

Final Examination

Instructions

- This is an open-book/open-note examination. This includes (but is not limited to) the material on the course website (emfink.net/CivilProcedure).
- The exam consists of three questions, all based on a single fact pattern. You must answer each question.
- There is no minimum or maximum length to your answers.
- You must submit your completed exam in ExamSoft no later than *11:59 pm on Wednesday, December 2nd*. Subject to that deadline, you may take as much time as you wish to complete the exam. As a rough guide, you should be able to complete the exam within 3 hours.
- Using your Final Exam ID number, *not your name*, sign the Elon Law School Honor Pledge in the space indicated below.

Honor Pledge

“On my honor, I will uphold the values of Elon University School of Law: honesty, integrity, responsibility, and respect.”

Exam ID Number:

The Case of the Missing Ivy

Harold Richman has lived in California for the past 25 years. He grew up in Gritty City, a gruff but lovable metropolis located in the State of Susquehanna. Harold's parents, Don and Sheila, were devoted gardeners who shared an obsession with English Ivy. In 2010, they died in a tragic gardening accident, becoming ensnared and eventually suffocating in the thick shroud of ivy that covered their house. Harold returned to Susquehanna, for the first time since he'd moved to California, for their funeral. They were buried at Whispering Glades Cemetery (owned and operated by Whispering Glades, Inc., incorporated and having its sole place of business in Susquehanna), where Harold purchased an "Eternal Rest Assurance Plan" that included two adjacent burial plots, at a cost of \$5000, plus a choice of ground cover planting to be maintained by Whispering Glades for an additional annual fee of \$100. For the ground cover, Harold naturally selected his parent's beloved English Ivy.

Recently, while on a business trip not far from Gritty City, Harold decided to pay a visit to his parents' graves for the first time since their funeral 10 years ago. When he got there, he was shocked to discover that, while the gravesites were otherwise in excellent condition, there was not a trace of ivy. Although Harold was not the world's most attentive son, he was well aware of his parents' obsession with ivy. Harold immediately marched to the Whispering Glades office and demanded to speak to the manager. When the manager, a Mr. Thanatogenos, appeared, Harold asked what happened to the English Ivy on his parents' graves. Mr. Thanatogenos calmly explained that Whispering Glades had removed all the ivy five years ago, because "it's gone out of fashion and it's a real nuisance to maintain". Incensed at this callous lack of respect for his deceased parents' wishes, Harold sternly declared, "A contract is a contract. I'll see you in court!", and then departed in a huff.

After returning home to California, Harold contacted Waldorf T. Flywheel, a lawyer in Gritty City, and recounted his devastating experience. Fighting back the tears, he explained, "They loved the ivy so. It's not about the money, it's about justice." Deeply moved, the lawyer agreed to represent Harold in a lawsuit against Whispering Glades. A week later, the lawyer filed a complaint (a copy of which has been provided to you along with the exam questions) in the U.S. District Court for the Eastern District of Susquehanna, asserting a claim under the Susquehanna Unfair Trade Practices Act (SUTPA) (the pertinent sections of which are reproduced below).

Susquehanna Unfair Trade Practice Act

Section 1. Definitions.

As used in this act,

[* * *]

(4) “Unfair methods of competition” and “unfair or deceptive acts or practices” mean any one or more of the following:

(i) Advertising goods or services with intent not to sell them as advertised;

[* * *]

Section 2. Unfair or Deceptive Acts or Practices.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Section 3. Private Actions.

Any person who purchases goods or services primarily for personal, family or household purposes and thereby suffers any loss of money or property as a result of an unfair or deceptive act or practice by the seller, may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and in addition the court may award to the plaintiff costs and reasonable attorney fees.

Question 1

Does the federal court have subject matter jurisdiction over Harold's suit?

Question 2

Regardless of your answer to the previous question, assume that the federal court has subject matter jurisdiction.

The Susquehanna State Supreme Court has held that a claim under the Susquehanna Unfair Trade Practices Act (SUTPA) requires more than the defendant's mere failure to provide goods or perform services as promised (which would be the basis for a breach of contract or promissory estoppel claim). Rather a seller engages in an unfair or deceptive act or practice, as defined under Section 1(4)(i) of the statute, only if, at the time of sale, the defendant did not intend to provide the goods or perform the services as advertised. The Susquehanna Supreme Court further explained that a plaintiff might prove the requisite intent either by direct evidence or by inference based on evidence that the seller engaged in a consistent pattern or practice of advertising goods and services and failing to provide them as advertised with no excuse or justification.

Whispering Glades moves to dismiss the suit under FRCP Rule 12(b)(6), arguing that Harold's complaint fails to state a claim for unfair or deceptive acts or practices under SUTPA. Should the court grant that motion?

Question 3

Regardless of your answers to the previous questions, assume that the federal court has subject matter jurisdiction and that Whispering Glades does not move to dismiss based on insufficiency of the complaint.

Susquehanna state law provides that a plaintiff seeking damages for mental or emotional distress must include a certification from a licensed mental health professional attesting to the plaintiff's mental or emotional state, when filing the complaint, and requires dismissal of the claim if the plaintiff does not comply.

In contrast, FRCP Rule 8 requires only a general "demand for the relief sought" at the pleadings stage. Production of evidence to substantiate the claims happens later, in the discovery process. Specifically, FRCP Rule 35(a)(1) deals with "Physical and Mental Examinations":

In General. The court where the action is pending may order a party whose mental or physical condition ... is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. ...

Whispering Glades moves to dismiss on the grounds that Harold did not include a certification from a licensed mental health professional with his complaint, as required under Susquehanna law. Harold opposes the motion, arguing that the federal court should follow the procedures under FRCP Rule 8 and Rule 35, not state law.

What should the federal court do?