UNIVERSITY OF HOUSTON LAW CENTER
Final Examination - Procedure I
Professor Lonny Hoffman - Fall 2021

Exam Timing and Submission. This examination will be available for download through the Electronic Blue Book portal as early as 4:59 am on Tuesday, December 14. You have six hours to upload your answers to the EBB portal. Your time period begins when you download the exam. At latest, you must upload your answers before 11:59 pm. Answers submitted after 11:59 pm will not be accepted. [If you run into any upload problems, you can email your answers to my executive assistant, Megan Bostick. Her email is at mbostick@central.uh.edu. If for any reason you need to call her, Megan's direct line is (713) 743-8298. Of course, do not copy me on any email to Megan. To be accepted, your email must be sent before 11:59 pm.]

The link to EBB is here: https://ebb.law.uh.edu/EBBLogon.aspx. Familiarize yourself with EBB beforehand; instructions are available here: https://uhlcithelp.zendesk.com/hc/en-us/articles/360047218193-EBB-Portal-Take-Home-with-Multiple-Choice. If you need help before the exam with EBB, contact Chad Kitko in our IT office. His email is ckitko@central.uh.edu; phone is (713) 743-2260. If you have technical difficulty or problems with EBB during the exam, contact Derrick Gabriel. His email is dgabriel@central.uh.edu; phone is (713) 743-2189. Finally, it is a good idea to keep a copy of your answers on your personal computer just in case there is any problem with your EBB submission.

You can take the exam wherever you want. I have also reserved Room 1090BLB at UHLC in case anyone needs a quiet, reserved space to take the test.

Exam Format. The exam consists of two parts. The first part, worth 70% of your final grade in this course, contains two essay questions: Q1 is worth 45%; Q2 is worth 25%. There's no word limit for the essay questions, but I've included suggested target ranges: for Q1, 2,000 words or less; for Q2, 1,000 words or less. The exam's second part has ten multiple-choice questions, each worth two points (for a total of 20% of your final grade in this course). As you know, the remaining 10% of your final grade is based on the three short assignments you previously submitted.

The exam is entirely open book. You may consult any written sources that you want while taking the exam. The only restrictions I impose are that you may not communicate with anyone about the exam until after you have turned in your exam and your answers must be entirely your own work. Any student found to have violated these restrictions will receive an "F" for the course. You may also be subject to discipline under the UHLC Honor Code. By submitting your final examination answers, you are affirming that you have abided by all University of Houston and UHLC honor system rules, including the UHLC Honor Code, which can be found here: https://www.law.uh.edu/student/HONOR-CODE-AND-PROCEDURES.pdf.

Use your exam ID, not your name. To maintain anonymity, it is imperative that you do not write your name anywhere on the exam; only use your numerical exam ID. And please be sure that you write the correct ID number. A wrong number delays getting grades out for everyone.

Part I: Essay Questions

This first part of the exam contains two essay questions.

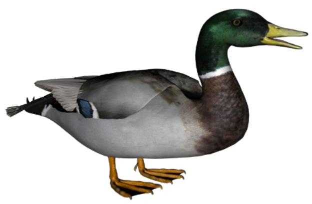
<u>Question 1 (worth 45% of your final grade)</u>

<u>There is no word limit for this question, but a suggested target range is 2,000 words or less</u>

Don, a retired guy in a small town in Maine, carves decoys and uses a site on the internet to sell them. His website is pretty rudimentary. Here's a screenshot of his website's home page:

Retired Guy's Ducks

Home **About Us** **Products** **Contact**



We ship anywhere in the United States. Call or email us to order your duck decoy. Our phone is (xxx) xxx-xxxx. Our email is retiredguyducks@gmail.com.

Don's business is all word-of-mouth; he does not advertise (other than by having a website). Paula hears about Don's ducks from a friend. She goes online to his website and then emails Don. After some back-and-forth exchanges, she agrees to buy a "Mischief Mallard Duck" from Don for $45.00, plus shipping. He asks her to mail him a check, which she does. After the money is received and deposited in his bank account, he mails the duck to the home address Paula provided to him, which is located in Houston, Texas.

The duck arrives. Without closely inspecting it, she puts it on her mantle. About a week later, Paula's toddler son gets badly injured when a sharp splinter from the duck's underside goes into his hand. The splinter is very deep and she has to go to take him to the emergency room. Paula does not have health insurance and the visit to the emergency room costs her $1,200.

Paula brings suit against Don in state court in Houston, alleging that the duck was improperly designed and that his negligence was the cause of her son's medical injuries. She says that Don was negligent in failing to properly use a hand scraper to smooth the wood. Don hires a lawyer who files a special appearance on his behalf, alleging that it would violate his constitutional due process rights for a court to exercise personal jurisdiction over him in this case. [As a reminder, a special appearance is the Texas state law procedural equivalent of filing a FRCP 12(b)(2) motion to dismiss for lack of personal jurisdiction.] Don does not contest that the state's long arm statute authorizes her to sue, nor does he challenge the adequacy of service or notice. How should the court rule on his special appearance? As always, if you think that the answer depends, in whole or in part, on information that you were not given, you should discuss what missing information would be helpful to have—and why.

Question 2 (worth 25% of your final grade)
There is no word limit for this question, but a suggested target range is 1,000 words or less

P (a Texas citizen for purposes of this question) files a lawsuit in the United States District Court for the Northern District of Texas against D. The suit alleges that D is a product manufacturer that is incorporated and has its principal place of business in New York. P asserts a state law negligence claim for $100,000 against D, alleging that D negligently manufactured a product that injured P.

In its answer, D brings a third-party complaint under Rule 14 against RS. D alleges that RS, which is incorporated and has its principal place of business in New York, is an authorized retailer and supplier of the product that allegedly injured P. (For purposes of this problem, you can assume that D and RS are totally independent companies.) D's third-party complaint alleges that RS owes D indemnity under state law for up to $50,000 for any damages that D might owe to P, based on an indemnity provision in a contract between D and RS. After RS's joinder, P amends her complaint to add a negligence claim against RS for selling a faulty product. Her claim, based on state law, seeks $50,000 in damages against RS.

If RS moves to dismiss both D's claim against it and P's claim against it on the basis that the court lacks subject matter jurisdiction over either claim, what result?

Part II
Multiple Choice Questions

This second section, worth 20% of the exam grade, contains 10 multiple-choice questions. Each multiple-choice question is worth two points. Mark and then submit your answers on the separate multiple-choice tab provided through EBB.

1. In the actual *Carnival Cruise Lines, Inc. v. Shute* case, after the plaintiffs filed suit in the United States District Court for the Western District of Washington, the defendant sought to enforce the forum selection clause by moving for summary judgment. In that case, the FSC directed that any suit be brought in a Florida state court. If a similar case were to arise today, what would be the most appropriate procedural means to enforce an identical forum selection clause—assuming that the defendant can show the forum selection clause is valid and enforceable?

   A. A motion to dismiss for failure to state a claim under Rule 12(b)(6).

   B. A motion to dismiss for improper venue under Rule 12(b)(3).

   C. A forum non conveniens motion to dismiss.

   D. A motion to transfer under 28 U.S.C. §1404.

2. On November 1, 2019, P brings suit against D in federal court. On Nov 11, D files an 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 venue is improper. D moves to amend her original answer. How should the court rule?

   A. The court should rule that D has not waived the argument that venue was improper because, under Rule 12(h)(2)(B) she can raise it in a motion under Rule 12(c).

   B. The court should rule that D has not waived the argument that venue was improper because, unlike personal jurisdiction, improper venue can be challenged either under Rule 12 or by statute under 28 U.S.C. §1406.

   C. The court should rule that D has waived the argument that venue was improper because she did not include the defense in a pre-answer motion before filing her answer.

   D. The court should rule that D has waived the argument that venue was improper because she did not include the defense in her answer.

3. P, Inc. is incorporated in Georgia. Until 2019, it conducted all business out of its Georgia office. In 2019, it moved its headquarters to Florida, where in now directs, controls, and coordinates all of the company's business. That same year, it entered into a contract with S, a company entirely based in Florida. When S failed to satisfy its contractual obligations, P brought suit against S in state court in Georgia, alleging breach of contract. S timely filed a notice of removal in the Northern District of Georgia. Was the action properly removed?

A. No because P will be deemed to be a citizen of both Georgia and Florida.

B. Yes because P will be deemed to be a citizen of Georgia or Florida, but not both.

C. Yes because P will be deemed to be only a citizen of Georgia.

D. The question cannot be answered until we have additional facts regarding how much business P still conducts in Georgia.

4. P (from Texas) filed a lawsuit in the United States District Court for the Northern District of Texas against D (from New York). D is employed by Donald Dick Enterprises. P hired a private process server, who served process on D at D's office building in New York, a 50-story building on Sixth Avenue, by handing the papers to R, a 50-year-old receptionist who was working in the lobby on the building's first floor. R works for the building, not for Donald Dick Enterprises. R then had the lawsuit papers delivered to the stockbroker by inter-office mail. Is the court likely to dismiss the action for improper service of process?

A. No because service was made on a person of suitable age (that is, over 18 years of age) who was not related to P.

B. No if D only asserts the defense of improper service of process in her answer but fails to timely file a pre-answer motion raising this defense.

C. Yes because an individual defendant may not be served by delivering process to a third party found at the defendant's place of employment.

D. Yes because service of process for a lawsuit filed in Texas will not be effective if it is accomplished in New York.

5. In a suit filed in federal court based on diversity jurisdiction, P1, from Texas, asserts two state law claims against D, from New York. The first claim is for $50,000; the second claim is for $30,000. In the same action, P2, also from Texas, asserts a state law claim against D for $20,000. Which of the following is true?

A. The court lacks power to hear all claims in the same case.

B. The court has power to hear all claims but must try the cases separately under Rule 42(b).

C. The court only has power to hear the two claims by P1 against D.

D. The court has power to hear all of the claims, provided that at least one of the claims by P1 is so related, within the meaning of 28 U.S.C §1367(a), as P2's claim against D.

6. Identify the statement below that is most accurate.

A. If P brings suit against D for a state law breach of contract claim, D must assert all counterclaims that arise out of the transaction or occurrence of P's claim, whether the counterclaim is for breach of contract or for some other cause of action.

B. If P brings suit against D for a state law breach of contract claim, D must assert all counterclaims that arise out of the transaction or occurrence of P's claim, but only if the counterclaim is also a claim for breach of contract.

C. If P brings suit against D for breach of contract, D must assert all counterclaims that D has against P.

D. If P brings suit against D for breach of contract, D must assert a counterclaim that arises out of the transaction or occurrence of P's claim only if both the claim and counterclaim arise under the same law (federal-federal; or state-state).

7. P, from Texas, is injured in a car accident with D, who was visiting from Louisiana. She sues D in federal court on November 15, 2020, asserting a single claim for negligence and seeking only compensatory damages for her injuries (that is, damages to compensate her for her medical bills and any pain-and-suffering she has experienced from the accident). As soon as she filed it, however, P's lawyer realized that she also should have also asserted a claim against D for gross negligence. So, just two days later, on November 17, 2020, P files an amended petition in which she now asserts both a claim for negligence and a second claim for gross negligence against D. For her gross negligence claim, she now seeks punitive damages (that is, additional damages to punish for grossly negligent behavior). D moved to dismiss the second claim on the ground that the statute of limitations expired on November 16. Identify the statement below that is most accurate.

A. The court should deny the motion to dismiss if D received such notice of the action that he will not be prejudiced in defending on the merits.

B. The court should deny the motion to dismiss if the second claim arose out of the same conduct, transaction, or occurrence set out in the original suit that P filed on November 15.

C. The court should deny the motion to dismiss because P's amendment was filed only two days after her original complaint and so she was allowed to amend as a matter of course under Rule 15(a)(1)(B).

D. The court should deny the motion to dismiss under Rule 15(a)(2) because a court is likely to find that there was no undue delay or undue prejudice to D.

8. Identify the statement below that is most accurate with regard to the substantial federal question doctrine.

A. It is a constitutional limit on federal subject matter jurisdiction.

B. It is a statutory limit on federal subject matter jurisdiction.

C. It is a common law interpretation of 28 U.S.C. §1331.

D. It is a common law test that recognizes the existence of subject matter jurisdiction unless a claim" clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

9. Identify the statement below that is most accurate with regard to diversity jurisdiction.

   A. Congress can authorize the federal courts to hear non-federal claims asserted by one foreign citizen solely against another foreign citizen, without regard to where those citizens are from.

   B. Congress cannot authorize the federal courts to hear non-federal claims asserted by one foreign citizen solely against another foreign citizen.

   C. The Supreme Court, but not Congress, can authorize the federal courts to hear non-federal claims asserted by one foreign citizen solely against another foreign citizen, but only if the foreign citizens are not from the same country.

   D. Congress can authorize the federal courts to hear non-federal claims asserted by one foreign citizen solely against another foreign citizen, but only if the foreign citizens are not from the same country.

10. P, alleging she is a citizen of Texas for subject matter jurisdiction purposes, files suit in New York state court against D1 (whom P alleges is a citizen of Texas) and D2 (whom P alleges is a citizen of New York). P's claims are based on state law and exceed $100,000 against each defendant. If D1 wants to remove the case to federal court, what is her best option?

   A. Bring a motion within 30 days of being served to remove the case to the federal court for the district and division within which such action is pending.

   B. File a notice of removal within 30 days of being served and argue that the federal district court has supplemental jurisdiction to also hear the claim against D2.

   C. File a notice of removal within 30 days of being served and argue to the federal district court that D2 is not a proper defendant in the case.

   D. D1 cannot remove this case unless and until the state court first dismisses D2 from the case.

END OF EXAM