was sitting in) collapsed and Petrone was badly injured, suffering multiple fractures of both legs and a severe contusion.

Petrone filed suit in New Mexico **State** District Court. [You may assume that the New Mexico Rules of Civil Procedure are the same as the Federal Rules of Civil Procedure]. Petrone named Potbelly, Arthur and Cornelius as defendants, charging each with negligence. Potbelly raised the affirmative defense of the fault of the City of Tucumcari based on the theory that the City was negligent in approving the building permit because Cornelius did not have a valid contractor's license. New Mexico is a several liability jurisdiction under which a defendant-tortfeasor is liable only for its percentage of fault and may "lay off" fault on other tortfeasors.

At the trial, Petrone sought to introduce the testimony of an expert witness to prove that architect Arthur negligently designed the stands. The proposed expert, Exner, was a liberal arts major college who now designs and builds metal storage sheds. Over the objection of Arthur, the court allowed Exner to testify and state her opinion that Arthur was negligent in the design of the bleachers.

Petrone asserted two theories of liability against Potbelly. First, Petrone alleged that he was an invitee on the premises and was thus owed a duty of reasonable care by Potbelly. Second, Petrone alleged that Potbelly was negligent in choosing the unlicensed Cornelius to construct the bleachers. At the close of Petrone's case, Potbelly made a motion for directed verdict as to the first theory (premises liability) on the ground that there was no evidence that Potbelly knew or show have known of the defect in the bleachers. The trial judge denied the motion.

When the jury instructions were being settled, Petrone submitted a proposed instruction that would inform the jury that Potbelly owed Petrone, an invitee, the "highest possible duty of reasonable care." Potbelly submitted a jury instruction directly from the Uniform Jury Instructions which states that Potbelly owed "a duty of reasonable care." The trial judge announced that the court would use Petrone's proposed instruction. Potbelly did not then object to the court's ruling that Petrone's proposed instruction would be used.

Potbelly requested that the judge submit two special interrogatories to the jury, one asking whether the jury found that Potbelly had breached its duty to Petrone as an invitee and the second asking whether Potbelly was negligent in hiring Cornelius as the contractor. The court declined the request and merely asked the jury to determine whether Potbelly was negligent and, if so, to assess a percentage of fault to Potbelly and to other alleged tortfeasors.

The jury returned a verdict for Petrone. The jury found compensatory damages in the amount of \$10,000. the jury found Potbelly negligent and assigned 50% of the fault to Potbelly. The jury found Cornelius negligent and assigned 20% of the fault to Cornelius. The jury found Arthur negligent and assigned 25% of the fault to Arthur. The jury also found the City negligent and assigned 5% of the fault to the city.

Judgment was entered against Potbelly for \$5,000, against Cornelius for \$2,000, and against Arthur for \$2,500.

Thereafter the defendants each filed timely motions for new trial and judgment NOV. Petrone filed a timely motion for new trial limited to damages or an additur, and presented in support of his motion the affidavit of one of the jurors, James. James' affidavit states that all the jurors except James were Cowboys fans who were aware that Petrone was a New Yorker and a Giants fan and each of whom stated during the jury deliberation that they disliked Petrone's "big city" lawyer and did not want to see that "shyster" get a significant contingent fee award.

You are the clerk to the trial judge who is considering the post trial motions. The judge has sent the following memo to you. Please respond to the judge's questions.

Dear Clerk Casey,

Below are my preliminary views on the manner in which I expect to rule on the post trial motion in Petrone, subject to your input. Please provide me with thoughtful but concise assessments of my proposed rulings and responses to my questions.

1. Arthur's Motion for NOV or new trial

In retrospect, I realize that it was a mistake to qualify Exner as an expert and allow her to testify against Arthur. I also realize that without Exner's testimony Petrone has no case at all against Arthur. I am therefore thinking that Arthur clearly deserves relief and so I think I will grant a judgment NOV or new trial in favor of Arthur. Please comment and explain concisely your reasoning.

2. Potbelly's Motion for NOV or new trial

I now realize that I erred in instructing the jury that Potbelly owed the "highest possible duty of reasonable care" to Petrone and that I should have given the UJI instruction proposed by Potbelly. But: A) Did Potbelly properly preserve the error?

B) Did the error cause provable prejudice (since the general verdict of the jury against Potbelly might have been based on the negligent hiring theory, as to which there is no error, instead of on the invitee issue which I wrongly did instruct on)?

In light of your answers to my two questions, what can and should I do about the error in instructing the jury?

3. Petrone's Motion for new trial or additur

Should I consider the affidavit of James? Explain. Should I grant an additur, assuming that I am convinced that the jury's assessment of only \$10,000 in damages is too low, or should I grant a new trial for that reason? Explain. If I use additur, what measure of damages should I use in setting the amount of the additur? Explain. If I use additur, should I tell the defendants that there will be a whole new trial or only a trial limited to damages if the defendants do not agree to the additur? Explain.

4. Scope of new trial

Assume that I finally conclude that I made no mistake other than the admission of Exner's testimony against Arthur and I conclude that Arthur deserves a new trial. Are there any problems in ordering a new trial for Arthur and simply affirming the verdict and judgment as to the others? If so, explain, and propose a solution and explain why your proposal is correct.

[End of Examination]