Exam Number _____

UNIVERSITY OF HOUSTON
LAW CENTER

Fall, Semester, 2004

Civil Procedure I

Monday, December 9, 2004 Time: 9:00 a.m. - 1:00 p.m.
Professor Hoffman Hours: 4

GENERAL INSTRUCTIONS

All checked (✔) items apply to this exam:

_____ Open Book _____ Closed Book __✔__ Partial Open Book (*see specific instructions*) __✔__ Scantron needed _____ Bluebooks needed _____ Supplemental Materials (*separate from exam*) _____ TURN INTO REGISTRAR when finished __✔_ Collected by Proctor	**SCANTRON INSTRUCTIONS** To use the scantron form: Only use the A, B, C, & D blocks under "IDENTIFICATION NUMBER" for your exam number. **DO NOT WRITE YOUR NAME ANYWHERE ON THE EXAM.**

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

IT IS A VIOLATION OF THE HONOR CODE TO WRITE YOUR NAME OR ANY OTHER IDENTIFYING INFORMATION ON THIS EXAM

In the Space Below, by writing your exam number and placing the mark "/s/" next to it you 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

Professor Hoffman

Thursday, December 9, 2004
Time: 9:00 a.m. - 1:00 p.m. (4 hours.)

Instructions

This examination is open book, provided that the materials you bring into the exam with you are your own. You may not use anyone else's notes. You may not use any commercial outlines, hornbooks, treatises, articles, or anything else that you did not produce yourself. Of course, you are free to bring in your casebook, your federal rules book, and any supplemental materials I handed out to you during the semester.

The examination is worth a total of one hundred points. The first section contains two essay questions. Each question is worth 35% of the total grade. The second section contains 20 multiple choice questions worth a total of 30% of the final grade (thus, making each question worth 1.5 points). You should mark your answer on the answer sheet provided.

I have tried to write an examination which gives you sufficient time to read each question and organize your thoughts before writing. 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

Finally, a few last, important reminders. First, write as legibly as you can. Second, remember to write your examination number on the copy of your examination which you turn in. Third, note that you will not need any bluebooks for the examination as you will write on—and only on—the exam pages that I give to you. Finally, 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. I have written an exam that should 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. 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.

For students who will type:

You must limit your answer to each essay question to 63 lines (that is, 63 lines for each essay answer). You may type only in the default font setting in ExamSoft (Arial 11 point). You may not alter the default margin settings (0 – 10.5 inches).

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 any 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.

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Part I
Essay Questions

Essay Question #1 (worth 35% of the total grade)

You are a judicial clerk working for a federal judge in Georgia. The following memorandum is your written assignment from your judge.

Memorandum

To: Law Clerk
From: The Judge
Re: *Palmer* case

This case arises from the death of Paulette Palmer and her unborn infant on December 5, 2002. On November 1, 2004, Jerry Palmer, the surviving spouse of Paulette Palmer and the surviving parent of the unborn infant, filed suit in this court against two defendants, Patterson Hospital ("Patterson"), and John G. Bates, M.D. ("Bates").

Both defendants are Georgia citizens. The claims raised in the case were grounded in both federal and state law. The federal claims were brought by all plaintiffs under the Federal Patient Anti-Dumping Act, 42 U.S.C. sec. 1395dd ("COBRA") against Patterson only. In addition, the complaint included state law claims by all plaintiffs against all defendants based on: (1) the Georgia Wrongful Death Act, O.C.G.A. § 51-4-1 et seq.; (2) the Georgia Medical Malpractice Act, O.C.G.A. § 51-1-27; (3) the Georgia Hospital Care for Pregnant Women Act, O.C.G.A. § 31-8-40 et seq.; and (4) Georgia common law, for wrongful death.

Jerry Palmer filed this suit in four distinct capacities: (1) as the surviving spouse of Paulette Palmer; (2) as the sole surviving parent of the unborn infant; (3) as administrator and personal representative of the estate of Paulette Palmer; and (4) as the personal representative and next friend of the unborn infant. At the time this suit was filed, Jerry Palmer was a citizen of Alabama. However, when acting in his representative capacities he is deemed to be a citizen of the state of which the deceased was a citizen at the time of death, Georgia in this case. See 28 U.S.C. § 1332(c)(2). For the issue I am asking you to address, there is no relevant distinction between Palmer's two representative capacities and, likewise, no distinction between his two personal capacities. Therefore, for simplicity, when referring to Palmer in his representative capacities, you may use the shorthand "Georgia Plaintiffs," and when referring to him in his personal capacities, you may use the term "Alabama Plaintiffs."

On December 1, 2004, both Patterson and Bates filed separate motions to dismiss for lack of subject matter jurisdiction. All parties stipulate that COBRA creates no private cause of action against treating physicians, such as Bates; thus, you should also assume that the COBRA claim may not be asserted against Bates. Please examine the relevant law and let me know how you think I should

rule on Dr. Bates' motion. Discuss all relevant points of law and legal analysis, and if you make any factual assumptions, be clear that you are doing so or, in the alternative, indicate what additional facts, if any, are needed in order to complete the analysis.

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Essay Question No. 2 (worth 35% of the total grade)

Dr. Kenneth Packer, founder, chief executive officer, and dominant personality of the defendant, Packer Engineering Associates, Inc., a consulting firm, hired Philip Visser in December 1996 as an employee of the firm. Visser was 57 years old when he was hired. Years later, a bitter dispute erupted within the board over Kenneth Packer's conduct. Allegations flew around the company that Packer was siphoning money from the firm into his pocket and that of another company that he dominated. Visser became one of Packer's most vocal critics, and he was personally responsible for fomenting much of the anti-Packer crowd and commentary.

Matters came to a head in October 2003 when Packer fired Visser. Visser was 64 years old when he was fired–and nine months short of the full vesting of his Packer engineering pension. As a result, he lost almost two-thirds of his pension benefits.

Visser brought suit in federal district court against Packer Engineering under a federal statute, the Age Discrimination in Employment Act, 29 U.S.C. 621 ("ADEA"). After a sufficient time for discovery had passed, Packer Engineering moved for summary judgment, claiming there was no evidence that Visser was fired as a result of his age. Packer Engineering filed one affidavit in support of its motion, from Kenneth Packer. The affidavit swore that he did not fire Visser on account of his age.

Visser responded to the motion by attaching the affidavits of three other employees of Packer Engineering. All three averred that they believed Packer fired Visser because of his age. All three affiants disclosed that they had worked closely with Packer. All three affidavits recounted that the affiants were aware of his pension situation. Using identical language, all three averred that "Mr. Packer wanted to get back at Visser and so he chose to hurt Visser by depriving him of his cherished goal of a full pension. Visser's age was a significant factor in the decision."

The trial judge correctly described the relevant, governing law as follows:

> A plaintiff in an ADEA case carries the initial burden of making a prima facie case of discrimination. This may be done by showing (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination (or, if it exists, direct evidence of discrimination). *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

The trial court concluded that on the record before it, the plaintiff failed to demonstrate a genuine issue of material fact regarding either (i) direct evidence of discrimination or (ii) of circumstances that would support an inference of discrimination. On this basis, the trial judge granted the motion

for summary judgment.

As one of the appellate judges sitting in review of this decision, how would you rule? You should assume that the trial judge correctly described the governing legal standards regarding proof of a prima facie case under the ADEA. Be sure to explain fully your answer.

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Part II

Multiple Choice Questions

(section is worth, in total, 30% of grade; each question is worth 1.5 points)

Case Number One: Questions 1-3

1. For graduation, P flew from his hometown in Denver, Colorado to New York City to spend a couple of days with his friend T. P & T decided to see the new art exhibit at the Metropolitan Museum of Art. P noticed a hot dog vendor at the steps to the Museum and figured fine art was better enjoyed on a full stomach. While P stood in line for tickets to the museum, T bought a couple of hot dogs. As T walked back over to P, he tripped, causing the hot dogs to fly out of his hands towards P. In a freak accident, the unusually hard hot dogs hit P in the eye, causing severe nerve damage. When P returned to Colorado, he decided to sue the Museum for negligence in a federal district court in Colorado. He found out that the museum does extensive fundraising in the state and believes, on that basis, that it would be subject to jurisdiction there. Which of the following is correct?

a) Applying the common law doctrine of *forum non conveniens* from Piper Aircraft v. Reyno, the Museum should move for dismissal of the action.

b) The action may be transferred to a district court in New York pursuant to statutory forum non convenienes, assuming that district is more convenient for the parties and witnesses and doing so is in the interest of justice.

c) Even if the museum is subject to personal jurisdiction in Colorado because of its extensive fundraising there, the district court in Colorado should still conclude that venue is improper in Colorado and dismiss under the authority of 28 U.S.C. § 1406.

d) The action can be maintained in federal district court in Colorado because that is where the plaintiff resides and, thus, is a place of proper venue under 28 USC §1391(a).

2. Assume that the museum does not raise any venue objection at the outset of the case, but, instead, first files a preanswer motion to dismiss under Rule 12(b)(2), focusing all of its energy on seeking dismissal based on an argument that it is not subject to personal jurisdiction in this case in Colorado. Which statement below is most likely to be correct?

a) From the constitutional perspective, if the museum were subject to personal jurisdiction in Colorado, it would only be because it is subject to specific jurisdiction in the state based on the personal injuries sustained by P in this case.

b) From the constitutional perspective, if the museum were subject to personal jurisdiction in Colorado, it would only be because it is subject to general jurisdiction in the state based on its extensive fundraising in there.

c) From the constitutional perspective, if the museum were subject to personal jurisdiction in Colorado, it would be because it is subject to both specific jurisdiction in the state based on the personal injuries sustained by P in this case and its extensive fundraising in the state.

d) From the constitutional perspective, if the museum were subject to personal jurisdiction in Colorado, it would be only because it consented to jurisdiction by not filing its jurisdictional objection simultaneously with its original answer.

3. The Museum filed a motion for summary judgment on P's claim for damages, but it failed to include any evidence or supporting materials. Which of the following is correct?

a) If the Museum argues in its motion that P lacks any evidence to support any damages it suffered, the burden shifts to P.

b) The Museum cannot meet its initial burden because it failed to include any evidence or supporting materials.

c) The Museum's motion is improper if filed within 20 days of the time fixed for trial.

d) The court has discretion to decide which party should bear the burden of production at the summary judgment hearing.

Case Number Two: Questions 4-9

4. P worked at X's industrial plant for the past 19 years. Unfortunately, P was diagnosed with a fatal disease associated with a chemical used at X's plant called Chemical B. X's use of the chemical violated numerous federal laws designed to protect workers. P's doctor informed him that P had less than two weeks to live. P and his wife wished to sue X, but thought it would be futile because P would not be around to begin the suit. Which of the following is correct?

a) P could perpetuate his testimony by deposition before filing suit against X.

b) P must file suit before he can preserve his testimony by deposition.

c) P could perpetuate his testimony by deposition before filing suit against X without giving X, Y, and Z notice of the deposition.

d) P could not perpetuate his testimony by deposition before filing suit against X because FRCP 32 does not provide for deposition before suit.

5. Assume that P filed suit against X, alleging that his exposure to Chemical B caused severe injuries. P's suit was based on federal statutes governing the use of Chemical B as well as numerous state law grounds. P served thirty-three interrogatories on X. Which of the following is correct?

a) Assuming all eight of the interrogatories after 25 (i.e., questions 25-33) seek relevant information, X must answer the interrogatories.

b) Assuming all eight of the interrogatories after 25 (i.e., questions 25-33) seek relevant information, X must answer the interrogatories, but only if eight of the prior questions (i.e., questions 1-25) seek information that is not relevant.

c) X will have waived any objection to any of the interrogatories it fails to make, unless its failure to object is excused for good cause.

d) X may simply refuse to answer the last eight interrogatories because P exceeded the presumptive limit of thirty in Rule 33.

6. After P filed suit against X, P served a request for production that included a request for copies of any studies X had in its possession, custody, or control relating to the effect of Chemical B on humans. Which of the following is correct?

a) If X discovers a study it did not produce in response to P's initial request for production, it must produce the subsequently-identified study only if it was conducted by an independent third party of which P is not likely to have any knowledge.

b) If X discovers a study it did not produce in response to P's initial request for production, it need not produce the subsequently-identified study if its prior responses were provided in good faith, after a complete search was conducted.

c) If X discovers a study it did not produce in response to P's initial request for production, it must produce the subsequently-identified study only if P sends a supplemental request for production seeking it.

d) If X discovers a study it did not produce in response to P's initial request for production, X must produce the subsequently-identified study.

7. P is aware that Company Y has documents indicating that X and the other companies in the industry purposely used Chemical B because it was cheaper than the alternative and that X and the other companies purposely concealed their used of Chemical B. P requested such documents from X, but X responded that it had no such documents in its possession, custody, or control. Which of the following is correct?

   a) P may subpoena the documents from Y.

   b) P must join Y in the suit in order to request the documents.

   c) P may serve a request for production on Y without joining it as a defendant.

   d) P will be unable to procure the documents from Y.

8. X served upon P a request for admission that read, "Admit that you were never exposed to Chemical B." P's attorney, busy with numerous other Chemical B lawsuits, forgot to respond to the request. After the time for responding to the request passed, X filed its motion for summary judgment on the basis that B was never exposed to chemical B. If offered as support, P's failure to respond to the request for admission. Which of the following is correct?

   a) Because P did not respond to the request for admission, X may not use it to support its motion for summary judgment.

   b) Because P did not respond to the request for admission, it may be used as support for the dispostiive motion, it need not be taken as conclusively establishing that P was never exposed to Chemical B.

   c) The court may *sua sponte* allow P to amend its admission.

   d) Y may use P's admission in a subsequent suit P brings against it.

9. X learns that P has previously filed actions against other companies for similar injuries. X requests all documents related to those actions. X also propounds several interrogatories related to those actions. Which of the following is correct?

a) P must respond to X's discovery requests, assuming the information is either relevant or reasonably calculated to lead to the discovery of admissible evidence (and assuming no privilege exempts the material sought from disclosure).

b) P need not respond to X's discovery requests because the discovery sought concerns information in another proceeding.

c) P may object to X's discovery requests if he can show that the information sought is not relevant to P's claim.

d) P must respond to X's discovery requests or he will be sanctioned under Rule 37.

Case Number Three: Questions 10-11

10. On June 1, 2001 P took his family to the San Diego Zoo for a family outing. P's son loved baboons, and so naturally their first visit was to the baboon cage. P and his two children were lining up for a picture with the baboon cage directly behind them while P's wife took their picture. Unfortunately, the lock on the cage was not secure and, excited by the camera's flash, one of the baboons sprung from the cage, biting P on his left calf in the process. Equally as unfortunate, the baboon was a carrier of a rare African bacteria. An infection spread throughout P's leg, leading ultimately to its being amputated. P, a resident of San Diego, sued San Diego Zoo, Inc. for negligence in federal district court in San Diego. The case was assigned to Judge Sleepy, who had a propensity for falling asleep during litigation but, nonetheless, had a sharp mind.

Assume the case proceeded to trial, and after the jury had reached a verdict, but before the verdict had been read aloud, Judge Sleepy awoke and realized that the court did not have subject matter jurisdiction over the action. Which of the following is correct?

a) Judge Sleepy should not *sua sponte* dismiss the case because it has already proceeded to trial on the merits.

b) Judge Sleepy should not *sua sponte* dismiss the case because lack of subject matter jurisdiction must be raised by the parties.

c) Judge Sleepy should *sua sponte* dismiss the case because the court lacks subject matter jurisdiction.

d) Judge Sleepy should *sua sponte* dismiss the case because only if the stae law claims predominate under 28 USC §1367(c).

11. Assume P originally brought his action in state court on June 1, 2002 and that,

prior to trial on May 6, 2003, the district court permitted P to amend his petition to drop San Diego Zoo, Inc. as a defendant and add MoreMoney, Inc., the Zoo's parent company. Assume MoreMoney is a Texas Corporation. Which of the following is correct?

a) MoreMoney, Inc. may remove the action to federal court because diversity jurisdiction now exists.

b) Even though diversity now exists, MoreMoney, Inc. may not remove the action to federal court because the case is too far advanced for the federal district court to take jurisdiction.

c) MoreMoney, Inc. may remove the action to federal court provided the San Diego Zoo first consents to the removal.

d) MoreMoney, Inc. may remove the action to federal court provided P first consents to the removal.

Case Number Four: Questions 12-13

12. P and D are neighbors and sometimes engage in simple business transactions with each other. When one particular deal turns sour, P wishes to sue D in state court for breach of contract. In addition, P is angry at D because about a year ago D's tree fell onto P's yard and P had to spend a good bit of money redoing the landscaping. Now that he is angry about the business deal, P also wants to sue D to recover his damages for the landscaping costs. Which of the following statements is correct? Assume the Federal Rules of Civil Procedure have been adopted wholesale as the governing rules in this state's jurisdiction.

a) P must bring the landscaping claim in a separate suit because the two claims are unrelated.

b) P may assert both claims in the same case.

c) P has to wait until after the contractual dispute has been adjudicated before filing the lawsuit about the property damage, because the claims do not arise out of the same transaction or occurrence.

d) P may assert both claims in the same case, but only after obtaining leave of court.

13. Assume the same facts as in the previous question, except that now P wants to sue in federal district court. P pleads that the amount in controversy in the business dispute is $60,000 and that the amount in controversy in the property damage dispute

is $25,000. If P brings his action in federal district court, which of the following is true?

a) P cannot join the two claims in the same case because neither independently satisfy the amount in controversy requirement.

b) For subject matter jurisdiction purposes, the amount in controversy of the two claims is aggregated; thus, the minimum amount in controversy under 1332 is satisfied and the case can remain in federal district court.

c) P may not join the two claims together because for subject matter jurisdiction purposes only federal law claims have their amounts in controversy aggregated; since these are state law claims, the minimum amount in controversy cannot be met.

d) P may join the two claims together but if the jury awards less than $75,000 in total then the court must vacate the judgment for lack of subject matter jurisdiction.

Case Number Five: Questions 14-15

14. P, resident of New Jersey, is injured when D, from California, crashes his car into hers in Manhattan, as she is returning home from her work at the end of the day. P sues D in federal district court in New Jersey. She alleges negligent driving and an amount in controversy is in excess of $75,000. Which of the following is true?

a) There is no diversity jurisdiction when the claim arises in a state which is not the domicile of either party.

b) The plaintiff failed to attach proof of her physical damages to meet the amount in controversy requirement under §1332.

c) Because state and federal courts possess concurrent jurisdiction over this dispute, it was properly brought by P in the federal district court.

d) Although state and federal courts possess concurrent jurisdiction over this dispute, because the claim for relief is merely for state common law negligence P should only have brought the case in state court; the relevance of concurrent jurisdiction is that D, at his option, could choose to remove the case to federal district court.

15. Assume, instead, that D is also from New Jersey. Which of the following is true?

a) She may bring it in federal district court in New York since the citizenship of both parties is diverse from New York.

b) She may not bring the case in federal district court anywhere because there is no diversity of citizenship between the parties.

c) She may not bring the case in federal district court anywhere because there is no diversity of citizenship between the parties, but if she brings the case in New York state court, D may remove it to the Federal District Court for the Southern District of New York because the federal courts have concurrent jurisdiction with the state courts over this case.

d) None of the above.

Miscellaneous: Questions 16-20

16. P, a citizen of New Jersey, sues D, a citizen of Georgia, in federal district court for failure to pay rent on the townhouse D is renting from P. A week after filing the case, P files a motion for summary judgment accompanied with an affidavit from P's property manager saying D never paid the rent. Which of the following statements is correct?

a) The court should grant the motion for summary judgment, because there is no genuine issue of material fact and P is entitled to judgment as a matter of law.

b) The court should not grant the motion for summary judgment, because P filed the motion for summary judgment too early.

c) The court should grant the motion for summary judgment, but should order P to pay D reasonable expenses incurred because of the filing of the affidavit.

d) None of the above.

17. Which of the following is true?

a) Offensive use of issue preclusion is categorically barred in the federal courts. The only recognized use for issue preclusion is for defensive purposes.

b) Offensive use of issue preclusion is not categorically barred in the federal courts but is disfavored

c) Issue preclusion may apply even when the issue was not actually litigated and determined in the prior case, as long as it was a necessary part of the verdict.

d) Issue preclusion may apply without regard to whether the issue was actually litigated and determined in the prior case, but only if the party against whom issue preclusion is sought had a full and fair opportunity to raise the issue.

18. Which of the following is <u>not</u> true?

a) Claim preclusion does not require that the claim have been actually litigated and determined in the prior case.

b) Claim preclusion may be applied against one who was a party or in privity with one who was a party in the prior case.

c) Claim preclusion does not apply when the prior suit is dismissed for a lack of jurisdiction.

d) Under federal claim preclusion doctrine, "same claim" is generally limited to the assertion of identical or nearly-identical claims in the subsequent case.

19. Plaintiff serves a 30(b)(1) deposition notice to take the deposition of a lower-level employee of ABC Corp. There are two defendants in the case, ABC Corp. and XYZ Corp., in the case which is pending in federal district court. Which of the following is true?

a) The testimony of the employee will be binding on ABC Corp. if the employee has direct knowledge of the facts giving rise to the claims asserted in the case.

b) The testimony of the employee will be binding on ABC Corp. without regard to whether the employee has any direct knowledge of the facts giving rise to the claims asserted in the case.

c) The testimony of the employee will be binding on XYZ Corp., the other named defendant, only if the employee has direct knowledge of the facts giving rise to the claims against XYZ Corp. asserted in the case.

d) The testimony of the employee will not be binding on either ABC Corp. or XYZ Corp.

20. Plaintiff serves a 30(b)(1) deposition notice to take the deposition of an officer of ABC Corp., but the officer lacks any direct knowledge of the facts giving rise to the claims or defenses in the case. Which of the following is true?

a) Pursuant to Rule 30(b)(6), ABC Corp. may designate in his place another officer, director or managing agent who possesses at least some knowledge of the facts giving rise to the claims or defenses asserted in the case.

b) Pursuant to Rule 30(b)(6), ABC Corp. may designate another officer, director or managing agent to testify on its behalf, provided that the witness so designated has the most knowledge of the facts which are known or reasonably available to the organization.

c) ABC Corp. must object to the Rule 30(b)(1) deposition notice and file a motion to quash or for a protective order prior to the start of the deposition.

d) ABC Corp. may object to the Rule 30(b)(1) deposition notice and file a motion to quash or for a protective order prior to the start of the deposition.

END OF EXAMINATION