EXAM NO. _____

THE UNIVERSITY OF TEXAS AT AUSTIN — SPRING 2006
SCHOOL OF LAW — MAY 3, 2006
 — 1:30-5:30 PM

FINAL EXAMINATION
IN
CIVIL PROCEDURE §3

PROFESSOR LONNY HOFFMAN

Instructions:

This four-hour 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. Question No. 1 is worth 40%. Question No. 2 is worth 35%. Question No. 3 is worth 25%. There are a total of 14 pages to this exam.

I have written an exam that should enable you within the time limits given to think about, draft, outline and then, finally, compose your final answer. The point is to encourage you to analyze the questions carefully, not merely to provide me with the first thought that comes to mind and write as fast as you possibly can, for as long as time permits.

A few important reminders: Remember to write your examination number on the copy of your examination which you turn in, and **do not write your name anywhere on the exam**. Second, keep in mind that you will not need any white books for the examination as you will write on—and only on—the exam pages that I give to you. Write only on the lines and do not feel that you have to skip lines, but do try to write as legibly as possible. Do not write on the back, between the lines, on the side or anyplace else. For students who type: you must limit your answers to the word counts listed for each question. Anything beyond these limits will not be considered.

I have handed out this instruction page to you before the date of the final examination, because I want 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 with all of these instructions so that you do not have to spend any time re-reading them on exam day. Good luck.

HONOR CODE: Chapter 1 of the Honor Code provides, in part: "All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. . . . A student who knows of unethical behavior of another student is under an obligation to take steps necessary to expose this behavior. . . ."

(questions start on the next page)

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Question No. 1 (for typists: limit 750 words)

Padagonia filed this diversity suit in the United States District Court for the Southern District of Florida against A.S. Capital, Inc., alleging that A.S. misrepresented facts in connection with a deal for a Venezuelan building project in which Padagonia was the purchaser and A.S. was the seller. The complaint alleged that venue was proper under the terms of 28 U.S.C. § 1391(a) but did not specify which subsection of § 1391(a) conferred venue.

A.S. Capital, Inc. is a New York corporation with its principal place of business in New York. This particular building deal was the result of negotiations between A.S.'s agents in Florida in its Miami office and Padagonia's representatives in Spain. All of the key correspondence and deal documents from A.S. were transmitted to and from its Miami office, not New York.

A.S. was served with process in the Southern District of Florida through service on its registered agent in the state. One week later, A.S. filed a preanswer motion to dismiss for improper venue under Rule 12(b)(3). The district judge subsequently entered an order dismissing the case. The district court reasoned that the only way venue could be properly laid in the Southern District of Florida was under § 1391(a)(3) but that this section was inapplicable since, according to the court, the case could have been filed in the Southern District of New York.

Padagonia timely filed an appeal of the venue decision to the 11th Circuit. Acting in the role of judicial clerk to one of the appellate judges assigned to the panel on this case, your role is to fully analyze the district court's decision dismissing the suit for improper venue.

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Question No. 2 (for typists: limit 500 words)

Creighton Miller is the administrator of the estate of Booker T. Pompey. Pompey worked for many years on various ships owned by American Heavy Lift Shipping, Inc. He was diagnosed with colon cancer and leukemia prior to his death in November 2001. In January 2004, Miller brought suit against American Heavy Lift Shipping, Inc. under state law for common law negligence.

The elements for establishing negligence in this jurisdiction are: (1) a duty owed to the plaintiff; (2) breach of that duty by the defendant; (3) the defendant's breach was a proximate cause of injuries sustained by the plaintiff; and (4) the plaintiff suffered injuries as a result. The statute of limitations on this cause of action is three years, thus Miller's January 2004 filing was within the limitations period.

In particular, relevant language in the complaint read as follows:

> 10. While serving as a mariner on said vessels, Pompey was exposed to asbestos and hazardous substances other than asbestos.
>
> 11. As a direct and proximate consequence of his exposure to asbestos and hazardous substances other than asbestos, Pompey has sustained injuries for which he seeks damages.

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In July 2005, Miller asked the court to grant him leave to amend to add a claim related to benzene exposure which ultimately was a causal factor in Pompey contracting leukemia, as Miller described it in his motion. In the amended complaint (attached to the motion), Miller again alleged a theory of liability under state negligence law. Miller claimed that Pompey had suffered from leukemia as a result of his exposure to benzene and benzene-containing products, and listed specific instances and methods of exposure on particular ships. Defendant did not oppose the motion to amend and the district judge granted leave to amend in August 2005. Plaintiff then promptly filed the amended complaint.

In September 2005 defendant asked the court to dismiss the suit on the ground that Miller's amended complaint did not relate back to his original complaint and that Pompey's negligence claim based on his new allegations of exposure to Benzene was barred by the three-year statute of limitations because it had accrued at least by the date of his death.

The district court granted summary judgment to defendant. The court relied on defendant's uncontested argument that different toxins and different methods of exposure cause different diseases, and found, specifically, that "exposure to benzene does not occur or act in the same manner as exposure to asbestos." Miller filed a timely notice of appeal.

If you were sitting on the appellate court, how would you rule and why?

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Question No. 3 (for typists: limit 400 words)

Assume P (from Texas) sues D (from Texas) in federal court, properly invoking the court's federal question jurisdiction under 28 U.S.C. § 1331(a). Assume D wants to implead Third Party Defendant on the ground that the Plaintiff's injuries were the result of the conduct of the third party defendant, not it. Defendant files a motion to implead under Rule 14, asserting a cause of action for restitution (a claim which is based entirely on state law). Defendant's restitution claim is framed in this way: "If the jury finds Defendant liable to Plaintiff, then Third Party Defendant is liable to Defendant in full restitution of all monies paid by Defendant to Plaintiff." In your answer, discuss all relevant considerations that must be taken into account in determining whether Defendant's impleader claim may be asserted in this suit.

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End of examination - Turn in exam to proctor