

UNIVERSITY OF HOUSTON LAW CENTER
Final Examination - Procedure
Professor Lonny Hoffman
Fall Semester 2019

Tuesday, December 10, 2019
Exam Rooms: 240BLB and 113BLB

Time: 6:00 p.m. - 10:00 p.m.

Instructions (revised as of November 26, 2019)

1. The exam is open book. You may bring in anything that you want.
2. During the exam, you may not speak with anyone about the exam and you may not be online or use any electronic device to communicate (except for using Electronic Blue Book (EBB)). It should go without saying—but I’ll say it anyway—that your exam answers should be entirely your own work.
3. For the exam, you will use EBB just as a portal to download the exam and upload your answers. This will allow you to use Microsoft Word to compose all of your answers, without having to use the EBB word processing software. This should make things a little easier. I’ve separately forwarded updated EBB instructions from Chad Kitko, but here’s an even shorter summary of what you will do:

Step 1- Log in to EBB at this link: <https://ebb.law.uh.edu/EBBLogon.aspx> by using your Cougarnet credentials. Before the exam, make sure you are able to log in without difficulty.

Step 2 – Click on the exam under the “Take Home Exams” section. It will be identified by the Course Name (“Procedure”); Section Number (14737); and Course Number (5406). After you’ve clicked on the exam, it will take you to a new page that will let you download the exam. Click the blue “Download” button. This will save the exam wherever your browser normally downloads files (likely in your download folder). Re-save the exam to a folder you are familiar with (e.g., Documents or Desktop). You can now log out of EBB.

Step 3 – You can now use Microsoft Word to compose your exam answers. Include both your essay and multiple-choice answers in your file. When you name the file, it’s best to name it with your exam number and the name of the class. *E.g.*, “Exam No. 1234 – Procedure.”

Step 4 – After you’ve finished your answers, log back in to EBB and, as you did before, click on the exam for Procedure under the “Take Home Exams” section. Now click on the gray “Browse” button and go to where you have saved your exam answers. (Note that when you go to save it, EBB will include the word “fakepath” in the browse window. This is apparently normal and correct.) Click on the blue “Submit Exam” button.

If you want help with EBB before the exam, contact Chad Kitko. His email is ckitko@central.uh.edu; phone is (713) 743-2260. If you have technical problems with EBB during the exam, contact Derrick Gabriel. His email is dgabriel@central.uh.edu; phone is (713) 743-2189. His office is in Student Services. If you have any trouble uploading your answer to EBB, immediately email your exam to my assistant, Lillian White at lwhite@central.uh.edu (do not copy me!) so she has it and can confirm that you completed it within the allotted time.

4. The exam consists of two parts. The first part has two essay questions. The first question is a shorter question (recommended target length: 500 words) that's worth 20% of your final exam grade. The second essay question is longer (recommended target length: 1,500-2,000 words). It is worth 50% of your final exam grade. The second part contains 10 multiple-choice questions and is worth the remaining 30% of your final exam grade. Each question is worth 3 points.

PART I
ESSAY QUESTIONS

This first part of the exam contains two essay questions.

Question 1 (worth 20% of exam grade)
[Suggested target length for answer: 500 words]

On November 1, 2019, P brings suit against D in federal court. On Nov 11, D files an original answer in which she admits or denies every allegation, but she does not include in her answer any defenses or affirmative defenses. On December 20, D realizes that she has a strong argument that the court lacks personal jurisdiction over her. D moves to amend her original answer. What are the best arguments for/against D being able to amend her original answer to assert a personal jurisdiction defense?

Question 2 (worth 50% of exam grade)
[Suggested target length of answer: 1,500-2,000 words]

Lincoln Financial Advisors is a tax accounting and financial services firm. It is incorporated in Delaware. Lincoln's Chief Executive Officer has an office in New York City and the company's board of directors holds regular meetings in New York. Its largest office (measured by total revenue) is in Houston, Texas. It also offers accounting and financial services out of its offices in New York, Chicago, Los Angeles, Miami, and Denver.

In 2015 Lincoln proposed to Mary Peterson, one of its wealthy clients, that she should invest in a foreign currency option ("the Strategy"). Lincoln told Peterson that the Strategy would produce a substantial tax savings on her federal tax return. Based on Lincoln's advice, Peterson invested, claiming the tax savings for 2016. However, after an audit, the IRS took the position that Peterson could not claim the losses generated by the Strategy for federal income tax purposes and sent her a delinquency notice that she had an outstanding tax liability of \$100,000.

Peterson could have tried to challenge the IRS auditor's position by bringing an administrative appeal with the Office of Appeals, which is an independent organization within the IRS that allows taxpayers to try to appeal any disputes with the agency. If she was unsuccessful in that administrative appeal, she then could sue the IRS in court, including by bringing suit in U.S. Tax Court, a court established by Congress under Article I of the US Constitution to adjudicate disputes over federal taxes owed to the IRS. If she had pursued an administrative appeal and brought a subsequent judicial suit in U.S. Tax Court, she would not have had to pay the amount of tax the IRS thought she still owed. However, Peterson decided not to seek any appeal of the IRS auditor's determination. In 2017 she paid the \$100,000 tax delinquency to the IRS.

Peterson lived in Houston from 1999-2016. In 2017, she and her husband sold their home in Houston and bought a new home in New York. She still flies back and forth to Houston at least twice a month for business. Whenever she flies back to Houston she stays in a hotel or with friends.

In 2018 Peterson filed an original petition in a state court in Texas against Lincoln alleging that it knew or should have known that the IRS would take the position that the purported losses generated by the Strategy were not properly allowable for federal income tax purposes. Peterson alleged that in 2014 the IRS advised accountants and tax advisors in a Formal Notice that it believed options like the Strategy was improper under Chapter XX of the Internal Revenue Code.

Peterson sued Lincoln under Texas state law for accounting malpractice. The elements of malpractice under Texas law are basically the same as for any negligence action: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach was the proximate cause of the plaintiff's injury; and (4) that plaintiff suffered damages as a result.

Lincoln timely removed the case to federal court. Peterson filed a motion to remand. How should the court rule?

PART II
MULTIPLE-CHOICE QUESTIONS

This second section, worth 30% of the exam grade, contains 10 multiple-choice questions. Each question is worth three points.

1. P is domiciled in Oklahoma City, Oklahoma, which is in the United States District Court for the Western District of Oklahoma. P wants to sue two defendants in federal court. The prospective defendants are D1, which is incorporated in Texas and has its principal place of business in Houston (in the Southern District of Texas); and D2, a natural person who is domiciled in Lincoln, Nebraska (which has only one federal judicial district, the District of Nebraska). P's claim relates to a tort that occurred entirely in the Western District of Oklahoma. Among the choices below, what is the best answer?

- A. Venue is proper in any judicial district in which D1 or D2 are subject to the Court's personal jurisdiction.
- B. Venue is only proper in any judicial district in which both D1 and D2 are subject to the Court's personal jurisdiction.
- C. Venue is proper in the Southern District of Texas, the District of Nebraska, or the Western District of Oklahoma.
- D. Venue is proper only in the Western District of Oklahoma.

2. Among the choices below, what is the best answer?

- A. The Supreme Court's decision in *Ashcroft v. Iqbal* can only be overruled by a subsequent decision by the Supreme Court.
- B. The Supreme Court's decision in *Ashcroft v. Iqbal* could be overruled by an amendment to Rule 8.
- C. The Supreme Court's decision in *Ashcroft v. Iqbal* could be overruled but doing so would require that Congress override it by statute since a duly-enacted statute necessarily controls over a conflicting rule of civil procedure.
- D. The Supreme Court's decision in *Ashcroft v. Iqbal* cannot be overruled by rule amendment or statutory enactment because the Court's decision was based on an interpretation of the U.S. Constitution.

3. P sues D1 and D2 in federal court, asserting state law claims against both. Among the following choices, what is the best answer?

- A. D1 may assert a claim against D2 as long as the claim arises out of the same transaction or occurrence that is the subject matter of P's claim against D1.
- B. D1 may assert a claim against D2 regardless of whether it arises out of the same transaction or occurrence that is the subject matter of P's claim against D1.
- C. D1 must assert a claim against D2 if the claim arises out of the same transaction or occurrence that is the subject matter of P's claim against D1.
- D. D1 may assert a claim against D2 only if the claim asserts that D2 is or may be liable to D1 for all or part of P's claim against it.

4. Among the following choices, what is the best answer?

- A. Rule 26(b)(3) only protects the work product of a lawyer.
- B. Rule 26(b)(3) only protects against the discovery of documents and tangible things, but the common law work product doctrine also protects against disclosure of work product that is not in documentary or tangible form.
- C. Rule 26(b)(3) only protects against work product gathered in anticipation of litigation or in preparation for trial.
- D. A and C are both correct.

5. P sues D in federal court for negligence. D files a motion for summary judgment under Rule 56, asserting that there is no evidence it breached any duty it owed to P. Among the choices below, which is the best answer?

- A. D has satisfied its initial burden as the summary judgment movant.
- B. D has satisfied its initial burden as the summary judgment movant only if Justice White's concurring opinion is treated as the controlling opinion from *Celotex*.
- C. If D has satisfied its initial burden as the summary judgment movant, then P must come forward with some evidence on which a reasonable jury could find that D breached a duty it owed to P.
- D. If D has satisfied its initial burden, then the court should grant summary judgment for D.

6. In a federal suit, P timely asserts a claim against D for negligence. A year later, after the statute of limitations has run, she files a motion to amend her complaint to add a second claim for gross negligence. Among the choices below, what is the best answer?

- A. If D objects, P may amend if she can show that her gross negligence claim arises out of the same conduct, transaction, or occurrence set out in her original complaint.
- B. If D objects, P may amend if she can show that the state law would allow her gross negligence claim to be asserted.
- C. A and B are both correct.
- D. Neither A nor B are correct.

7. P, domiciled in Florida, sues D, an Ohio domiciliary, in state court in Florida. She asserts a cause of action for breach of negligence and seeks as her remedy (i) \$10,000 in compensatory damages and (ii) an unspecified amount of punitive damages. D removes the case to federal court. Assume that the substantive tort law in Florida is settled that a claimant can recover no more in punitive damages than three times the amount of compensatory damages. Among the choices below, what is the best answer?

- A. The court should dismiss the punitive damages claim under Rule 12(b)(6) and allow the case to remain in federal court.
- B. The court should remand the case, but only if P files a motion to remand on the ground that she is not seeking more than \$75,000 in total damages.
- C. The court should remand the case, even if P does not file a motion to remand.
- D. The court should remand the case and award attorneys' fees and costs to P incurred in seeking remand.

8. P asserts a state law claim against D in federal court. There is no diversity between the parties. Among the choices below, what is the best answer?

- A. P's claim must be dismissed because a plaintiff cannot initiate a state law claim against a non-diverse party in federal court.
- B. The action could have been maintained in federal court, but only if P had brought suit in state court and D had timely removed it under 28 U.S.C. §1441.
- C. P's claim may be maintained in federal court if it raises a substantial question of federal law.
- D. P's claim may be maintained in federal court, regardless of whether it satisfies the well-pleaded complaint rule.

9. P, an individual domiciled in Texas, and D, a corporation based in Oklahoma, enter into a contract. The contract provides that any dispute between the parties must be litigated in state court in Oklahoma. P later brings suit in the Southern District of Texas against D. Among the choices below, what is the best answer?

- A. Assuming the clause is enforceable under the *Carnival* test, the Court should dismiss the case unless the private and public interest factors, balanced together, cut against transfer.
- B. Assuming the clause is enforceable under the *Carnival* test, the Court should dismiss the case unless the public interest factors cut against transfer.
- C. Assuming the clause is enforceable under the *Carnival* test, the court should transfer the case unless the private and public interest factors, balanced together, cut against transfer.
- D. Assuming the clause is enforceable under the *Carnival* test, the court should transfer the case unless the public interest factors cut against transfer.

10. Among the choices below, what is the best answer?

- A. Complete diversity is required by 28 U.S.C. §1332 but that requirement can be changed by Congress.
- B. Complete diversity is required by 28 U.S.C. §1332 and that requirement cannot be changed by Congress because the Supreme Court has interpreted the statute (in *Strawbridge v. Curtis*) as requiring complete diversity.
- C. Complete diversity is required by the diversity head of jurisdiction in Article III, section 2 of the United States Constitution.
- D. Complete diversity is not required by the text of 28 U.S.C. §1332.

END OF EXAM