

EXAM NO. _____

**FINAL EXAMINATION IN
CIVIL PROCEDURE
PROF. LONNY S. HOFFMAN**

**FALL 2005
DECEMBER 16, 2005
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Short Answer Question No. 1

(worth 25% of final examination grade)

Larry (a resident of Michigan) has a terminal disease. He believes the only way to preserve his life is a transplant of bone marrow from his relative, Marty (a resident of Texas). But Marty refuses to consent to the operation that would take the bone marrow from him. Larry, therefore, sues Marty in federal district court (citing 28 U.S.C. §1332 as the source of the court's original jurisdiction). He sets out these facts in his complaint, and requests that the court issue an order requiring Marty to submit to the operation. Assume that there is no legal right entitling a person to invade the body of another for these purposes. The complaint thus appears not to state a viable cause of action.

Draft a memorandum outlining all of the procedural options available to defendant Marty in terms of seeking dismissal and/or sanctions against Larry. Be certain to be specific about how Marty would go about exercising any or all of these procedural options, should he decide to do so.

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Short Answer Question No. 2

(worth 25% of final examination grade)

Plaintiffs filed their Complaint in state court on January 28, 2005, alleging causes of action based only on Arkansas law. Plaintiffs contend that Defendants KPMG LLP, a national accounting, auditing and consulting firm, and Sidley Austin Brown & Wood LLP, a Chicago based law firm, provided opinion letters to plaintiffs regarding plaintiffs' participation in KPMG's investment program. The investment program involved Offshore Portfolio Investment Strategy ("OPIS") and Bond-linked Issue Premium Structure ("BLIPS"). In the opinion letters, KPMG and Sidley Austin expressed to plaintiffs the investment program would "more likely than not" be upheld if challenged by the Internal Revenue Service. Plaintiffs allege, however, that certain internal statements were made by KPMG employees, which reflected KPMG's belief that OPIS and BLIPS were illegitimate and possibly unlawful under the Internal Revenue Code.

Defendants timely filed a notice of removal to the proper federal district court and, thereafter, plaintiffs timely filed a motion to remand.

How do you think the district judge should rule on the motion to remand? Assume there is no basis for diversity and that the sole ground for jurisdiction—if one exists at all—will have to be based on federal question jurisdiction.

Lines for handwritten answers to Short Answer Essay Question No. 2 begin on Page 22

Long Answer Essay Question

(worth 50% of grade on final):

Tomlinson filed a suit for damages in Oklahoma state court against H&R Block, Inc. As the basis for personal jurisdiction, Tomlinson alleged that some or all of defendant's wrongful acts and conduct occurred in Oklahoma and that defendant operates out of more than nine thousand tax offices and ninety-eight financial centers in the United States and offers franchise opportunities, seminars, and training sessions to teach people the tax preparation business. She claimed that she used defendant's services to prepare her income tax return and enrolled in income tax courses offered by defendant. The complaint does not indicate where Tomlinson was living when she allegedly used the tax services and enrolled for the course. She is currently a resident of Oklahoma.

In Count I of her complaint, she alleged that H&R Block, Inc. made false and deceptive statements by using her social security number in educational seminars and tax preparation training courses after it had published a privacy policy stating it protects personal information. In Count II, she alleged that defendant misappropriated her social security number for its financial advantage by using it in tax preparation courses, apparently in a "2002 Student Work book" that was otherwise unidentified.

Defendant first objected before the state judge that service had been improperly effectuated on the general manager of one of its franchise operations in Oklahoma and that this manager was not a designated agent for service of process. The state court denied its motion to quash service on the ground that under Oklahoma common law service on "any managerial or executive official" of a company is deemed to be constructive service on the company, even if such a person is not designated by the company as its proper agent for service of process and even if, under the relevant business statute, the only persons that a company may appoint to accept service of process are "a president, a general counsel or an outside lawyer designated by the company to receive service."

Instead of appealing the denial of its motion to quash service, defendant removed the case to federal court under 28 U.S.C. §1332, asserting that it is a New York corporation with its principal place of business in New York and that diversity exists because at the time suit was filed Tomlinson's state suit indicated that she was a resident of Oklahoma. Defendant also noted that plaintiff's state suit sought damages in excess of \$75,000. Thereafter, defendant filed a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). In support of its motion, defendant filed several affidavits averring the following: (1) that H&R Block, Inc., is solely a holding company; (2) that it never conducted business or training or published educational or promotional materials for use in Oklahoma; (3) that it did never had a physical presence, bank account, or phone listing in the state; and (4) that in regard to the website on which Tomlinson relies to try to demonstrate jurisdictional amenability, defendant notes that the

website contains the following disclaimer which shows that the holding company, H & R Block, lacks sufficient contacts in Oklahoma:

H&R Block, Inc. is a holding company which has no employees. Any goods or services that may be offered for sale through this Web site or a link hereto are offered by operating subsidiaries of H&R Block, Inc., and not by H&R Block, Inc.

In response, Tomlinson submitted two exhibits. The first exhibit was a portion of a training manual for an Oklahoma Income Tax Course that stated it was "an annual publication of H&R Block, Region 37." The second exhibit was a single page from an unidentified book indicating that it was copyrighted by "H&R Block Tax Services, Inc." Plaintiff provided no additional information establishing from what document the page was annexed, but in her responsive brief her counsel argued that "the page came from the '2002 Student Work book."

Tomlinson also argued that Oklahoma may assert general jurisdiction over the defendant because the H&R Block website indicates that H&R Block, Inc., serves over 18.7 million tax clients in the United States. She argued that the court should infer from the exhibit that some of those clients are in Oklahoma.

Analyze what relevant legal issues are raised by this situation and discuss them fully.