

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM.

Follow the instructions from the proctor.

This exam will last 2 HOURS. Before turning in your answer, REREAD each question to be sure you haven't missed anything.

If you use blue books, **DOUBLE-SPACE** your answers.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, "Andropov (A) would sue Brezhnev (B). B may be liable to A because"

Plan on spending at least 10 minutes at the end **PROOFREADING** your answers. You may not write **ANOTHER WORD** after time is called.

Each question has been assigned a point total, and the exam as a whole has a point total of 105. Spend the amount of time on each question reflecting its relative worth. Assume each question stands alone; do not cross-reference material from your answer to another question.

REMEMBER THE HONOR CODE: DO NOT DO THINGS THAT TEND TO IDENTIFY YOURSELF.

GOOD LUCK!

Question 1 (65 points)

You are an associate in a law firm that handles personal injury claims. Ruth Nishida has come to your office seeking your advice regarding a potential case. At a visit to her doctor six months ago, Ruth learned that she has lymphohematopietic cancer (Non-Hodgkin's Lymphoma). She has been told that this cancer may have resulted from exposure to PCBs. PCBs are a class of 209 discrete chemical compounds called congeners in which one to ten chlorine atoms are attached to biphenyl. Monsanto made more than 99 percent of all the PCBs that were ever manufactured and sold in the United States. There are no known natural sources of PCBs in the environment.

PCBs were designed to be resilient to heat and chemical breakdown. As a result of this resilience, PCBs are commonly found in the environment to this day, even though their manufacture and sale in the United State was banned over thirty years ago. Some PCBs entered the environment because they were incorporated into "open use" products, such as paints, varnishes, adhesives, hydraulic fluids, and carbonless copy paper. These "open use" products allow for the release of PCBs during the use of the PCB-containing products themselves. Other PCBs entered the environment as waste following disposal of manufacturing by-products and end-use products that contained PCBs.

You have obtained the affidavit of an expert, Dr. David Rosner. He states that Monsanto knew as early as 1938 that PCBs were systemically toxic and could cause acute toxicity problems, given sufficient exposure. In the 1940s, DDT, a similar chemical, was first detected in animal tissue. In 1966, using new technology, scientists discovered PCBs in animal tissue in Sweden. Subsequently, PCBs were found in birds in the United States in 1968. Before these discoveries, Monsanto made no effort to test for PCBs in the environment or to determine the long-term health effects of PCBs. In 1970–71, Monsanto ceased the use of PCBs in "open use" products. The manufacture and importation of PCBs as well as the production and repair of PCB transformers were banned in 1979. Some PCBs that were manufactured prior to 1979 are still in use in transformers today. However, the current danger from PCBs comes from their presence in the environment, Dr. Rosner believes, based on his review of internal Monsanto documents, Monsanto had actual knowledge many of its PCBs would be released into the environment by third parties. Dr. Rosner cites to one document from 1969, after it was known the PCBs were accumulating in the environment, where Monsanto noted "[i]t has been recognized from the beginning that other functional fluid uses could lead to losses of [PCBs] to liquid waste streams from the customers' plants. Losses could occur from spills, from unusual leakage of large volumes and daily losses of smaller volumes." Dr. Rosner further opined Monsanto should have been aware that standard industrial waste disposal practices from the 1930s to the 1960s resulted in huge quantities of PCBs being released into the environment as waste.

An analysis of Ruth's blood shows she has elevated levels of several different PCBs in her blood. Ruth's doctor, Dr. Troxell, has stated that he knows "with certainty that [Monsanto's] PCBs are in the American food supply." In addition, Dr. Troxell states he knows with certainty that Nishida "has [Monsanto's] PCBs in her body." Studies have linked elevated PCB levels with an increased risk of developing Non-Hodgkin's Lymphoma.

Based on the above, please evaluate Ruth's prospects for recovering damages in a product liability claim against Monsanto. Ignore any potential for a class action or multidistrict litigation.

Question 2 (40 points)

In the early morning of December 4, 2012, Joshua Dussault was on top of the south levee of Smith Canal, throwing rocks—pieces of concrete and asphalt found on the levee—at passing vehicles. The Interstate Highway crosses over the Smith Canal just south of Country Club Drive. Riprap, including chunks of concrete, lines the waterside slope of Smith Canal to the levee.

Dussault chose rocks about the size of baseballs and threw them overhand, hard enough to hurt anyone he hit. He spent 10 to 15 minutes throwing rocks and hit a few vehicles.

At the same time William F. Collins was traveling along the Interstate Highway, driving a big rig truck manufactured by Navistar, Inc. Dussault threw a chunk of concrete weighing about two and a half pounds and struck the Navistar tractor pulling two trailers driven by William. The rock penetrated the windshield and hit William in the forehead, causing severe brain injuries. William lost control of the truck and it hit the sound wall. Dussault heard a large crash. Dussault was convicted of three counts of assault with a deadly weapon or with force likely to cause great bodily injury. He was sentenced to 12 years in prison.

William and his wife Barbara have sued Navistar alleging that the truck's windshield was defective because it failed to keep the rock that Dussault threw from penetrating. Plaintiffs have retained an expert who claims that the windshield of the truck was defective because its penetration resistance was inadequate. The expert claimed there were alternative designs would have been safer: windshields with greater rake angles to deflect road debris.

The windshield of the Navistar 8200 driven by William had a rake angle of 71.2 degrees from horizontal (90 degrees being straight vertical). For comparison, plaintiffs' expert offered the Ford F650, which had a rake angle of 37.6 degrees. The expert conducted a test with the rake angle of the windshield of the Navistar 8200 changed to 52 degrees. Under the conditions of the test (the assumptions of which, particularly the speed of the truck and the rock, were hotly disputed), the rock skipped on the windshield and did not penetrate it. No manufacturers of heavy trucks had a windshield design as plaintiffs' expert proposed. The angle of windshields varies by type of vehicle. Heavy trucks are generally 27 degrees from vertical (63 degrees from horizontal), while passenger cars are more sloped at 55 or 65 degrees from vertical (45 or 35 degrees from horizontal).

You represent Navistar. Please prepare an evaluation of the claims that William and Barbara have brought, and any defenses that Navistar might assert.