

EXAM NO.

CIVIL PROCEDURE

PROFESSOR KLERMAN

FALL 1999

DECEMBER 17, 1999

OPEN BOOK

3 HOURS

- ~~1) The exam has 10 pages. Please make sure you have all ten. Be sure to answer all questions.~~
- 2) The exam is open-book. You may consult any materials you wish. You may use a calculator.
- 3) Although you can allocate your time as you wish, I have indicated the time I suggest for each question. The times add up to 2.5 hours, which gives you half an hour for additional reflection, checking, and proof-reading.
- 4) Directions for Part I (10 multiple choice questions):
Write your exam number on the attached computer sheet. Mark your answers clearly and darkly, and erase your changes completely. No points will be awarded for incorrect answers, but neither will such answers be penalized. If you think one of the multiple choice questions is ambiguous or unfair, you may make a written challenge. You may make only one such challenge. *If you make more than one challenge, I will ignore all but the first.* Make your challenge in a Blue Book or in Examiner or however you are writing Parts II and III of the exam.
- 5) Directions for Parts II and III (long hypothetical and policy questions):
A) Make arguments for both sides, whenever such arguments are plausible.
B) Make alternative arguments for the same result, whenever such arguments are plausible.
C) Address all plausible issues, but spend more time on issues which are more debatable.
D) Cite to cases, rules, and statutes whenever relevant. You may leave out parentheses when citing rules and statutes. That is, it is fine to cite Rule 12b6 rather than 12(b)(6).
- 6) For all questions, assume that the relevant statute of limitations is 1 year and that Los Angeles is in the Central District of California.

**YOU MUST STOP WRITING WHEN INSTRUCTED TO DO SO BY THE PROCTOR.
FAILURE TO DO SO WILL BE CONSIDERED A BREACH OF ACADEMIC DUTY
AND WILL BE REPORTED TO THE DEAN'S OFFICE BY THE PROCTOR.**

DO NOT LIFT THIS COVER SHEET UNTIL INSTRUCTED TO DO SO BY THE PROCTOR.

Part I (40 minutes). Multiple Choice Questions (Deleted to preserve for future use)

Part II. (1 hour, 10 minutes)

Jan Gilletteman is a 1L at USC Law School. Before coming to USC, she lived her entire life in Montana. After graduation she thinks she would like to get a job in Idaho, but she is not sure. On January 1, 1999, Jan was injured when her notebook computer caught fire and singed her hand. On July, 1, 1999, Jan filed a complaint against Tohiva, the manufacturer of the computer, in federal district court for the Central District of California on a product liability theory, claiming \$100,000 in damages. Tohiva is incorporated in China and manufactures its products there. It sells its computers only through its website and has UPS deliver computers from its warehouse in China directly to the customer. Each computer shipped to the U.S. comes pre-loaded with software, including Microsoft Office2000, Quicken Deluxe, TurboTax (for US federal taxes), TurboTax State (for state taxes in the state to which the computer is shipped), Netscape Navigator, and Pine.

Tohiva responded to the suit by filing a motion to dismiss, which the judge denied. Tohiva then answered the complaint by denying that its product was defective and asserting that it lacked knowledge about the extent of Jan's damages.

Tohiva sent Gilletteman's lawyer a request to inspect the burned computer. Gilletteman's lawyer refused to allow Tohiva to inspect the computer. Tohiva made a motion to compel, which the judge granted along with \$1000 in attorney's fees and expenses. Gilletteman then complied with the judge's order. Upon inspection, Tohiva's engineers ascertained that the fire started in the microprocessor, which was made by BNE, a small Silicon Valley start-up. On October 1, 1999, Tohiva impleaded BNE. A month later, Gilletteman amended her complaint to add BNE as a defendant. BNE filed motions to dismiss the claims against it, which the judge denied. BNE then filed an answer denying that its product was defective and asserting that it lacked knowledge about the extent of Jan's damages.

During discovery, the following facts came out: (1) Gilletteman's hand suffered only very minor injuries, if any at all. She required no medical treatment, and within a week after the burn, it was impossible to tell if the hand had ever been burned. (2) Gilletteman claims, however, that she suffered intense pain and fear when the machine burst into flames. Her claim is corroborated by five witnesses who were in the room when the computer burst into flames. One bystander, however, testified in his deposition that Gilletteman was 20 feet away from the computer when it burst into flames and that, upon seeing the burning computer, she exclaimed "Terrific! I always hated that machine, and now I can sue Tohiva for big money." (3) The market value of Tohiva's computer at the time it burst into flames was \$1500. (4) Tohiva and BNE had been sued five times before for similar accidents. They had won the first four cases, but lost the fifth.

Gilletteman moved for summary judgment against both Tohiva and BNE. Tohiva moved for summary judgment against both BNE and against Gilletteman. And BNE moved for summary judgment against both Gilletteman and Tohiva. The judge denied Tohiva's and BNE's motions, but granted Gilletteman's motions and entered judgment holding Tohiva and BNE jointly and severally liable for \$1500 in damages.

Tohiva and BNE immediately appealed. You are a law clerk to an appellate judge hearing the appeal. Write a memo to your judge analyzing the issues and arguments that the judge will need to address to decide the case. Assume that (a) the parties raised all plausible arguments in the district court in support of and in opposition to the various motions described above, and (b) that the parties raised all non-waived issues in their appellate brief and made all plausible arguments in support of their positions.

Part III (40 minutes)

U.S. Senator Pugilist is considering the following proposals:

(A) The U.S. Supreme Court shall not make any change to the FRCP unless it can show, by the preponderance of the evidence, that such changes will decrease the sum of direct costs and error costs.

(B) For each averment in the complaint, the plaintiff must state either (a) what evidence it has to prove that averment, or (b) what investigation it has done to try to uncover evidence to prove that averment and what discovery devices it plans to use to prove the averment. Complaints failing to meet these criteria shall be dismissed. Similarly, for each denial in the defendant's answer, the defendant must state what evidence it has to prove the denial. For each assertion of lack of information in a defendant's answer, the defendant must state what investigation it has done to try to uncover evidence on that issue and what discovery it plans to use for that issue. Any denial or assertion of lack of information not properly supported in this manner shall be disregarded, and the plaintiff's averment shall be taken to be true.

You are Senator Pugilist's resident legal policy wonk. She has asked you to write a memo evaluating each of these proposals.

She has also asked you to propose any other reforms you think would improve American civil procedure. She requests that all proposals (a) specify the new legal rule to be enacted and (b) explain why the new rule would be superior to current law.