Civil Procedure II

Elon University School of Law

Prof. Fink

# Final Examination

## Instructions:

This is a closed-book examination. You may not use any material other than what is provided to you by the proctor.

You will have three (3) hours to complete this exam. This exam consists of three (3) questions. You must answer each question. Be sure to read each question carefully.

If your answer depends on any assumption(s) beyond what is stated in the question, be sure to identify, and explain the relevance of, your assumption(s).

Your answers will be graded based on (1) your identification of the relevant issues, (2) your identification and explanation of the applicable rules, and (3) your analysis of how those rules apply to the stated facts. *There is no limit on the length of your answers*. As a rough guideline, you should be able to answer each of the questions within about 2-3 typed pages.

You must also write out the Honor Pledge in the space below, and sign with your Exam ID number. Do not write your name anywhere on the exam or in your answers.

### Honor Pledge

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

Exam ID:

# Questions

## Facts

Vesuvius is a health insurance company based in Connecticut and incorporated in Delaware. Vesuvius offers managed care plans, under which members who receive covered medical treatment from participating providers incur no out-of-pocket costs, and the company reimburses the doctors for the covered treatment at rates set by the company.

Dr. Herbert West is a physician who lives and practices in North Carolina. West entered into a contract with Vesuvius as a participating healthcare provider under the company’s managed care plans. The contracts specify the terms for payments to participating providers. After treating a patient who is a plan member, the provider submits a form identifying the patient’s diagnosis or condition, and itemizing the procedures performed, using a standardized coding system. The company processes each form using a computer program that compares procedure codes against diagnosis/condition codes to determine whether the procedure was medically appropriate & covered under the plan. For each approved procedure, the company reimburses the provider according to the rates established under the plan. The reimbursement rate schedule is incorporated into the company’s contracts with participating providers.

West believes that Vesuvius has been underpaying him for procedures he has performed under the company’s plans. Specifically, he believes that the company has manipulated its reimbursement review programs to systematically reduce reimbursements through “downcoding” (i.e. changing the code for a particular procedure to one with a lower reimbursement rate) and “bundling” (i.e. combining the codes for multiple procedures into a single code with a lower reimbursement rate than if the procedures were coded separately). West further believes that Vesuvius adopted these practices as a means of increasing their own profits at the expense of doctors who participate in their managed care plans.

In addition to practicing medicine, West is President of an organization, Physicians Against Insurance Nightmares (“PAIN”), the mission of which is to abolish private medical insurance and replace it with a government-funded national health service. Seeing an opportunity to rake an insurance company over the coals & expose the industry’s shady practices, West decides to sue.

West meets with an attorney, Amanda Bonner. West tells Bonner that he believes that Vesuvius has shortchanged him by about $100,000 in reimbursements through downcoding and bundling. West concedes that he doesn’t have any direct proof of these practices, but he tells Bonner, “I just know the reimbursements have been far less than I should be receiving.” West also tells Bonner, “I don’t really care about the money. My goal is to take down the insurance companies. They’re greedy, soulless, penny-pinching pencil-pushers. I hate them with a burning passion, and they must be destroyed.”

Bonner has never had a case involving a health insurance company before, and is not familiar with industry practices or the applicable law. After some quick research, Bonner files a complaint against Vesuvius in North Carolina state court, asserting claims for breach of contract and fraud under North Carolina state law.

Vesuvius moves to dismiss for failure to state claim, arguing that the state-law breach of contract and fraud claims were pre-empted (i.e. impermissible as a matter of law) by a federal statute, the Health Insurance Company Competition & Unfair Practices (“HICCUP”) Act. The HICCUP Act permits any person who suffers financial harm as a result of deceptive or unfair practices by a health insurance company to sue for monetary damages. The federal courts have exclusive jurisdiction over claims under the HICCUP Act (i.e those claims may not be brought in state court).

The state court concludes that the HICCUP Act does pre-empt the breach of contract and fraud claims, and dismisses the action. Bonner then files a new action on behalf of West in the U.S. District Court for the Middle District of North Carolina, asserting a claim under the HICCUP Act and a claim under the North Carolina Deceptive Trade Practices Act. (*See* Complaint.) The elements of these two claims are similar:

1. A deceptive act or practice by the defendant in connection with the parties’ transaction(s). (Allegations and proof of fraud are not required, merely conduct having a tendency to deceive a reasonably prudent person in a similar transaction.)

2. Monetary harm to the plaintiff caused by the defendant’s deceptive conduct.

## Question 1

Vesuvius files an answer denying the material factual allegations in the complaint, and asserting various affirmative defenses, including claim preclusion (res judicata) and issue preclusion (collateral estoppel). Vesuvius then moves for summary judgment, supported by the record of the North Carolina state court action. In the motion, Vesuvius asserts two grounds for dismissal:

1. Claim Preclusion: West’s claims are barred by the final judgment in the prior state court action.

2. Issue Preclusion: The issue of whether Vesuvius engaged in any deceptive practices has been conclusively decided in favor of Vesuvius, based on the final judgment in the prior state court action.

How should the court rule?

## Question 2

Vesuvius also moves for sanctions under FRCP Rule 11, contending that West brought the suit to advance his political agenda of destroying the health insurance industry, and that the NC Deceptive Trade Practices Act claim is frivolous, because it is pre-empted by the HICCUP Act. The 4th Circuit U.S. Court of Appeals has not decided whether the HICCUP Act pre-empts claims under state deceptive trade practices statues, and other federal appellate courts are divided on that issue.

Should the court grant the motion for sanctions?

## Question 3

Assume that the federal court does not dismiss either claim and that the case proceeds to trial. North Carolina courts require a Deceptive Trade Practices Act plaintiff to prove actual reliance on the alleged deception. In contrast, federal courts do not require proof of actual reliance in deceptive trade practices cases.

Should the federal court follow North Carolina or federal law regarding the requirement of actual reliance on West’s NC Deceptive Trade Practices Act claim?