

THE UNIVERSITY OF DAYTON SCHOOL OF LAW
FINAL EXAMINATION

CIVIL PROCEDURE
SPRING SEMESTER 2000

Professor Turner Wednesday, May 10,2000
9:00 a.m.- 1:00 p.m.

CLOSED BOOK
THERE ARE 200 TOTAL POINTS ON THIS EXAM

PROBLEM ONE
50 Points

In 1996, Henry Boll, a citizen of California, entered into a contract with Thomas Mann, a citizen of Ohio, in which Boll agreed to provide yacht repair services in Australia during the 1996 Whitbread, an around-the-world yachting race. Boll promised to have the necessary maintenance and repair facilities in place for Mann's boat during the race stop-over in Australia. The contract also provided that any disputes regarding the contract would be governed by California substantive law. Mann claims that Boll failed to set up adequate facilities in Australia for boat repair. Consequently, Mann had to seek emergency repairs from another contractor which resulted in Mann paying much more for the work done than it would have cost if Boll had been able to do the work as promised.

On March 20, 2000, Mann sued Boll in the U.S. District Court for the Southern District of California, seeking \$200,000 for the breach of the contract. California's Statute of Limitations on contract claims is four years and the four years for Mann's claim expired on Saturday March 25, 2000, five days after Mann filed the lawsuit. Mann effected personal service on Boll on Monday, March 27, 2000.

Federal rule of Procedure 6(a) provides:

"In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days."

The Supreme Court of California held in 1985 that the California statute of limitations is not extended when the last day of the statutory period falls on a Saturday, Sunday, or a legal holiday. It also held in the same case that the California Statute of Limitations is not tolled until service is effected on the defendant.

Boll has moved to dismiss Mann's complaint for failing to state a claim. How should the judge rule? Explain.

PROBLEM TWO

50 Points

J.D. Rothschild Company has been marketing products under the J.D. Rothschild name since 1991. For most of that time, Rothschild marketed its products only in the greater Atlanta area. The company had six employees and they did not travel outside Atlanta and only made telemarketing calls in Atlanta. J.D. Rothschild did not sell its products directly to consumers but concentrated on direct sales to retailers and wholesale outlets.

In November, 1998, J.D. Rothschild contracted with Yahoo, Inc., of California, to host a web site for the company. Since the creation of the web site, anyone with access to the Internet has been able to place orders with J.D. Rothschild from anywhere in the country. Sales through the web site have not been overwhelming, but the company did receive orders worth \$25,000 from customers in three states, Wisconsin, Kansas and Maryland.

J.D. Rothschild also maintains a "800" number for orders which customers anywhere in the country can use to place orders. The "800" number appears on its labels and on its web site. J.D. Rothschild also distributes catalogs of its products in states along the Atlantic Seaboard, not Ohio.

On October 20, 1999, Rothschild Berry Farm, a company incorporated and doing business in Ohio, brought a trademark infringement action against J.D. Rothschild in the Federal District Court for the Southern District of Ohio. On November 5, 1999, J.D. Rothschild moved to dismiss the case on the basis that Ohio could not obtain personal jurisdiction over the defendant consistent with constitutional due process requirements. Ohio's long-arm statute has been interpreted by the Ohio Supreme Court to reach as far as due process allows.

In January of 2000, J.D. Rothschild received its first two orders from Ohio through its web page. One order was placed by Rothschild Berry Farm for \$1,000, and the other was placed by Dayton Nut Company for \$500. J.D. Rothschild did not fill the orders.

Assume that you are Judge DeLott's law clerk and she has asked you to suggest in a brief memorandum how she should decide the motion. Be sure to explain your position because the judge does not appreciate memoranda that contain only conclusions and no analysis.

PROBLEM THREE

30 Points

Sam Donaldson, a citizen of Dayton, Ohio, was driving through Oakwood, Ohio when he was pulled-over by Bull Conner, an Oakwood police officer. At the time, Bull was wearing an arm patch with a Confederate battle flag on it. During the stop there was an exchange of words and, according to Sam, he was pulled from his car and assaulted by Bull. Sam claims that Bull had it in for him because the previous month Bull had purchased an used automobile from Sam which Bull claims was defective. Sam had refused to let Bull out of the contract.

Sam has now sued Bull in the Montgomery County Common Pleas Court, for the State of Ohio. He is asking for \$20,000 in compensatory damages and \$75,000 in punitive damages. His claim is federal civil rights claim under 42 U.S.C. Sec. 1983. Sam has also joined to his civil rights action a claim for \$10,000 which is the unpaid balance owed by Bull on the used car he purchased from Sam.

Bull has moved to have Sam's case removed to the Federal District Court for the Southern District of Ohio. Sam is opposing removal. Should Judge Rice approve removal of the case? Explain.

PROBLEM FOUR

40 Points

Rios was a driver for Popular Dry Goods Company. In September 1998, he was driving a company truck when he collided with a automobile driven and owned by Davis. On January 15, 1999, Popular Dry Goods filed a claim in the Dayton Municipal Court against Davis in the amount of \$9,000, within the Municipal Court's \$10,000 jurisdictional limit in civil cases. As required by Ohio Rule of Procedure 13, Davis filed a compulsory counterclaim against Popular Dry Goods for \$5,000, for damages to his car. In the counterclaim, he joined Rios as a defendant, claiming Rios' negligence was the sole cause of the accident. Rios filed an answer denying the allegation of negligence.

The case was tried to a jury and it determined that Rios and Davis were equally negligent and that their negligence was the proximate cause of the collision. Therefore, neither Popular or Davis recovered anything.

On March 18, 2000, Rios brought a suit in the Montgomery County Common Pleas Court against Davis for \$30,000, for personal injuries he incurred in the collision, claiming that Davis' negligence was the proximate cause of the accident.

Assume that Davis has consulted you about the case. He would obviously like to end this case as soon as possible. Are there grounds for a viable motion to dismiss for failure to state a claim? As part of your responsibility as Davis' counsel, you have to evaluate the likelihood of success for such a motion. How would the judge likely rule on the motion? Explain.

PROBLEM FIVE

30 Points

Billy Lear, of Ohio, contracted to sell a tract of timberland he owned in Idaho to Sarah Cordelia, also a citizen of Ohio. The value of the land depends mainly on its timber. At the time the contract was executed, however, much of the timber had been destroyed by a fire which had occurred about a month earlier. When Sarah learned of the fire and the destruction of the timber, she refused to go ahead with the contract and demanded the return of her earnest money, in the sum of \$50,000.

Billy sued Sarah for breach of contract and sought damages for the difference between contract price and the value of the land on the date performance was called for, \$1,200,000. Sarah defends on the ground that there was a mutual mistake of fact with respect to existence of timber, and Therefore the is contract voidable at her option. According to Idaho law, which controls in this case, an important factor in Sarah's defense is that she genuinely believed that the timber was still on the land at the time at the time she and Billy entered the contract.

Billy has filed a motion for summary judgment against Sarah claiming that she must have known the timber had been destroyed by fire because the price for the land was much lower than it would have been if had standing timber. To support his motion, Billy submitted an affidavit by Barbra Walters a real estate appraiser from Idaho. Ms. Walters has a Masters Degree from the University of Idaho in real estate appraisal and she had been appraising land in Idaho for 20 years. The affidavit states that the value of the land in question would be \$3,000,000 with standing timber on it, and worth only \$1,500,000 in its present state. The agreed upon price in the contract was \$1,620,000. Sarah does not oppose the motion with affidavits or other materials outside the pleadings. Her answer alleges as part of her affirmative defense that she did not know the timber had been destroyed.

Should the judge grant the summary judgment motion? Explain.

END OF EXAM

HAVE A GOOD SUMMER!

ANSWER KEY FOR CIV PRO EXAM (2000)

PROBLEM ONE 50 POINTS

I. Erie Railroad issue

A. What are the laws in possible conflict?

B. Possible out-come difference

1. Explanation of the language of two provisions. The state provides that the last day for filing can be a weekend or a holiday. The Federal Rule appears to give an extension to the following Monday.
2. State also provides that the statute of limitations is not tolled until service is effected while the Fed Rule is silent on this point.
3. Service was effected on Monday which would be in time if the Fed Rule applied, but would not be in time if state rule applied. Under the state law, the time would have expired on the preceding Saturday.
4. Therefore there does appear to be a potential outcome difference.

C. Is there a Federal Rule on Point?

Standard: If there is a federal rule of procedure on point, it will apply unless it violates the Rules Enabling Act or the Constitution.

1. 6(a) seems to cover the issue, but language does not mention a statute of limitations but instead refers to "any period of time prescribed or allowed by these Rules." The Rules themselves do not talk about statutes of limitations as such. There are lots of times for filing and response, etc. which suggest the rule is designed to regulate times for the processing of papers once a law suit is commenced and is not meant to cut off substantive rights like a statute of limitations does.
2. I suppose an argument could be made that the Rule is on point, but after the Walker case that would be difficult.
3. Hanna shortcut will not apply.

D. Extended Erie Analysis

1. Revisit outcome difference which is quite definitive. Under the state rule, the plaintiff's case would be dismissed. While under the Federal Rule, the Statute would not have tolled prior to the time service was effected and plaintiff could pursue his claim.

2. Encourage Forum shopping

- a. It might induce a party to pick a federal court if he knows the statute of limitations is about to expire and the litigant wants to hedge his bets by adding a few days of grace. He would know in advance of filing that he would have additional time to effect service, until Monday in this case.
- b. On the other hand, one could not foresee at the time of filing that the extra couple of days for effecting service would be crucial.

3. Inequitable administration of the law

- a. This would discriminate against non-diverse citizens because they would subject to a shorter statute which would cut off their substantive rights. While in the Fed Court, non-diverse defendants would be exposed to potential lawsuits for a longer time.
- b. On the other hand, there is not much inequality. It only comes into play in those rarer cases when the last day of the statute falls on a weekend or a holiday. If it falls on a weekday, the time cut-off would be the same for both divers and non-diverse parties.

4. Byrd Balancing Test

Standard: Balancing the effect of following state rule on federal courts versus the effect of federal rule on state interests.

- a. The reason for the statute of limitations is to limit the time old claims can be brought. It is meant to be a definitive drop-dead date so that potential defendants can get on with their lives. Applying the fustier federal rule, would mean that a party who the state wanted to be free from liability would still be at risk. His substantive right to be free from suit would be modified.
- b. Applying the state st of lim would not be of much impact on the federal judicial system. Rule 6 was not meant as a drop-dead date for lawsuits and for most of the filing times it is supposed to govern, there would be no impact. It wasn't meant to cut off rights. Time for filing answers, motionse etc. will still be governed by the Rule.
- c. One could argue that there would be little impact on the state interests by following the Fed Rule. Instead of a defendant being free on a Saturday, if the limit expires on a Saturday, he will have to wait until Monday before giving a sigh of relief.

5. Conclusion

PROBLEM 3, CIV PRO EXAM (2000)

30 Points

Removal of Federal claim

A. Standard of 1441

B. Analysis

1. Civil Rights claim arise from Fed statute and therefore raises a federal question
2. Claim for breach of contract seems to be an unrelated state claim.

C. Issue: can contract claim be removed with federal claim

D. Standard: Supplemental Jurisdiction

E. Analysis:

1. One approach is to demonstrate how different the two claims are.

a. The facts of the civil rights claim are related to the stop and the assault on Sam. The evidence would relate to what happened at the scene, who said what to whom? The witnesses that would be critical would be those at the scene. The testimony about injuries would also be special to the civil rights action.

2. One could try to make a connection by pointing out that the cause of the attack, according to Sam was the defective car he sold Bull. Thus there would be some testimony about the motive in the civil rights case. But, there would be no need to develop facts about whether the car was actually defective and whether Sam did refuse to let Bull out of the contract. Motive is not an element of assault by a police officer.

F: Is the civil rights action removable under 1441(c) separate and independent?

G. Standard: Separate and independent.

H. Analysis:

1. Show that "1" above is the case

2. Make a case for bringing it along anyway because there is some relationship between the two claims. I.e. the prior contract is the motive for the attack, according to Sam. Thus there would be some overlap of testimony. Joining the contract claim would not be too confusing since it involves the same parties.

PROBLEM FOUR

40 Points

Claim and issue preclusion

Claim preclusion or Compulsory Counterclaim

A. Claim preclusion doesn't really apply because Rios was brought in as a defendant on a counterclaim. Claim preclusion only applies to claims that a plaintiff should have joined.

B. The best argument would be for a compulsory counterclaim. Rios was sued by Davis for damages to his car, along with Popular Co. A compulsory counterclaim would require the assertion of any claim arising out of the same transaction or occurrence, namely the automobile accident.

1. However, even if there were a compulsory counterclaim rule in play, it would not be compulsory in

the context of the facts. The case was brought in a municipal court with a \$10,000 limitation on claims. Rios's claim was for \$30,000 and therefore outside the court's subject matter jurisdiction.

Issue preclusion

A. Standard:

1. Identity of issues and parties
2. Fully and fairly litigated
3. Necessary to the decision

B. Analysis

1. Identity of issues: The issue of Rios' negligence is the same in the second suit as in the first. Rios was the driver of the truck and Davis claimed that it was Rios' negligence was the sole cause of the accident. Since Rios was joined on the counterclaim as a defendant, there was also an identity of parties.

2. Fully and fairly litigated: This is a trickier question

- a. Did Rios have an incentive to really litigate the issue of his negligence?

He was a named defendant, but it was really Popular that was on the line for the damages. Nothing was coming out of Rios' hide. The total amount was for \$5,000 which was not much of an incentive if it was Popular who would be paying it.

b. On the other hand, should Rios be able to escape issue preclusion when actually involved in the litigation of the case and at the same time be in a position to bind Davis if a judgment goes against him?

c. Rios might have a greater incentive to litigate his negligence because if he were found negligent then there is the possibility that he would be liable to the damages to his employer's truck.

d. Rios has no reason to appeal the decision. He has escaped Scot-free. The only parties with an incentive to appeal would be Popular and Davis. They are out-of-pocket because of the decision.

e. This was a fairly small budget case with respect to damages and that is a disincentive to go at it hammer and tong.

f. The decision was a 50-50 finding which meant that no one paid anything. Not a bad result all around and not an incentive to appeal.

3. Necessary to the result.

a. The decision was 50-50 and that is a rather exact verdict for an inexact process. A slight change in percentages, such as Rios 40% and Davis 60% would mean that Rios could recover some damages in his personal injury action. Should there be a binding effect to a verdict that looks on its face as a kind of compromise? If the jury would have been dealing with a personal injury case instead of property damage, it might not have been so willing to split the difference.

b. Contra: The equally liable finding was necessary to the result. The result was a denial of liability for both parties. If it was not 50-50 under comparative negligence law, then somebody would have recovered money. The ultimate conclusion followed exactly from the factual finding on liability. 50-50 equals a denial of both Popular's and Davis's claims.