

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 3, 1995

GENERAL
(70 points)

- I. (16 points)
- A. Was oral agreement made in FSM or elsewhere? Does FSM law apply to contract?
 - B. If FSM law applies, potential defenses
 1. Is lower quality of last shipment material breach of contract?
If so, may reject last shipment (notifying Park) and not pay for it (may, if still interested in new shipment offer new contract for it), but still responsible for paying for earlier, conforming shipments [unlikely lower quality would be considered failure of condition to contract relieving Awassio of any payment because conditions not created unless clear and unambiguous – law does not favor forfeitures]
 2. Is contract too vague to be enforceable?
 3. Is contract unenforceable because of Pohnpei Statute of Frauds requiring written agreement if contract will not be preformed within one year? (If considered open account, or series of month-to-month contracts will probably be okay)
 4. 15% interest rate violates 34 F. S. M. C. 204(1) (exceeds prime rate by more than 2%) So Awassio may assert remedies of 34 F. S. M. C. 207 (as defense and counterclaim if sued first) and avoid payment of principal and interest
 5. Unjust enrichment?
 - C. Cancel future deliveries under contract
- II. (9 points)
- A. President has 20 days to act after decision by Secretary; since decision was submitted to President 25 days ago it is too late to appeal to President to reverse decision on ground that it would adversely affect a compelling national interest relating to foreign affairs or to the general public welfare
 - B. Appeal to FSM Supreme Court within 30 days of final decision [decision not final until President acts or his 20 days are up, so A has ample time here to prepare appeal]
 1. Trial Division
 - a. may conduct trial de novo

- b. may set aside Secretary's decision if it was arbitrary, capricious, abuse of discretion, or otherwise unlawful, or unconstitutional; or in excess of authority, denial of rights, without substantial compliance with legal procedure; or unwarranted by the facts
 - (1) was denial arbitrary, capricious or abuse of discretion or unwarranted by the facts when the two states affected recommended approval, and only one of the hotels and none of the tour companies that might be affected recommended denial
 - (2) was submitting application to only Pohnpei and Kosrae instead of all four states a violation of procedure? and if so, should decision be set aside as without substantial compliance with procedures required by law

2. Appellate Division

- a. can appeal trial division decision if adverse
- b. may appeal to directly from Secretary's decision if parties agree on facts, and if issue involved was one of extreme time sensitivity and of national importance that ultimately would have to be decided by the appellate division [unlikely on these facts]

3. Writ of Mandamus (from either division) to issue must involve non-discretionary, ministerial duty and no adequate remedy at law present [unlikely when appeal possible]

4. Injunctive relief [but does irreparable harm exist? not really different, in this case from pursuing appeal]

III. (21 points)

A. (5 points)

- 1. Kosrae State Court, as court of general jurisdiction, has jurisdiction over parties and most events took place there [but defendant might remove to FSM Supreme Court]
- 2. FSM Supreme Court trial division may exercise jurisdiction because of diversity of citizenship of parties (corporation incorporated in FSM, but with any foreign-citizen shareholders is foreign citizen for diversity purposes); although could potentially sue in any FSM state, suit in state other than Kosrae would be inconvenient to plaintiff
- 3. Other FSM state courts; suit possible, because defendant does business there and calendar distributed there, but unlikely

- as not convenient to either plaintiff or defendant
4. Guam courts; suit possible in Territorial courts or U. S. federal district court because defendant has corporate headquarters there
 5. Courts in Saipan, Palau, and Marshall Islands could probably also exercise jurisdiction because defendant does business there and calendar distributed there, but dismissal for forum non conveniens possible
 6. therefore suit in either Kosrae State Court or FSM Supreme Court Trial Division Kosrae most likely
- B. (12 points)
1. Law to be applied; whatever court hears case will apply tort law as recognized by Kosrae state law
 2. Possible Cause(s) of Action
 - a. Invasion of Privacy [bonus points if type of invasion of privacy tort identified]
 - (1) Publicity that Unreasonably Places the Other in False Light Before the Public [does not have to rise to the level required for a defamation action]
 - (2) Unauthorized Use of Likeness in Advertising
 - b. Defamation
 - c. Negligence (of Palm Airways in failing to require photographer to obtain a signed release)
 3. Summary judgment is granted when no genuine dispute of material fact exists and movant is entitled to judgment as a matter of law; dispute whether plaintiff consented to having her picture taken not material because consent to take photo does not give consent to publish photo and is not disputed that consent was not given for publication; likely outcome – summary judgment for plaintiff on issue of liability for invasion of privacy causes of action [plaintiff's strongest causes]
- C. (4 points) summary judgment on issue of liability is not final judgment because amount of damages not yet determined, therefore is not yet appealable unless permission sought and granted for an interlocutory appeal pursuant to FSM App. 5(a) [not done here]; notice of appeal has no effect at this time, but may once there is entry of final judgment [FSM App. R. 4(a)(2).]; next step for plaintiff is to schedule proceedings (trial) on issue of damages

IV. (6 points)

- A. Basis upon which FSM Supreme Court can hear appeal – regardless of state constitution anything involving national constitution, law, or treaty may be appealed to FSM Supreme Court
- B. Issues considered by FSM Supreme Court on appeal – because was state crime tried in state court FSM Supreme Court, based on facts as presented, will only consider issues raised by accused's rights under the FSM Constitution
 - 1. Was confession obtained in violation of Alaric's FSM Constitutional rights against self-incrimination and to counsel?
 - a. Alaric may waive right if done so knowingly, voluntarily and intelligently
 - b. Argue whether waiver voluntary if done in sleep-deprived state and police would not let Alaric sleep until he confessed [also was it done intelligently?]
 - c. Argue whether waiver done knowingly [and intelligently] if done while drunk
 - 2. Likely Outcome [not asked, bonus points] – Conviction reversed, confession suppressed, remanded for new trial in state court

V. (18 points)

- A. Damages – Quincy's medical costs, pain and suffering, any long-term disability (includes future medical costs), punitive damages from any defendant grossly negligent or reckless (unlikely on these facts); possible loss of consortium or society claim by Quincy's family [suit would be brought on Quincy's behalf by parent or guardian as next friend]
- B. Possible defendants and grounds and defenses
 - 1. Forklift operator – negligent in stacking boxes in unsafe manner (higher than markings on boxes said was safe) and on ground that was not level
 - 2. Sigrah Corp. – employer of forklift operator liable for employee's negligence when employee working within scope of employment [*respondeat superior*]
 - 3. Contemplacion – possible liability for his or his laborers' negligent failure to properly supervise unloading and storage of tiles by forklift operator, creating attractive nuisance [in dangerous condition for children, but such that it would

- naturally and foreseeably attract child's interest and curiosity] on property; possible defense – was Contemplacion an independent contractor or was he merely foreman hired to hire and supervise George's other construction workers?
4. George – possible liability for Contemplacion's or his laborer's to properly supervise unloading if George retained substantial control and supervision over the construction project so that actions of construction workers attributable to him on respondeat superior theory, maintaining attractive nuisance; possible defense – Contemplacion was independent contractor over which he had little control over than to make payments when due
 5. Victor, Inc. – Liability for George's liability on respondeat superior theory for its agent/employee George, also possible liability as leaseholder to land for maintaining attractive nuisance thereon; likely defense – George acted without the authority [*ultra vires*] or knowledge of the board of directors of Victor, Inc. and therefore was acting outside of his scope of employment; *But* was George acting with apparent authority so that principal Victor, Inc. would be held liable for actions of its (apparent) agent George?
 6. Losap – possible liability for injury on his land, *e.g.*, allowing attractive nuisance to be maintained on property; probable defense – longterm lease of land transferred any effective control over property to others whose actions he has little or no control over
- C. Other possible defenses
1. comparative negligence to apportion liability among those who were negligent
 2. Quincy was trespasser, therefore comparative liability negligence on his part (*but* attractive nuisance doctrine may apply to 12-year old to absolve Quincy of any negligence)

ETHICS (10 points)

- VI. (4 points) Conflict probably exists because George acted without Victor, Inc.'s knowledge in ordering construction and therefore Victor, Inc. may have different defenses to liability than George, *e.g.*, Victor may argue

George's acts were without authority and cannot be attributed to corporation; no evidence here that Attorney Holcombe made full disclosure to both clients of conflict including implications of common representation and risks and advantages involved, and obtained express consent from both, possible orders: continuance to see if defendants consent; if not, Attorney Holcombe should be discharged as counsel for both and each defendant given time to hire new counsel other than Attorney Holcombe, possible discipline of Holcombe for failure to communicate with clients concerning conflict at beginning

VII. (6 points)

A. Ethical Issues

1. Does Able's representation of Fiti create conflict with former client? Yes, if is substantially related matter and position is materially adverse to former client; (Is lessee's [Fiti's] interest in trespass action by third party is material adverse to lessor's [Masao's]? Probably not, if position of both based on Masao's title to land, may still be advisable to obtain consent of Masao to represent Fiti);
2. Lawyer for state representing private party in case where state also party;
3. Failure to act with reasonable diligence in representing Fiti by not timely filing answer thus allowing entry of default judgment

B. Possible avenues of relief

1. Motion to vacate default judgment and entry of default, thus allowing case to be decided on its merits, and if that fails
2. Action for legal malpractice against Able for damages
 - a. Get a new lawyer
 - b. Request court discipline attorney Able

EVIDENCE
(20 points)

VIII. (4 points)

- A. Testimony relied upon was hearsay [define hearsay] and properly excludable because does not fall into to any exception of general rule prohibiting hearsay; Note hearsay within hearsay problem here (she said that he said . . .)

- B. Appeals court ruling – argue either
 - 1. Testimony came in before judge sustained defense counsel’s objection and defense counsel failed to ask the court to strike it therefore court may rely upon testimony [appeals court should affirm], or
 - 2. trial court should have stricken objected to testimony on its own motion because court was slow in ruling on defense counsel’s objection and should have stopped witness from answering before ruling [appeals court should reverse – plain error]

- IX. (4 points) Affidavits to support motion for summary judgment must be made on personal knowledge; paras. 1 & 2 of affidavit are personal knowledge and admissible, para. 3 inadmissible as hearsay unless offered to show state of mind of Mayor, paras. 4 & 5 hearsay within hearsay problem (what name on side of boat might be admission of party opponent, but what Jally & others told Mayor is hearsay, what Mayor told affiant is hearsay) inadmissible [maybe fit within present sense impression exception, if report to Mayor was immediately after seeing and report from Mayor to affiant also quick (?) but insufficient information in affidavit to tell how timely reports were]; therefore at minimum paras. 4 & 5 (& probably 3) should be stricken or disregarded

- X. (4 points) Leading questions permissible on cross-examination, but scope limited to areas covered on direct; proper to pursue line of questions concerning plaintiff Quincy’s presence on construction site and whether he was aware of its dangers; compound question problem if both questions asked at same time instead of one being answered before other is asked

- XI. (8 points)
 - A. (3 points) Henry is an expert witness qualified to give opinion testimony if proper foundation laid; Henry’s experience and knowledge sufficient to assist judge to understand the evidence and determine facts at issue therefore Henry may testify as expert FSM Evid. R. 702.
 - B. (5 points)
 - 1. witness’ credibility may be impeached by evidence of conviction of crime punishable by more than one year imprisonment (felonies) or that involves dishonesty or false statement; convictions not admissible if more than 10 years old (or, if

more recent, more than 10 years since release of witness from imprisonment) unless advance warning of intention to introduce given adverse party timely notice in writing and if court determines probative value of conviction outweighs prejudicial effect; FSM Evid. R. 609(a)&(b). argue whether 30 year old conviction would fit this standard

2. evidence is limited to either witness's admission of conviction or certified copy of conviction if witness denies conviction; FSM Evid. R. 609(a).