Exam Number _____

UNIVERSITY OF HOUSTON
LAW CENTER

Fall, Semester, 2003

Civil Procedure I

Tuesday, December 16, 2003 — Time: 2:00 a.m. - 6:00 p.m.
Professor Hoffman — Hours: 4

GENERAL INSTRUCTIONS

All checked ( ) items apply to this exam:

_____ Open Book __ ___ Closed Book (except you may bring in your rulebook.) _____ Partial Open Book (*see specific instructions*) _____ Scantron needed __ ___ Bluebooks needed _____ Supplemental Materials (*separate from exam*) _____ TURN INTO REGISTRAR when finished __ ___ Collected by Proctor	

?? If you have any questions during the exam, see Catherine Wright in 40 TUII.

In the Space Below, write your exam number and place the mark "/s/" next to it. This will acknowledge that you attended at least 80% of the scheduled classes this semester for this course.

DO NOT WRITE OR SIGN YOUR NAME IN THIS SPACE.

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PROCEDURE I

Instructions

This examination is closed book, with one exception. You may bring in your rulebook. Any information that you have written in the rulebook may also be included, though you may not reproduce any materials that you did not author.

The examination is worth a total of one hundred points. There are three essay questions. The first question is the long answer essay and is worth 50% of the total grade. The last two are the short answer essay questions, and each is worth 25% of the total grade.

You will not need any blue books for the examination. You will write on—and ***only*** on—the exam pages that I give to you. You must only write on the lines that I have given. Write on every line (do not skip lines) but do not write on the back, between the lines, on the side or any place else. Be sure to write as legibly as you can. For students who will type: I will provide you with the word limit for each question. If you exceed the word limit on any question, I will treat it just as I would a student who handwrites outside of the lines I have given on the exam. Finally, for all students, remember to write your examination number on the top of every page of your exam copy.

I have tried to write an exam that will enable you to spend time thinking about your answer, drafting or outlining your answer, and then finally writing your final answer, all within the time limit given. I will have scratch paper in the room for you. The point is to encourage you to think and to analyze the question carefully; not merely to provide me with the first thought that comes to mind and to write as fast as you possibly can, for as long as time permits. The goal should be short, clearly articulated ideas -- not heaps and heaps of words. The amount of time you spend on any question is entirely up to you, but I would strongly suggest that you allocate your time to correlate with the relative values of the questions.

I have handed out this instruction page to you before the date of the final examination, because I wanted to try to reduce—as much as possible—uncertainty and anxiety on test day about how the examination will look, and what is expected of you. I encourage you to read the instructions over carefully, and make certain that when you finally sit down to take the examination, you have already familiarized yourself fully with all of these instructions so that you do not have to spend any time re-reading the instructions on exam day.

Good luck.

Long Answer Essay Question No. 1
(50% of grade)

Ernst & Young, L.L.P. and Cendant Corporation are co-defendants in a securities case brought in the United States District Court for the Southern District of Texas. Assume that Ernst & Young is a Pennsylvania corporation and that Cendant is incorporated in Delaware, and that both have their principal place of business in New York.

The plaintiffs, a group of investors all of whom are from Texas, allege that the two companies conspired to defraud them as to the true financial condition of Cendant. They claim that they never would have bought shares in the company if they had known of Cendant's poor financial condition. They allege claims arising under federal securities law. In particular their claims are based on Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (the "SEC"), Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC. Section 10(b) of the Exchange Act and Rule 10b-5 prohibit "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security."

Both Cendant and Ernst & Young file pre-answer motions for dismissal under Fed. R. Civ. P. 12(b)(2). In addition to its answer, Ernst & Young files and serves a cross-claim against Cendant under Federal Rule of Civil Procedure 13(g). Ernst & Young alleges that Cendant owes it indemnity, based on the terms of the audit contract between Cendant and Ernst & Young, for any monies it might pay—by judgment or by settlement—to the plaintiffs. That contract was negotiated and finalized in New York, following extensive discussions between Cendant and Ernst & Young in Cendant's New York office. Please note that the cross-claim necessarily is based on state law since, for purposes of the claim, neither Cendant nor its auditor are considered "purchasers" or "sellers" of securities within the meaning of Section 10(b) and Rule 10b-5. Cendant timely files an answer to the cross-claim, asserting as its principal defense that because Ernst & Young was negligent in preparing the audits, it does not owe contractual indemnity.

Exactly one month later, the plaintiffs settle all of their claims against Cendant and Ernst & Young. All parties appear before the court to announce that a settlement has been reached as to the plaintiffs' claims, and they ask the court to sign a judgment disposing of all of plaintiffs' claims. The judge enters the judgment and dismisses all of the plaintiffs' claims. At this same hearing, Ernst & Young emphasizes that its cross-claim against Cendant remains and asks for a trial setting. The judge acknowledges that the cross-claim survives the settlement, but says she wants to wait before setting the case for trial.

If Cendant does not want to have to continue to litigate in this federal district court, what argument(s) should it make. Prepare a memorandum outlining the options available to Cendant, citing any specific authority. Be certain to assess the likelihood of success for any option you discuss.

Short Answer Essay
Question No.1
(25% of grade)

In the same litigation, assume that Cendant decides it wants to remain in the United States District Court for the Southern District of Texas and does not take any of the actions you may have discussed in your previous answer. Instead, Cendant notices and takes the oral deposition of Simon Wood, a former Ernst & Young senior manager and auditor who prepared the Cendant financial statements at issue in the underlying litigation. At Wood's deposition, Cendant inquires into communications that took place between Wood, Ernst & Young's counsel (who

also represented Wood) and Dr. Phillip C. McGraw of Courtroom Sciences, Inc. Dr. McGraw is a consulting expert in trial strategy and deposition preparation who was retained as a non-testifying trial expert to assist Ernst & Young's counsel in preparing the case. Dr. McGraw participated in a deposition preparation meeting with Wood and his counsel before the deposition was conducted.

At the deposition, Cendant's counsel specifically asks Wood, "Did Dr. McGraw provide you with guidance in your conduct as a witness?" and "Did you rehearse any of your prospective testimony in the presence of Dr. McGraw?

Counsel for Wood objects, citing the work product doctrine, and directs his client not to answer. After the deposition, Cendant brings a motion to compel. If you were the trial judge ruling on whether to allow these inquiries, how would you rule?

Short Answer Essay
Question No. 2
(25% of grade)

National Presto Industries, Inc., a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin, is an investment company that specializes in making investments on behalf of its clients in the equities and bond markets. It has employees throughout the country. Similarly, its investors are located throughout the United States. All records relating to its investments are maintained at its main headquarters in Eau Claire.

The Securities and Exchange Commission, the federal agency with civil law enforcement authority to protect investors and maintain the integrity of the securities markets, began an investigation of Presto for violations of federal law governing investment companies. As the geographic chart on the next page illustrates, the SEC is organized into five regions: the Pacific, Central, Midwest, Northeast and Southeast Regions. In addition to its main headquarters in Washington, D.C., the SEC maintains eleven regional offices throughout the United States. With approximately 3,100 staff, the SEC is small by federal agency standards.

The Presto investigation was conducted by SEC agents out of its Chicago regional office since the SEC does not have an office in Wisconsin. Following its investigation, lawyers for the SEC brought a civil suit on the agency's behalf against National Presto Industries in the United States District Court for the Northern District of Illinois. The SEC alleges that Presto has been violating federal law governing investment companies and, in particular, operating an unregistered investment company in violation of Section 7(a) of the Investment Company Act of 1940, 15 U.S.C. §80a-1.

The parties have exchanged lists of persons likely to possess discoverable information, pursuant to Federal Rule of Civil Procedure 26(a). With the exception of the two SEC agents in Chicago who led the investigation, all other potential witnesses listed by both parties are located in Eau Claire, Wisconsin.

Presto asks the district judge to transfer the case pursuant to 28 U.S.C. §1404(a) to the Western District of Wisconsin, the district in which its headquarters are located. If you were the district judge in Chicago, how would you rule and why?

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