

**CIVIL PROCEDURE II**  
**PROFESSOR NUSSBAUMER**  
**FINAL EXAMINATION**  
**MAY 4, 2007**

**INSTRUCTIONS**

1. This examination is scheduled for **three (3) hours**. It consists of **two parts** to which you should give roughly equal attention.
2. This is a modified **closed-book exam**. You are **not** permitted to consult any materials other than the copy of the **Federal Rules of Civil Procedure** provided you at the beginning of the examination period.
3. There are two parts to this examination, MULTIPLE CHOICE and ESSAY.

**PART I**, the **multiple-choice** segment, contains **35 questions**. You are advised to read each of the answer choices (time permitting) and to choose the **BEST** possible answer out of the four choices provided. Indicate the best answer on the ParSCORE test form provided.

**PART II** consists of one **essay** question. Remember to take your time; read, think, analyze and organize your answer before you begin to write. Write your answers in the blue books provided. Be sure to write on every other page and every other line. Be sure to write legibly, or else your exam may not be graded.
4. Assume that all litigation occurs in federal court and is governed by the Federal Rules of Civil Procedure (“FRCP”) unless instructed otherwise. Also, assume that—if there is a conflict of legal authority--you are being tested on the majority rule (unless stated otherwise).
5. Write your student exam number on your exam envelope, the ParSCORE test form, every page of this exam, and all used blue books. **DO NOT** use your name, student ID number or Social Security number on any exam materials. Students who put their names on their exam materials will receive a small grade penalty for doing so.
6. At the conclusion of the exam, return all test materials including blue books, scratch paper, and this exam packet to the envelope and submit it to the proctor. **Do NOT seal the envelope**. Students who fail to return all exam materials at the end of the exam may not be graded.

**Best Wishes!**

## Part II

### Essay Question (suggest time allotment of 90 minutes)

Company owns property next to the New River, on which it stores fertilizer material that Company mixes and sells to landscapers. Plaintiff, an environmental group, files a lawsuit in federal court alleging that Company has violated the federal water act. The act requires companies to obtain a federal permit if they operate a “fertilizer yard” that discharges pollutants into a river. Plaintiff alleges that defendant is operating a fertilizer yard on its property, that the fertilizer yard is discharging four pollutants into the New River, and that defendant does not have a federal permit for the discharges.

In a prior federal case, the County Department of Public Works had filed suit against Company, seeking penalties on the ground that Company had failed to obtain a special sales permit when it started selling fertilizer material from the property last year, as required for “fertilizer yards.” In that case, Company had argued that it was not operating a fertilizer yard. The court ruled that a permit was required, and assessed a \$40,000 penalty against Company. Company did not appeal the court’s decision.

In the instant action, plaintiff moves the court for an order that Company is barred from litigating whether it is a “fertilizer yard” based on the prior County action. The court grants the motion.

After the close of discovery, both sides file a motion for summary judgment (each accompanied by detailed briefs). Plaintiff argues that it has produced sufficient proof on each of the elements it needs to prove a violation of the water act so that there would be no point in letting the case proceed further. The two elements are: (1) that Company is discharging pollutants into the New River; and (2) that Company does not have a federal permit for the discharges. Company defends against Plaintiff’s motion by arguing that a jury could find Plaintiff has not proved its case on either one of these elements, and that--even if the Plaintiff did prove its case-in-chief--that Company has proven its affirmative defense (described below). Company also argues for its own summary-judgment motion on the ground that there is no genuine issue as to whether its affirmative defense can be proved.

In support of its motion, Plaintiff submits the results of water sampling in the New River which show that the water just downstream from Company’s property contains greatly elevated levels of four pollutants used by fertilizer yards. In response, Company argues that if any discharge to the river is occurring, it is coming from the waste of a herd of cows grazing on the neighboring property, which also borders the New River. Company submits the affidavit of a chemist who testifies that the pollutants found in the sample often are found in the waste of cows.

Also in support of its motion, plaintiff submits a copy of Company’s answer to the complaint. In the answer, Company admits paragraph 7 of the complaint, which alleges that defendant has no federal permit for the fertilizer yard.

It is a complete affirmative defense to any action brought under the statute that a company currently has fewer than 10 employees. Company, having timely pled this defense, raises it in

opposition to plaintiff's summary-judgment motion, and in support of its own summary-judgment motion. As evidence for its affirmative defense, Company submits its official "articles of incorporation" that it filed with the State two months ago, indicating that Company currently has eight employees. Arguing against the affirmative defense, Plaintiff submits one piece of evidence, an affidavit from an employee of another fertilizer yard in the area, who testifies that his company has twenty employees working for it.

The court denies both parties' motions for summary judgment.

Please answer and discuss whether the court correctly ruled on:

- (1) Plaintiff's request for an order that Company is barred from relitigating whether it is a "fertilizer yard" based on the prior action; and
- (2) The parties' motions for summary judgment.

**END OF EXAM**

Good luck with the remainder of finals week, and thank you for being an enjoyable class to teach!