

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 21, 1997

[Citations to statutes, rules, and the like are included in brackets as an aid to those reviewing the exam; a test taker is not expected to memorize and repeat the numbers so long as the legal principles are cited and discussed.]

GENERAL
(70 points)

- I. (14 points)
- A. (3 points) because Belle took out loan (transacted business) while on Chuuk court on Chuuk can exercise personal jurisdiction over him even though he was not a resident of Chuuk when suit filed, *see* long arm statute [4 F.S.M.C. 204(1)(a)]
 - B. (6 points) bank would argue that the state, for the purposes of making the loan repayments, was Belle's agent and that once it became known the state was not paying allotments (Belle had constructive notice of failure to pay), Belle could have voluntarily terminated the allotments and paid the bank himself, and that as principal Belle was responsible for the acts and omissions of its agent; also Belle's argument couldn't possibly apply to time period after he left state employment
 - C. (5 points) summary judgment is granted when no genuine dispute of material fact exists and movant is entitled to judgment as a matter of law; Belle has admitted borrowing money and seems to have admitted that the loan has not been paid off (by his contention that the bank is liable for the state's nonpayment) and his affirmative defenses have already been ruled against; bank then entitled to summary judgment on issue of Belle's liability as there are no material facts in dispute concerning that issue, the exact amount still owed may still be in dispute
- II. (20 points)
- A. court will apply either law of place where contract made (could be either Saipan or Yap — facts don't tell) or where contract is to be performed (appears to be Yap); if Yap, FSM court will apply Yap state law, if Saipan, then CNMI law (Yap most likely)
 - B. Fizco will respond by filing answer within 20 days stating that
 1. Fizco did not breach contract, Barnard did breach by failing to pay for April shipment thus relieving Fizco from any further obligation to ship Vin Fiz to Barnard
 2. no damages for late arrival of March Vin Fiz because Barnard did not run out of Vin Fiz before shipment arrived
 3. \$4,500 refund for damaged container and \$150.00 cost for disposing of it
 - a. Fizco has insufficient information to know truth or falsity thereof, and will thus put the plaintiff to his proof; container was shipped undamaged
 - b. Barnard failed to timely inspect and notify Fizco of container's damage so that

Fizco could correct problem

4. \$1,000,000.00 for selling containers to other Yap merchants — admit selling containers to other merchants and deny liability to Barnard for it because
 - a. contract had no exclusivity clause in Barnard's favor, or if it did [facts don't say] Barnard had breached the contract by not paying for April shipment and therefore Fizco not bound by exclusivity clause
 - b. when Barnard didn't pay for April containers Fizco was required by general principles of contract law to mitigate its damages by selling the containers for whatever it could get
 5. \$2,000,000.00 punitive damages — deny any liability for punitive damages — punitive damages not ordinarily recoverable in breach of contract action — damages limited to actual amount lost; if no claim by Barnard that Fizco's alleged breach involved such fraud and abusive behavior as might constitute an independent tort, Fizco will move (either in answer or before answer) for dismissal of punitive claim because it fails to state a claim for which relief can be granted
 6. Fizco will counterclaim for
 - a. \$9,000 damages for failure to pay for April shipment (the amount due for April shipment minus the amount realized from sale of shipment to other merchants)
 - b. plus costs of storage and sale, plus whatever other relief the court deems just and proper in order to put Fizco back in the condition it would have been had Barnard not breached the contract
 - c. attorneys' fees if contract allows them
 - d. and possibly lost profits from lost future sales to Barnard
 7. depending on cause of damage to damaged container and any insurance arrangements
Fizco may implead the *S.S. Dernita*
- C. on all issues for which Fizco thinks there are no material facts in dispute it will move for summary judgment as soon as feasible

EVIDENCE

(20 points)

III. (6 points)

- A. objection will be on ground of hearsay, define hearsay — out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
- B. records, reports, statements and data compilation of public offices and agencies concerning the activities of, matters observed or factual findings made pursuant to duty imposed or authority granted by law are admissible hearsay [FSM Evid. R. 803(8)]; (presumably day book was kept pursuant to authority granted by law)
- C. may be hearsay within hearsay problem; hearsay within hearsay admissible if conforms to exception of hearsay rule [FSM Evid. R. 805];

1. whether Vadis "called" to Barnard's not material issue, so presumably not being offered for truth of matter; Barnard's report that container unfit and ordered destroyed, may be admissible as statement of recent perception where declarant unavailable (Vadis off-island for medical treatment and presumably beyond court's subpoena power) made while recollection clear and not in response to anticipated or pending litigation [FSM Evid. R. 804(b)(5)]
 2. probably admissible under public records exception as a data compilation [FSM Evid. R. 803(8)]
- D. contents of public record, if admissible, may be proved by copy if testified to by witness who has compared it with original [FSM Evid. R. 1005]; judge would probably overrule objection

GENERAL
(cont.)

IV. (15 points)

- A. action on Arnold's behalf
 1. file immediate petition for writ of habeas corpus (explain writ is brought to test legality of Arnold's confinement)
 2. seek prompt hearing on petition (same day or early next day)
- B. pretrial motion and grounds
 1. motion to suppress Arnold's signed confession
 2. grounds for suppression — Arnold's right to due process of law violated — confession is fruit of the poisonous tree because
 - a. Arnold not released or charged within reasonable time [violation of 12 TTC 68(1)(c); same as 12 F.S.M.C. 218(4)] and Arnold not brought for initial appearance before state judge within 24 hours of his arrest [violation of 12 TTC 67; similar to 12 F.S.M.C. 218(5)] and no good cause for delay; therefore any evidence obtained as a result of Arnold's detention beyond the initial 24 hours should be suppressed [pursuant to 12 TTC 70; same as 12 F.S.M.C. 220]
 - b. confession was also obtained after police had refused to let Arnold's attorney speak with him in violation of Arnold's right to be informed that attorney was available for him [12 TTC 68(1)(a) and (2)(b); similar to 12 F.S.M.C. 218(1)] and not allowed to see counsel or family member at place of detention [12 TTC 68(1)(a); same as 12 F.S.M.C. 218(2)]; therefore entitled to suppression [pursuant to 12 TTC 70; same as 12 F.S.M.C. 220]
 - c. other possible grounds not clear from facts as given — Arnold may not have been informed of his right to remain silent and to have an attorney present during questioning and may not have made a valid (voluntary, knowing, and intelligent) waiver of those rights
 3. if insufficient evidence left after suppression of confession motion to dismiss on that ground as well as for egregious violation of due process

V. (9 points) Options

- A. although constitutional prohibition of imprisonment for debt can be imprisoned for contempt — intentional disobedience of court order [4 F.S.M.C. 119(1)(b)]
1. debtor who violates order in aid of judgment may be held in civil contempt [6 F.S.M.C. 1412]; civil contempt — could seek order that Kramer be confined to jail for up to 6 months or until he pays [4 F.S.M.C. 119(2)(a)] (jail at night, release during day to work to earn money to pay?)
 - a. but in civil contempt defendant must have the present ability to comply with order and by facts of case Kramer does not
 - b. however, if it was Kramer's fault that he has no present ability civil contempt may still be possible (did he deliberately quit and work for no cash to avoid payment? or did customary and traditional obligations require him to quit?)
 2. criminal contempt — could request judge to refer case to attorney general for prosecution of criminal contempt for intentionally not obeying court order when had ability to do so, but there is three month statute of limitations on criminal contempt [4 F.S.M.C. 119(2)(b)], and depending on when Kramer quit his job the time may have run out; also a sentence for criminal contempt will not help in payment of your client's judgment
- B. may seek writ of execution for full amount of judgment only through a modification of the order in aid of judgment [6 F.S.M.C. 1413], and then execute on any nonexempt property [see 6 F.S.M.C. 1415], but unlikely anything to execute on (probably would have been revealed at first hearing before order in aid was granted)
- C. inquire into arrangement with brother-in-law; seek order that Kramer inform plaintiff's counsel as soon as he finishes helping brother-in-law build house and as soon as he gets another job and that either the payments are to resume with first paycheck, that wages are to be garnished (such relief seems most likely)

VI. (12 points) possible steps

- A. contact Planet Kissed Tuna Canning Co. and inform them that the title to part of the land they have started construction on is in dispute, ask them to cease building on that land and warn that they may be held civilly liable if they continue
- B. contact the land commission and try to get the land registration process moving in hopes there will be a favorable outcome in the land commission (unfavorable outcome can be appealed to the trial court) (lawsuits over land title to land in registration area not allowed except by showing of special cause [67 TTC 105])
- C. adverse possession claim not possible by either lineage because neither lineage's possession has not been exclusive
- D. file suit in trial court, either state or FSM (allege diversity jurisdiction if FSM), seeking a TRO with notice, if possible, then preliminary injunction, and eventually permanent injunction against cannery's construction (*analyze* four factors for injunctive relief — likelihood of success on the merits, irreparable harm (lack of adequate legal remedy), relative harms to the parties, and public interest)

on grounds that

1. **nuisance** — its operation will create public nuisance and will infringe on Xinmen's lineage's quiet use and enjoyment on land to which there is no title dispute and on any traditional fishing rights in lagoon
2. **trespass** — current construction plans have cannery trespassing on disputed land claimed by Xinmen's lineage which if allowed to continue will cause irreparable damage to land that land commission settle title of in Xinmen's favor

EVIDENCE

(cont.)

- VII. (5 points) objection may be relevance and hearsay; Yunan's statement he was going to cut brush on his land is hearsay, but is admissible as showing then existing state of mind such as intent or plan and may be offered to show that he acted in conformity with his stated intention to cut brush on his land [FSM Evid. R. 803(3)], might also be admissible as evidence of reputation concerning boundaries of land [FSM Evid. R. 803(20)]; Wyvern may testify that he found Yunan in the now disputed strip and that the brush had been cut there because is relevant and of his own personal knowledge
- VIII. (4 points) evidence of liability insurance not admissible to show negligence, but is admissible if offered for other purpose, such as to show ownership or control [FSM Evid. R. 411]; judge should overrule objection if evidence offered to show Hillbloom's ownership or control of concrete steps
- IX. (5 points)
- A. objection was probably on ground that question concerning conditions at time of accident was outside the scope of the direct examination (and does not go to the witness's credibility) which dealt only with the workplace conditions in the weeks before the accident [FSM Evid. R. 611(b)]; judge should sustain the objection if the question seems to be outside the scope of direct
 - B. Since Woxof was on the defendant's witness list, the court, in its discretion, could permit defense counsel to inquire into additional matters as if on direct examination [FSM Evid. R. 611(b)], and if Woxof is reluctant to answer defense counsel can ask that he be treated as a hostile witness

ETHICS

(10 points)

- X. (5 points) an attorney has a duty to diligently represent his client, but he also has an obligation not to assist a client in conduct he knows is fraudulent [MRPC 1.2(d)], not to bring frivolous claims [MRPC 3.1], not to fail to disclose a material fact to the tribunal when disclosure is necessary to avoid assisting a fraudulent act by the client [MRPC 3.3(a)(2)], not to offer evidence the lawyer knows to be false [MRPC 3.3(a)(4)], and not to assist a witness to testify falsely [MRPC 3.4(b)], but lawyer also has obligation not to reveal confidences of client [MRPC 1.6]; you must try to persuade Nero not to offer false testimony and inform Nero that you will take remedial steps if he testifies falsely and disclose Nero's deception to the court (remedial steps — move to

withdraw from case, unclear whether in civil case can tell court that testimony is perjured) [Bonus points — potential conflict from other clients possibly being drawn into Nero's perjurious conduct]

XI. (5 points) Discuss the potential ethical issues:

- A. the fee may be unreasonable for the time, labor, and skill involved [MRPC 1.5(a)] (shouldn't lawyer's duty to keep client reasonably informed mean he should inform client of the certificate of title he discovered?)
- B. lawyer cannot acquire a proprietary interest in cause of action or subject matter of litigation [MRPC 1.8(j)] (lawyer could instead opt for lien to secure his fees)