MEMORANDUM

To: **Spring 2002 Civil Procedure Class**

From: **Michael Allen**

Date: **May 8, 2002**

Subject: **Final Exam – Outline of Answer**

I wanted to take the time and give you with an outline of possible responses to the questions posed in the final examination as well as an explanation of the answers for the multiple choice questions. You should recognize a few things about this outline. First, this outline may not contain all possible points that students could legitimately raise in response to the questions. I would certainly give credit when a student provides a correct response that I did not think about. Second, I have used an outline form. I expected (and I am sure that you all used) an essay format. Third, I do not expect that any student will raise all of the points in the outline. Finally, I only provided an outline with respect to Section I and short thoughts about the multiple choice questions in Section II. Section III is all about your ability to take and defend a position.

For your reference I have also attached the following two items to this memo: (1) as Exhibit A a copy of the exam itself since you could not remove it from the test room, and (2) as Exhibit B a copy of my grading sheet. With these preliminaries out of the way, here are my thoughts on the exam:

Section I

Question 1

Claim of lack of Subject Matter Jurisdiction re: amount in controversy

- You should advise the President that Ms. Fall will not prevail on this argument for remand.
    - The general rule in terms of removal/remand is that a case may be removed by a defendant so long as the case could have been brought in the federal court in the first place. There are some qualifications to this rule (discussed below), but none of them are relevant here. In this case, Ms. Fall's claim is not a federal question and supplemental jurisdiction does not support jurisdiction over either claim because neither one standing along has an independent basis for federal subject matter jurisdiction. Therefore, the claim could only be in federal court if diversity jurisdiction provides the basis for jurisdiction and, thus, removal.

- 28 U.S.C. § 1332(a) provides the basic rule for diversity of citizenship jurisdiction in federal courts. That statute requires that there be in excess of $75,000, exclusive of interest and costs, at controversy in a case in order for there to be subject matter jurisdiction.
    - It is true in this case that each count of the complaint standing alone calls for recovery of less than $75,000. That is not a bar to removal, however, due to the rules regarding the aggregation of claims for jurisdictional purposes.
        - The relevant aggregation rule here is that a plaintiff may aggregate all her claims against a single defendant, whether those claims are related to one another, for jurisdictional purposes.
        - In this case, Count I is worth $50,000 and Count II is worth $35,000. The total of these claims ($85,000) is, therefore, sufficient to meet the statutory requirement.

Claim of lack of Subject Matter Jurisdiction re: citizenship of parties

- I would advise the President that Ms. Fall is not likely to prevail on this argument for remand.
    - The same rules for removal apply here as described above for the amount in controversy question.
    - In addition to meeting the amount in controversy requirement, the plaintiff and defendant must also be of diverse citizenship under 28 U.S.C. § 1332(a) as relevant to these facts.
        - On these facts, there is no dispute that Ms. Fall is a citizen of Washington, D.C. Therefore, if Mr. Bush is also a citizen of Washington, the requirement of diversity of citizenship would not be met.
            - As an aside, if Mr. Bush were deemed a citizen of Washington, he also could not remove the case in any event due to the operation of 28 U.S.C. § 1441(b).
        - In order to determine citizenship, you need to have residence and a current intent to remain indefinitely. This test is subjective as we saw in Gordon v. Steele, the case involving the college student. Therefore, we would look to evidence concerning the President's

subjective intentions about his residence and where he intends to remain indefinitely.

- Here, it is likely that the President would be able successfully argue that he is a citizen of Texas. This so because of the following points:
  - His term as President is limited and most former Presidents do not remain in Washington.
  - We assume that his testimony would be to the effect that he considers Texas home. He might be able to bolster this testimony with matters such as income tax filings, voter registration, and frequent trips home.
  - He ran for the White House as an outsider.
  - He continues to maintain strong contacts with Texas, including the use of the Western White House in Waco, Texas.
- In conclusion, my assessment is that Mr. Bush would be considered a citizen of Texas for diversity jurisdiction purposes.

<u>Defective Notice of Removal</u>

- I would also advise the President that Ms. Fall is not likely to prevail on her claim that his notice of removal was defective.
  - 28 U.S.C. § 1446(b) provides that Mr. Bush should have filed his notice of removal within 30 days after receipt of Ms. Fall's complaint. On the facts of the problem, that would mean that Mr. Bush should have filed his notice of removal by February 15, 2002. He did not do so, waiting until to March 1, 2002 to do so.
    - Mr. Bush's mistake, however, is not fatal to his removal effort. The reason is that 28 U.S.C. § 1447(c) provides that a motion to remand raising any issue other than lack of subject matter jurisdiction must be made within 30 days of the filing of the notice of removal. On the facts of this problem, that means that Ms. Fall should have filed her motion to remand no later than April 1, 2002. She waited too long by filing the motion on April 15, 2002.

- Note that she is allowed to raise her first two points because they relate to subject matter jurisdiction. This final point is barred because it is unrelated to subject matter jurisdiction.

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Question 2

Joinder Under the Rules

- There are 2 possible avenues under the Federal Rules for the President to join the Texas Rangers in the lawsuit.[1]
  - The first option is Rule 14 Impleader.
    - Rule 14(a) allows Mr. Bush to bring the Texas Rangers into the case as a third-party defendant if Mr. Bush can claim that the Rangers will be liable to him if he is liable to Ms. Fall on her claim. Under these facts, Mr. Bush meets the requirements of Rule 14(a). His claim would be that if he has to pay Ms. Fall on her breach of contract claim it is because of the guarantee Mr. Bush agreed to in the contract. So, he will claim that if he pays Ms. Fall on the guarantee the Rangers should pay him. This is the classic Rule 14 impleader situation.
  - The second option is Rule 19 compulsory joinder.
    - The first step in the Rule 19 inquiry is to consider whether the Rangers are "a person to be joined if feasible." To make this determination, you need to address the factors listed in Rule 19(a)(1) and (2).
      - The Rangers do not fall within Rule 19(a)(1). Complete relief can be afforded between Mr. Bush and Ms. Fall without the Rangers being present in the lawsuit. In other words, if the court determines that there has been a breach of contract, Ms. Fall can obtain full recovery from Mr. Bush as to Count I of her complaint.
      - The Rangers would fall within Rule 19(a)(2).

[1] Mr. Bush cannot use Rule 13(h) to join the Rangers. Among other reasons, the facts state that Mr. Bush is not asserting a counterclaim against Ms. Fall. Rule 13(h) can only be used in the situation in which a counterclaim is asserted.

- The first step under Rule 19(a)(2) is to determine if the Rangers claim "an interest relating to the subject of the action." The team does claim an interest under the meaning of the Rule because it is a party to the contract that is the subject of the pending action.

- The next step in the analysis is to determine if the Rangers fall within either Rule 19(a)(2)(i) or Rule 19(a)(2)(ii). Note that Mr. Bush only needs to satisfy one of these subsections so long as the team meets the interest requirement.

    - In terms of Rule 19(a)(2)(i), a good argument can be made that the team's interest as a practical matter could be harmed as a result of the Fall v. Bush case. It is true that the team will not be bound by issue or claim preclusion by a result in the case because it is not a party. But the requirement of harm here is broader than a mere legal harm to the interest. It is really not important, however, to resolve this question because Rule 19(a)(2)(ii) is clearly satisfied.

    - The requirement of Rule 19(a)(2)(ii) is met because Mr. Bush could be subject to inconsistent rulings if the Rangers are not a party. For example, Mr. Bush could lose this case and then try to sue the Rangers on the guarantee. He might lose that case because a different court finds that there was no breach by the Rangers.

- Once you determine that the Rangers should be joined under Rule 19(a) you should then join the Rangers as a party. You only need to proceed to the Rule 19(b) analysis if you determine that the Rangers cannot be joined. As set forth below, there is a strong argument that the Rangers would not be subject to personal jurisdiction under the District's long arm statute. In addition, there would not be subject matter jurisdiction over this claim if you proceeded based on Rule 19. Therefore, you would need to proceed to Rule 19(b).

- The question under Rule 19(b) is whether the Rangers are so important to the case that the case should be dismissed if the Rangers cannot to joined. The Rule directs the court to consider "whether in equity and good conscience the action should proceed.

. . " The Rule provides four factors to consider in resolving this question.

- The first Rule 19(b) factor is a consideration of the extent to which a judgment in the Rangers' absence would be prejudicial to either the Rangers or either of the parties. As set forth above under Rule 19(a), Mr. Bush can make the claim that he will be prejudiced by the Rangers' absence because he could face inconsistent rulings as to whether the Rangers owe Ms. Fall money under the contract.

- The second Rule 19(b) factor is the extent to which a judgment can be shaped to avoid the prejudice. In this case, it is difficult to see how the judgment could be shaped to avoid the prejudice.

- The third Rule 19(b) factor is whether a judgment rendered without the Rangers will be adequate. It would. Ms. Fall does not need to have both parties to get paid under the contract.

- The final Rule 19(b) factor is a consideration of whether the plaintiff would have an adequate remedy elsewhere if the action were dismissed. The answer here is yes because she could file the claim in Texas.

- My assessment is that the Rangers are "indispensable" in the meaning of Rule 19(b) and that the court should dismiss the action if the Rangers cannot be joined.

Subject Matter Jurisdiction

- The question also calls for a consideration of subject matter jurisdiction. In this case, subject matter jurisdiction would be proper over a claim by the President against the Rangers under Rule 14(a). Subject matter jurisdiction would be lacking, however, if the Rangers were added to the case under Rule 19.

  - With respect to Rule 14:

    - Mr. Bush's claim is not a federal question under the terms of 28 U.S.C. § 1331. The claim is basically one based on state law breach of contract.

    - Second, there will not be diversity of citizenship under 28 U.S.C. §

1332, potentially for two independent reasons. First, the claim does not exceed $75,000 exclusive of interest and costs. Instead, it concerns a guarantee on a $50,000 contract. Second, the team is a citizen of Texas based on both its principal place of business and state of incorporation and, depending on your analysis, so is Mr. Bush.

- The third option is supplemental jurisdiction under 28 U.S.C. § 1367. The first question (under section 1367(a)) is whether Mr. Bush's claim against the Rangers arises from the same nucleus of operative fact as does Ms. Fall's claim against the President. It does. Both claims arise from the same alleged breach of contract. Second, this section makes clear in the last sentence that it applies both to the joinder of claims and the joinder of parties. The exception in Section 1367(b) does not apply because Mr. Bush is not a plaintiff asserting a claim. Therefore, there is supplemental jurisdiction over this claim.

- With respect to Rule 19, the team becomes a defendant instead of a third-party defendant as it would be under Rule 14(a). As opposed to Rule 14, we are now concerned with whether there would be jurisdiction over a claim by Ms. Fall against the Rangers concerning the $50,000 advertising contract. Remember, under Rule 19 there is no claim between the Rangers and Mr. Bush. Of course, Mr. Bush could later bring a cross claim against the team. But such an action would be down the road. An analysis of subject matter jurisdiction in the context of Rule 19 follows:

  - 28 U.S.C. § 1331 is not relevant because there is no federal question jurisdiction over a state law breach of contract claim.

  - 28 U.S.C. § 1332 does not provide jurisdiction. There is no problem with the citizenship of the parties. Ms. Fall is from Washington and both the Rangers and Mr. Bush are from Texas. The problem comes from the amount in controversy requirement. Ms. Fall cannot make out a claim against the Rangers for more than the $50,000 amount of the contract. Moreover, she is not allowed to aggregate the claim against the Rangers with any other claim in the action. For example, she cannot add this claim to Count II because the defendants are different and the claims are totally unrelated. In addition, she cannot add this claim to Count I against Mr. Bush because the total value of the contract is only $50,000. In other words, she can't double dip.

  - The claim also fails jurisdictionally under 28 U.S.C. § 1367. There

is no problem with Section 1367(a) because then claim against the Rangers arises out of the same nucleus of operative fact as Count I. The difficulty comes with respect to Section1367(b). That section applies because (1) the original action was based on a diversity and (2) the claim against the Rangers is being made by Ms. Fall, a plaintiff. The statute precludes the use of supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule . . . 19 . . . of the Federal Rules of Civil Procedure." Because the Rangers were made a party under Rule 19 in this hypothetical, the team was a defendant and Ms. Fall is a plaintiff, there is no jurisdiction under Section 1367.

Personal Jurisdiction

- The final issue to consider is whether the Rangers would be subject to personal jurisdiction in the District of Columbia. I believe they would not.
    - The first step in the personal jurisdiction analysis is to consider whether either claim against the Rangers (*i.e.*, the third party claim by Mr. Bush or a claim by Ms. Fall should the team be joined under Rule 19) falls within the District of Columbia long arm statute. This statute restricts the jurisdictional reach of the District. Both claims essentially deal with the same underlying facts – not paying under the contract – and can be considered together. As set forth below, the claims do not fall under the terms of the statute.
        - Subsection (2) concerns substantial activity in the District. On the facts, the Rangers do not meet this standard.
        - Subsection (1) sets forth several activities that could subject the Rangers to personal jurisdiction if the claim arose from those activities. None of the items on the list applies. The closest possibility is subsection (1)(g) concerning breaching a contract in the District by failing to perform acts within the District. The team's breach, if it occurred, was in Texas where its obligation to pay was centered. Moreover, the actual payment itself was also to be done in Texas at the Austin National Bank.
            - Of course, one could always make arguments that the Rangers had somehow caused an injury in the District to Ms. Fall and were engaged in solicitation in the District via the radio ads. Of course, there is a problem here because the radio ads do not appear to have been done. So, this point seems like a stretch to me. Nonetheless, a person

could credibly make this argument.

- The second step in the jurisdictional analysis is to consider whether the exercise of personal jurisdiction would be consistent with the United States Constitution.

    - Step one in the Constitutional analysis is general jurisdiction. A corporate defendant may be subject to general jurisdiction in a forum if it is incorporated in that forum or if its has its principal place of business there. The Rangers do not meet either of these tests. A defendant may also be subject to general jurisdiction if it has engaged in substantial and continuous activity in a state. The record makes clear that the Rangers do not engage in anything close to such activity in Washington.

    - Step two in the Constitutional analysis is specific jurisdiction. Under this analysis, you are trying to decide whether the defendant's forum related activities are so closely related to the claim that the assertion of jurisdiction over the defendant would not "offend traditional notions of fair play and substantial justice." *International Shoe*. Specific jurisdiction has two components. *Asahi*.

        - Minimum Contacts: There would be minimum contacts here. The Rangers decided to reach out and enter into a contract with a resident of the District in an attempt to try and get business from the District. This type of activity is a very good example of the "purposeful availment" the Supreme Court considered important in finding minimum contacts. *Hanson, McGee*. Moreover, where a party enters into a contract with an entity from the forum state, the burden on that party to avoid jurisdiction in the forum based on a breach of that contract is particularly high. *Burger King*. In short, given the Rangers' conduct in voluntarily entering into a contract with a Washington resident, the team should have reasonably foreseen that it could be haled into court in the District for a breach of that contract. *Worldwide Volkswagen*.

        - Fairness: The second specific jurisdiction issue is whether the assertion of personal jurisdiction over the Rangers on this claim in Washington would be fair. It would be based on the fairness factors articulated in *Worldwide Volkswagen*.

- The primary consideration is the burden the defendant. Here there might be a burden on the Rangers because it appears to be in a difficult financial condition. This factor may not be particularly important here, however, due to the size of the claim. In other words, the claim is only going to be about $50,000. The team should be able to retain a lawyer to deal with that size claim without much of a burden. Moreover, the D.C. District Court follows the same basic rules as courts in Texas, a factor that makes the burden even less.

- Another fairness factor to consider is the interest of Washington DC in resolving the dispute. That interest is high because the District has an interest in protecting its citizens.

- Yet another factor is the interest of Ms. Fall in obtaining relief. She has such a interest. Also, given the relatively small amount of money at stake it may be that her interest in resolving the matter in Washington is greater because she could conclude that it is not worth traveling to Texas to address the issues.

- The final two factors are not particularly relevant.

- In sum, it would be fair to subject the Rangers to jurisdiction in Washington on Ms. Fall's claim.

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Question 3

- The President's Motion for Summary Judgment should be denied under Rule 56.

  - Under Fed. R. Civ. P. 56 and the Supreme Court's decision in *Celotex*, Mr. Bush has the initial burden as the movant, the person filing the motion for summary judgment. The nature of Mr. Bush's burden, although not your ultimate answer to the question, depends on how you characterize Mr. Bush's argument. If the President is claiming that he wins because

Ms. Fall breached the contract, Mr. Bush would likely have the burden of proof on this issue at trial. In this event, he would be able to meet his initial burden in only one way:

- Submitting affirmative proof of his defense.

- If, on the other hand, you say that Mr. Bush is simply claiming that Ms. Fall can not prove a breach because she did not perform, Mr. Bush would not have the burden of proof at trial. Therefore, he may meet his initial burden in two ways:

  - Submitting affirmative proof showing that Ms. Fall cannot recover under her claim.

  - In the alternative, Mr. Bush can show that there is no evidence in the record by which Ms. Fall can establish the elements of her claim at trial. *Celotex*

- However you characterize the nature of Mr. Bush's motion, Mr. Bush is likely to have met his initial burden. This shifts the burden under *Celotex* to Ms. Fall to show that there is some genuine dispute as to a material fact.

- Ms. Fall has met her burden here no matter how you characterize Mr. Bush's initial motion. Her affidavit says that she performed. Even though Mr. Bush submitted far more evidence saying that Ms. Fall did not perform, the fact is that a rational jury could find for either party. For example, the jury could conclude that the people submitting affidavits for Mr. Bush were not credible because they were trying to ingratiate themselves with the President. It is, of course, unlikely that Ms. Fall will win if the state of the evidence remains the same at trial. Nonetheless, there is something for the jury to decide. The summary judgment device does not exists to resolve issues involving credibility.

- The reasons set forth above, the summary judgment motion should be denied.

Section II

Question 1

The correct answer is J. John made the motion to dismiss for lack of personal jurisdiction. That motion was timely under Rule 4(d)(3), which gives John sixty days to respond. Rule 12(g) provides that John had to make all his Rule 12 motion at the same time. Options A - E are all Rule 12 motions. None of them were made with John's original motion. Therefore, you must turn to Rule 12(h) to determine the consequences of John's failure to comply with Rule 12(g). Rule 12(h)(1) provides that John has waived his improper venue and improper service motions. Rules 12(h)(2) and 12(h)(3) together provide that the defenses of lack of subject matter jurisdiction, failure to state a claim and failure to join a Rule 19 party may all be asserted in the answer.

Question 2

The correct anser is D. Paul's best option is to have the clerk enter George's default on the docket pursuant to Rule 55(a). Thereafter, Paul will need to request a judgment from the judge under Rule 55(b)(2) because the amount he is seeking in the case is not a sum certain or a sum that can be made certain by computation. Options B and C are incorrect under Rule 55. Option A is not the best course for Paul because summary judgment requires an actual evaluation of the claim instead of a focus on whether George has failed to defend that claim. Simply put, Rule 55 is the easier course. Option E is simply incorrect.

Question 3

The correct answer is A. Rule 15(a) provides the answer to this question. That Rule states that Harry may file an amended complaint "once as a matter of course at any time before a responsive pleading served . . . ." Under these facts, Harry has an unlimited right to file his amended complaint because Ron has not yet filed a "responsive pleading." A motion to dismiss is not a pleading. Therefore, Options C - E are not correct. Option B is not correct because Rule 4(d)(3) gives Ron sixty days to respond to the complaint by answer or motion.

Question 4

The correct answer is D. The answer to this question is provided by Rule 30(d). The best thing to do is stop the deposition and immediately seek a protective order. See Rule 30(d)(4). It would be improper for Dr. Dore's lawyer to instruct his client not to answer. Moving to strike, even if allowed, would not advance Dr. Dore's goal of not disclosing the information. Options C and E are simply incorrect.

Question 5

The correct answer is B. This question concerns the appropriate sanctions for a party -- Harry -- failing to attend a deposition. Rule 37(d) provides the answer. That Rule indicates that the court may impose certain sanctions on Harry. Those sanctions include dismissal of the complaint. Option C is incorrect because the court is not required to dismiss the complaint. Option A is not correct because sanctions beyond attorneys' fees are possible. Option D is incorrect because the Rules make clear that Harry cannot take matters into his own hands. Option E is incorrect because under the combination of Rule 37(d)(4) and Rule 37(b), contempt is not an option here.

Question 6

The correct answer is A. The Rule 11 motion must be denied because it was filed in violation of the safe harbor provision of Rule 11(c)(1)(A). Given this failure, nothing else matters.

Question 7

The correct answer is C. Option C is the only option that is incorrect. You are not precluded from moving for a new trial if you failed to move for judgment as a matter of law at the close of all the evidence. Option A is not correct because Rule 59(d) allows the court to make a motion for new trial *sua sponte* (on her own). Option B is a correct statement of the standard used to grant a new trial. Option D is a correct statement of the final judgment rule. Option E states the correct course of action under Rule 50(c).