

**Civil Procedure Fall 2006
Final Exam
Professor Kimberly Kirkland**

Please note, this exam is structured slightly differently than past finals. Question 2 has only one part. Issues traditionally embedded in question 2(b) are elsewhere in the exam. I expect that many if not most of you will finish this exam by the end of the day and will not require the full 24 hours.

Instructions—please read carefully.

PLEASE USE THE EXAM NUMBER THAT IS ON FILE WITH THE REGISTRAR'S OFFICE

Due at 9:00 a.m. in the Registrar's office, Friday, December 22, 2006.

1. Format:

- Your answer must be typed. Type on only one side of each page.
- You are limited to a **total** of seven typewritten pages for your answer.
- Your answer should be double-spaced. Use 8 1/2" x 11" paper. Use 1 1/2 inch left margins. All other margins should be 1 inch. Use 12 point (or larger) Times New Roman font.
- Put your **exam number** on the top of each typewritten page you turn in. Place a page number on the bottom of each page you turn in. The exam and page numbers may be handwritten.

2. Honor Code Issues:

- You are NOT permitted to **dismiss your exam answer, or questions you have about the exam, with anyone other than the Registrar until all students have completed the exam. If you do, your score for the exam will be 0, and I will pursue honor code charges.**
- You may use an outline you prepared, your textbook, and your rulbook to help you answer the questions. You may use any commercial study aids that you find useful to help you to understand the material. You shall not do any legal research to help you answer questions. Do not read or consult any judicial opinions other than the excerpts of opinions in your textbook and the cases assigned in the syllabus. This is a test of your analytic skills; it is not a test of your ability to find cases or narratives setting forth analysis performed by others. Violation of the instructions constitutes an honor code violation.
- Although you may refer to commercial outlines if you feel they help you understand the material, they are not authority for your answers. In other words,

if you are stating the rule or test that applies in a given situation, you need to cite the Federal Rule of Civil Procedure and/or the judicial opinion you were assigned that addresses that rule or test. Gilbert's, Emanuel's and the like are not sources of law. If you quote material you did not author in your exam answer, you must use quotation marks to identify the language as non-original and you must cite the source. You may cite cases from the text book using one of the parties names (e.g. Conley p. 208) and you may cite the Federal Rules of Civil Procedure as follows: FRCP 15 or R15.

- You are NOT permitted to ask me any questions during the exam period.

3. **Test Taking Pointers:**

- Think before you begin writing. Organize your answer and thoughts before you begin writing.
- If your answer to an issue eliminates other issues clearly raised by the hypothetical, assume that the other issues will arise and discuss what would happen if the court addressed those issues. For example, if you conclude the complaint will be dismissed on statute of limitations grounds but the facts clearly raise an issue about whether the joinder of two parties as plaintiffs was appropriate, discuss the joinder issue even if you believe "in real life" the court would not reach that issue because the complaint would be dismissed on statute of limitations grounds.
- Explain your conclusions. That is, with respect to each issue raised in the exam, make sure you do "a" and "b" below. Do "c" and "d" where appropriate to decide a close question.
 - a) Identify the applicable law (FRCP and/ or case law).
 - b) Apply the applicable law to the facts given in the hypothetical, discussing any factual nuances that create uncertainty in applying the rules.
 - c) If there is applicable case law on point, analogize and or distinguish the facts of the precedent to help you decide the "gray" areas raised by the hypothetical.
 - d) Identify the policies underlying the relevant procedural rules and doctrine where necessary (probably only where you encounter a "gray" area)
- Some of the names used in the question below are names of living individuals and existing programs, however, the scenario that follows is purely fictional. Use only the facts I give you in answering the questions asked. Do not assume any facts you may know independently about the actual television series or its stars.
- Failure to follow any of these instructions may result in loss of points.

QUESTION ONE.

Lucy Arnold, a struggling actress, lives in Los Angeles, California. She works as a waitress to make money while she auditions for roles in television, film and theater productions. Lucy was ecstatic when she was hired to act in a television ad campaign for Arlington Vespa, a Vespa¹ dealership in Arlington, Virginia. Arlington Vespa is a Virginia corporation and its only place of business is its Arlington store. The Vespa is an Italian made motor scooter renowned for its styling. She had not had an acting job in a year. Lucy was hired after an exhaustive search because she closely resembles actress Sarah Jessica Parker, known for her role as Carrie Bradshaw on a television series called *Sex and the City*. *Sex and the City* was a national phenomenon for the 6 years it aired. Parker has gone on to make movies that are distributed nationally. However, Parker's character in the *Sex and the City*, has become an icon for young women and is her best known role. Carrie Bradshaw, Parker's character in *Sex and the City*, lived in New York City, dressed in couture fashion and lived a sophisticated, urban lifestyle. Arlington Vespa's target demographic is young, single, urban professionals with high disposable incomes who are concerned with aesthetics. They thought Parker's image would be universally appealing to their target demographic.

Lucy was hired to do a series of five ads for Arlington Vespa. The campaign was titled "I'm as stylish as my Vespa." In the first ad Lucy, dressed like Parker's character Carrie in very high heeled shoes and a designer dress, comes out the front door of what appears to be a Georgetown brownstone and hops onto a cherry red Vespa. She tucks her purse under her arm, turns to the camera and says, "Drive a Vespa and become an instant

¹ A Vespa is an Italian made motor scooter, renowned for its design.

classic--- by sheer force of association.” She drives off down a crowded city block, hair and scarf flowing in the wind behind her. The advertisement was filmed in California.

The Vespa dealership and its advertising agency bought ad time on a Virginia television station, WAVA. WAVA broadcasts throughout the Virginia, Maryland and Washington DC area. Shortly after WAVA began broadcasting the first ad a friend of Parker’s saw the ad and thought it was Parker. She called Parker who lives in New York and asked her when she started doing commercials. Parker called her agent and asked what was going on. Her agent investigated. He saw the advertisement and was amazed at how closely Lucy resembled Parker. He discovered that Lucy was a young actress living and auditioning for work in Los Angeles. He told Parker what he had discovered and recommended that Parker talk to her lawyer about how to proceed. Parker called her lawyer and they decided to send WAVA and Arlington Vespa a cease and desist letter claiming that the ad constituted an unauthorized use of Parker’s image and demanding that they stop running the ads. Worried about potentially significant exposure and negative publicity, WAVA and Arlington Vespa pulled the first ad and cancelled Lucy’s contract for further four additional advertisements in the series.

Lucy brought suit in the Superior Court for Los Angeles County California against Parker and Arlington Vespa. Lucy alleges interference with contractual relations against Parker (i.e. she claimed that Parker unlawfully interfered with her contractual relationship with Arlington Vespa.) She alleges that Arlington Vespa breached its contract with her when it cancelled the contract in response to Parker’s cease and desist letter. She claims damages in the amount of \$125,000 against each.

Question 1A. Sarah Jessica **Parker** has moved to dismiss for lack of personal jurisdiction under FRCP 12(b)(2). You are the judge. Decide **Parker's motion**.

Question 1B. Assume now that you represent Parker and have not yet responded to the complaint in any way. For purposes of this question only, assume you have decided **not** to raise the personal jurisdiction defense because Parker tells you she loves the shopping in LA and would be happy to travel there whenever you need her. You would like to be litigating in federal court because cases are being decided more quickly there. You have researched the issue and concluded that Lucy has stated a claim for which relief can be granted for interference with contractual relations. Also assume Arlington Vespa has already answered. In its answer Arlington Vespa denied the allegations that it breached its contract with Lucy but otherwise raised no defenses.

Further assume that you have decided you have a viable misappropriation of another's public image claim (a tort recognized in California) against both Lucy and Arlington Vespa. You would rather not pursue Lucy at this time for misappropriation of Parker's public image because she makes so little money you are unlikely to recover from her and the jury may feel sympathetic toward her because she's a struggling actress. If she were to become successful later maybe it would be worth pursuing her in a separate action. You would like to pursue Arlington Vespa for misappropriation of Parker's public image. You estimate the damages for misappropriation are \$150,000. The United States District Court for the Central District of California encompasses Los Angeles. What procedural tactics will you pursue at this stage of the litigation? What advice do you need to give your client about your strategy outlined above?

The Law:

Assume California has adopted rules identical to the Federal Rules of Civil Procedure.

Long arm Statute:

Personal jurisdiction over non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or an executor or administrator, who in person or through an agent:

1. transacts any business out of the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state; or

3. commits a tortious act out of the state causing injury to person or property within the state if the non-domiciliary

(i) regularly does or solicits business, or engages in any other conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Intentional Interference With Contractual Relations:

- 1) A contract existed between plaintiff and another
- 2) Defendant was aware of the contract (not necessary that defendant knew the details of the contract)
- 3) Defendant intentionally interfered with the contract.
- 4) Defendant caused the other party to the contract to breach
- 5) Plaintiff was damaged as a result of Defendant's actions.

Breach of Contract:

- 1) The Defendant entered into a contract,
- 2) the defendant breached the contract and
- 3) plaintiff suffered damages as a result.

Appropriation of Likeness of Another:

- 1) The Defendant appropriates to his own use or benefit,
- 2) for commercial purposes,
- 3) the name or likeness of the plaintiff,
- 4) without the consent of the plaintiff, and
- 5) the defendant is unjustly enriched by the misappropriation of the plaintiff's name or likeness.

QUESTION TWO

You are the judge presiding over a case filed in federal court. The plaintiff, Jason Stewart was the manager of a Starbucks coffee outlet in Concord New Hampshire. He was fired after he was absent from work for a number of days for what his doctor diagnosed as bipolar disorder. Stewart sued Starbucks for violation of the Family Medical Leave Act (the FMLA), a federal statute that entitles employees up to 12 weeks of unpaid leave to address a serious medical condition. To prevail in a FMLA case, the plaintiff must prove that:

- 1) he was an eligible employee,
- 2) his employer was an employer covered by the act,
- 3) he suffered from a serious medical condition,
- 4) he gave his employer notice of his need for leave as soon as was practicable,
and
- 5) the employer interfered with his right to take leave.

Notice must be reasonably calculated to apprise the employer that the employee has a serious medical condition. Notice must be received before the employee is terminated. The employee does not need to use the words FMLA or provide a specific diagnosis. The defendant Starbucks has filed a motion for summary judgment on the element of notice. (Do not address any other elements in your discussion.) The Plaintiff has filed an objection. The following portions of the record were attached to the parties' briefs:

Affidavit of Jason Stewart:

I started to feel odd in November. My boss had just told me that he had scheduled me to present a new system I developed at the annual company meeting in front of a thousand people. Management apparently really liked my system and wanted to implement it throughout all of the stores. I am uncomfortable with public speaking, so at first I thought I was just anxious about the presentation. But before long I was having difficulty sleeping. I started drinking at night to help me get to sleep. Increasingly, I had difficulty concentrating on my job. I didn't turn in my financial statements for the third quarter, which were due on December 1st, because I just couldn't sit still and focus. I started having paranoid thoughts. I thought someone was watching me and my computer. I thought my boss was watching me and out to get me. At this point I didn't know what was wrong with me; I just knew I felt like I was going crazy. At a meeting with my boss on December 12th, he told me I looked terrible. I told him I hadn't had more than an hour or two of sleep a night for over a month and that I'd lost 15 pounds in the last 3 to 4 weeks. I asked him if I could take some vacation time but he said no because the holidays are a busy time and he couldn't spare me.

By December 19th, I felt like I couldn't go on. I was suspicious of my boss I felt like I was crawling out of my skin. I called a therapist I knew and saw her briefly after work on the 19th. After asking me a lot of questions, she told me to I needed to see a medical doctor. I went to see the doctor on the 20th. He told me to take some time off, try to relax and he gave me some anti-anxiety medication. I went home and called my assistant manager's cell phone. She didn't pick up. I was relieved. I left a message saying I'd seen a doctor, I was sick and would be out for a few days. I took the

medication and went to bed and slept for the first twenty-four hours. For the next couple of days I still felt anxious and sick to my stomach. The last person I wanted to talk to was my boss. I was still convinced that she was spying on me. I went back to the doctor's office on the 26th and the doctor diagnosed me with "bipolar disorder with paranoid tendencies." He wrote a note saying I needed to be out of work for 8 weeks. He sent it to Starbucks, but they had already fired me by the time they received the note.

Affidavit of Sandra Ford.

I am a Starbucks regional manager. I was Jason Stewart's boss. Jason was an excellent manager for 8 years. He took initiative and was creative. He was one of my best store managers. In November, I attended a meeting with Jason. Jason acted strangely. He told me he wasn't sleeping. He couldn't explain why he hadn't turned in his financial reports. He wanted me to authorize vacation time, but he should have known we were too busy over the holidays. I heard from Debbie Sands, the assistant manager in Jason's store, that Jason was out from the 20th forward. He told me Jason had not said anything about why he was out. I tried calling Jason on his cell phone repeatedly between the 21st and the 26th but he never responded. I fired him on the 26th. I made Debbie the store manager. Later that day, Debbie told me she received a fax from Jason's doctor saying that he had bipolar disorder. By that time, I'd already fired and replaced Jason.

Deposition of Debbie Sands:

Q. What is your current position at Starbucks?

A. I am the manager of the Concord store.

Q. What was your position on December 20th?

A. I was the assistant manager. Jason Stewart was my boss.

Q. Do you remember whether Jason was at work on December 20th?

A. He was not. And he actually never returned to work after that.

Q. Did you receive a call from Jason on the 20th?

A. Not that I remember.

A. Were you qualified to serve as store manager when you were promoted to that position?

Q. Yes. I've been ready for that job for years. I had applied for the job at the time Jason was hired but they gave it to Jason instead.

You are the judge assigned to the case. Decide the defendant's motion.

Good luck and have a great break. I'll look forward to seeing you in January.

