

DO NOT TURN THE PAGE UNTIL INSTRUCTED TO DO SO

INSTRUCTIONS

1. You may have with you your casebook, (Cound, Friedenthal, Miller & Sexton, Civil Procedure), the 1994 Civil Procedure Supplement, your notes, any class handouts, and any outlines which you have prepared. You may not have commercial outlines or other sources. If you have any such item, please stack them in the front of the room.

2. Answer all questions and all subparts of each question. After each question, I have written a recommended time allotment. You may deviate from this allotment. However, the recommended time reflects the approximate weight accorded to the question. The total recommended time amounts to just two and one-half hours. However, you may have a full three hours to complete the exam. I suggest that the extra half-hour be used for proof-reading and review.

3. I also recommend that you devote approximately one-third of your time on each essay question to thinking about and/or outlining your answer. This will help assure clarity, organization, and completeness, all of which will count in your favor. Rambling discussions of irrelevant material may count against you and certainly will not help your score. Turn in only your final answer, not any notes or outlines made in thinking about a question.

4. Write legibly. You may wish to print. While I will make every effort to read your writing, if I cannot understand what you are saying you will not get credit. I suggest that you skip every other line in the answer book.

5. This exam consists of 5 pages, including this page. Please be certain that you have the entire exam before starting.

6. Unless otherwise specified, assume for each question that the current Federal Rules of Civil Procedure are in effect.

7. BE SURE TO PLACE YOUR EXAM ID NUMBER ON ALL BLUEBOOKS, AND TO NUMBER AND TURN IN ALL BLUEBOOKS WHICH YOU USE. THIS EXAM IS GIVEN PURSUANT TO THE LAW SCHOOL HONOR CODE

QUESTION 1. (Approximately 45 minutes)

Below are brief descriptions of three cases: *Ragan v. Merchants' Transfer & Warehouse Co.*; *Cohen v. Beneficial Industrial Loan Corp.*; and *Woods v. Interstate Realty Co.*

Pick one of these three cases. Imagine that you are a federal judge today, and that this case has come before you (assume that it was never decided in 1949). Decide whether you would apply the state or the federal procedure, and write an opinion explaining your decision.

Please note clearly at the top of your opinion which case you are deciding.

RAGAN v. MERCHANTS' TRANSFER & WAREHOUSE CO., 337 US. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949), grew out of a highway accident that occurred on October 1, 1943. On September 4, 1945, Ragan filed a diversity action in a federal court in Kansas. However, service was not made on the defendant until December 28. Kansas had a two year statute of limitations on tort claims. Ragan claimed that according to Rule 3 of the Federal Rules, the suit was commenced (and hence the statute tolled) by the filing of the complaint. The defendant countered that Kansas law dictated that service had to have been made within the two year period. The Supreme Court held that Rule 3 was not intended to govern questions concerning the tolling of statutes of limitations, and, therefore, state law would determine in diversity when the statute was tolled.

In COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the Court held that a federal court must apply a New Jersey statute requiring a plaintiff in a shareholder derivative suit to post a security for expenses bond even though what is now Federal Rule 23.1, which ostensibly governs such cases, did not require a bond. The Court found that whether the New Jersey statute was classified as procedural or substantive, it created substantive liabilities for expenses. In the Court's view, Rule 23.1 did not contradict the New Jersey statute, but was addressed to independent concerns.

And, finally, in WOODS v. INTERSTATE REALTY CO., 337 U.S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949), the Court held that a Tennessee corporation that had not qualified to do business in Mississippi could not maintain a diversity action in a federal court in that state if, by virtue of its failure to qualify, the Mississippi state courts were closed to it.

QUESTION 2. (approximately one hour and 15 minutes)

Poor Peter! Hoping to earn big profits and takes advantage of purported federal tax benefits, Peter, a resident of Covington, Kentucky (located directly across the Ohio River from Cincinnati, Ohio), invested \$45,000 in a scheme promoted by Dan Dealer. The investments turned out to be worthless, and the tax benefits non-existent. Peter believes that the investments were fraudulently misrepresented by Dan.

Dan, a resident of Detroit, Michigan, travels throughout Michigan, Indiana, Illinois, and Ohio, putting on seminars in which he promotes his investment scheme. These seminars are open to the public, and advertised in local newspapers distributed in the geographic area of the seminar. Peter saw one of these ads in the Cincinnati Inquirer (which circulates widely in Covington and other Kentucky suburbs of Cincinnati), and attended a seminar held at a hotel in Cincinnati. After the seminar, he mailed his investment check to Dan's office in Detroit. Dan does not own property in Kentucky, has never transacted business in Kentucky, and has never entered into any contracts in Kentucky. He does not advertise his seminars in Kentucky papers.

Peter is now suing Dan to recover his \$45,000. He has brought suit in the Federal District Court for the Eastern District of Kentucky (in which Covington is located), alleging a claim of fraud under state common law, and a civil RICO claim (Racketeer Influenced and Corrupt Organizations Act) under federal law [18 U.S.C. Sec. 1962(c)]. Both claims arise from the same facts of Dan's seminar and Peter's lost investment. His lawyer tells him that he has a good chance of winning under both state law and RICO. Dan was served under the Kentucky long-arm statute, which provides for jurisdiction over an out of state defendant who has caused tortious injury in Kentucky by an act committed outside of Kentucky, and which has been interpreted by the Kentucky courts as reaching to the fullest extent allowed by the Constitution.

Dan has moved, on a timely basis, to dismiss the suit for (1) lack of subject matter jurisdiction over all claims; (2) lack of personal jurisdiction; and (3) improper venue. You are Peter's lawyer. Prepare a memorandum to the court opposing Dan's motion to dismiss.

QUESTION 3, SHORT ANSWERS. (Approximately 30 minutes)

Question 3 consists of six (6) short answer questions you should plan to spend about 30 minutes total, or 5 minutes per question. Each short answer question is worth the same amount of points. In answering, give your answer and then a brief (one or two sentence) explanation for your answer.

EXAMPLE:

Q. Smith, of Ohio, intends to sue Jones, also of Ohio, for slander. Smith expects that Jones will raise the First Amendment in his defense. May Smith sue in federal court?

A. No. Smith's slander claim is a state law claim, and there is no diversity of citizenship. Under the well pleaded complaint rule (*Nottlgy v. Louisville & Nashville RR*) anticipation of a federal defense is not sufficient to grant the federal court original jurisdiction.

QUESTIONS

3a. Wylie, a citizen of Nevada, sues Acme Corp. for \$65,000 on a state law negligence claim in federal court in Nevada. Acme, a Delaware corporation with its principle place of business in Nevada, moves to dismiss for lack of subject matter jurisdiction. What result?

3b. Suppose that the court grants Acme's motion to dismiss for lack of subject matter jurisdiction. Wylie then brings the same action in Nevada state court, and Acme pleads res judicata. Will the defense prevail?

3c. Assume that Wylie brought his negligence suit against Acme and lost. Wylie's friend, Rod Runner, mentions to Wylie that he also sued Acme for the same type of injury, and won on a theory of strict liability. Wylie then files a new lawsuit against Acme based on the original accident, but claims a right to recover only on strict liability. Acme claims res judicata. Will Acme prevail on the defense?

3d. Bill sues Newt for trespassing on his property. Newt denies that Bill owns the land. In the course of the lawsuit, both parties put on evidence as to the issue of ownership, and the court determines that Bill owns the land and awards damages for trespass. Subsequently, Bill sues Bob for trespass on the same piece of land, and Bob denies that Bill owns the land. May Bill invoke collateral estoppel on the issue of ownership?

3e. Suppose that in the first suit (question 3d) the court had decided that Bill did not own the land, and held in favor of Newt. Subsequently, Bill sues Bob for trespass on the same land, and Bob denies that Bill owns the land. May Bob invoke collateral estoppel on the issue of ownership?

3f. Paula, a citizen of New York, sues Diane, a citizen of Ohio, and Desmond, a citizen of Pennsylvania, in state court in Ohio, alleging various state law claims with damages in excess of \$50,000. May Diane and Desmond remove the suit to federal court?

END OF EXAM
MERRY CHRISTMAS