EXAMINATION IN CIVIL LAWSUITS LEWIS DECEMBER 20, 1991 2:00-5:00 P.M.

MATERIALS: YOU MAY USE THE CASEBOOK (Field, Kaplan and Clermont's Civil Procedure (6th ed., Foundation 1990), Foundation's 1991 Federal Rules of Civil Procedure pamphlet, any course handout materials, and notes and outlines prepared by you or your study group. No other commercially sold or distributed material is allowed.

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YOU MUST WRITE THE COURSE NAME AND SECTION AND YOUR EXAMINATION NUMBER ON THE EXAMINATION PAPER AND EACH BLUE BOOK YOU USE; YOU WILL BE REQUIRED TO TURN IN THE EXAMINATION PAPER WITH YOUR BLUE BOOK

INSTRUCTIONS

The questions will carry raw point values that roughly correspond to the time allowed to answer them. THE PAGE-SIDE LIMITS ON THE ANSWERS TO THE SUBPARTS OF QUESTION I ARE DESIGNED TO PROTECT YOUR TIME AND TO EXPRESS THE RELATIVE IMPORTANCE OF THE SUBPARTS--OBSERVE THEM. THE LIMITS ASSUME SINGLE SPACED ANSWERS--BUT "SIDES" MEANS ONE SIDE OF A TWO-SIDED PAGE. THUS THREE SIDES MEANS THREE SIDES IN TOTAL, NOT BOTH SIDES OF THREE PAGES. THE PORTION OF AN ANSWER THAT EXCEEDS THESE LIMITS WILL NOT BE READ, SO IT IS A WASTE OF YOUR PRECIOUS TIME TO VIOLATE THOSE LIMITS

Please clearly state any assumptions, about fact or law, on which your answers are based. Illegible answers or parts thereof cannot receive credit. It will be to your advantage to spend time planning your answer before you reduce it to writing. Be as concise as comprehensive response permits.

IMPORTANT: (1) NO CREDIT FOR ANSWERS NOT SUPPORTED BY A REASON OR REASONS; (2) NUMBER AND LETTER YOUR ANSWERS AS DESIGNATED IN THE CORRESPONDING QUESTION

QUESTION I APPROXIMATELY 1-1/4 HOURS

Adjacent Atlanta restaurant owners A and B, citizens of Georgia, bring an action in federal district court in Atlanta against landscape architect C, a citizen of Alabama, for a defectively designed plan that led to problems with excessive water runoff in 1988, causing damages of $85,000. C asserts a claim against landscape developer D, a corporation incorporated in Georgia with a principal place of business in Alabama. C alleges that D's faulty installation of plastic drainage pipes was the cause of $60,000 of the $85,000 of damages claimed by A.

C also asserts that A owes it $40,000 under the contract that called for C's architectural landscape services. A then claims that B has breached an agreement to reimburse it for the $40,000 claimed by C, because a portion of the planned work was to be done on the border between A's and B's lots and would enhance the value of B's property. C further asserts that about a year after the runoff, when he was visiting B's restaurant and complained to the waiter about the quality of the food, B slandered him by screaming in front of other customers that C was a tasteless Auburn redneck whose idea of gourmet dining is ketchup on Colonial Bread, a slice of Spam, a 6-pack of Old Milwaukee, and a chew of Red Man for desert.

D asserts that A still owes $140,000 for D's landscape installation work; A responds by denying D's allegations and asserting a claim that D's faulty performance of that contract caused the $85,000 water runoff damage.

SUBPART (A) ANSWER LIMIT:3 PAGE SIDES

Identify and evaluate the strength of each argument that B, C, D and A would make in opposition to each claim asserted against them.

SUBPART (B) ANSWER LIMIT: 1\2 SIDE OF 1 PAGE

Assume that, even though the plans were drawn in Alabama by Alabama defendants, Georgia state courts would use Georgia's own 4-year statute of limitations for defective design claims rather than Alabama's 1-year statute. Assume further that Georgia state courts would apply strict liability principles to the defective design claims, while an Alabama state court would insist on proof of negligence. As the federal judge of the Alabama district where the action would be transferred if transfer is allowed, rule on A's and B's contention that Georgia law should be applied on both the limitations and standard of care issues.

QUESTION II APPROXIMATELY 15 MINUTES

Suppose the plaintiff, in a federal court action, prays for specific performance of a contract. She does not pray (in the event specific performance is denied) for compensatory damages resulting from breach of contract. Your answer, served 12 days after service of the complaint, contains no counterclaim.

Identify the measures, if any, that plaintiff might take in both pretrial and trial proceedings to recover contract damages, get jury trial, or both. Could plaintiff conceivably attain either of these objectives if she stands on the original complaint? Could she forfeit either or both even if her pleadings on the eve of trial show her entitlement to both?

**DO QUESTION III OR QUESTION IV, NOT BOTH**

QUESTION III APPROXIMATELY 15 MINUTES

IN ONE PARAGRAPH, identify one way to correct the "anomaly" created by the 1991 amendment to FRCP 15(c) that would not offend a different provision or provision of federal law.

**OR**

QUESTION IV APPROXIMATELY 15 MINUTES

You are counsel for plaintiff, anticipating trial in Abilene, Texas. Abner, a Texan, is a nonparty witness who lives 112 miles from the federal courthouse in Abilene, in a different federal district from the one embracing that city. Under Texas law Abner could be subpoenaed at his home or office to testify in state court in Abilene. You are concerned that examination of Abner at trial will yield less favorable testimony than you elicited during Abner's deposition.

IN ONE PARAGRAPH, identify the relevant rules of federal civil procedure and evidence and evaluate the arguments for and against your attempt to introduce into evidence a portion of Abner's deposition transcript in lieu of his live trial testimony.

QUESTION V APPROXIMATELY ONE HOUR AND FIFTEEN MINUTES

Drivers A, B & C collided on a foggy evening. In Civil Court in a state that follows the 2d Restatement of Judgments and has procedural rules identical to the Federal Rules of Civil Procedure, A brings a negligence action against B, seeking $8,000 for property damage and $35,000 for personal injuries. By statute, the Civil Court may entertain claims or counterclaims "to the extent that all claims asserted by any one party do not in the aggregate exceed $25,000."

15 days after service of the complaint, B answers. The Answer asserts lack of subject matter jurisdiction concerning the personal injury claim, as well as the defenses of A's contributory negligence and B's own impoverishment in response to both claims. In a section of the Answer entitled "Counterclaim," B alleges that A's negligence caused the accident and prays for $50,000 in damages representing her own personal injuries. The Answer contains no additional allegations.

(1) 30 days after service of the Answer, and before any response by A, B moves for a judgment by default on the counterclaim. As trial judge, would you grant it, in whole or in part? Why?

(2) B then moves to dismiss the complaint for lack of personal jurisdiction and because the statute of limitations ran before the action was commenced. As trial judge, rule on this motion.

(3) Assume the trial court enters a $25,000 judgment in B's favor on the counterclaim. While A's appeal from that judgment is still pending, B files an independent action against A for the $25,000 balance of B's claimed personal injuries. In that action A timely asserts the defense that B's claim is precluded by the judgment in action 1. As trial judge, would you grant the motion?

(4) Assume [contrary to the assumption in (3) above] that the action 1 court does not give B a default judgment on the counterclaim. Instead, after the action 1 parties have conducted discovery, A moves for summary judgment concerning the counterclaim. In support, he offers only a memorandum of law arguing that the depositions, interrogatory answers, documents, and other materials contain no evidence of his contributory negligence. B responds with her own affidavit asserting that the accident could not have happened unless A had been negligent, because neither she nor C was. As trial judge, rule on A's motion.

(5) Assume the action 1 court enters a final judgment in A's favor for $25,000, grants A's motion for summary judgment on the counterclaim, and B does not appeal. In a subsequent negligence action by C v. B, C moves for an order that B is estopped from denying her negligence. As trial judge, rule on C's motion.

**-LAST OF THREE PAGES-**

END OF EXAMINATION