

CIVIL PROCEDURE MID-TERM EXAMINATION
Fall 2003
Instructor: Craig Smith

QUESTION 1

Moe bought a home in Los Angeles, California. After shopping around for a mortgage, Moe choose Stooze Mortgage, a subsidiary of a large, nationwide bank. Stooze (a Delaware corporation) has its headquarters in Atlanta, Georgia. Moe called an 800 number, requested a loan application, filled it out, and sent it in. He subsequently received a phone call approving the loan. Before he actually closed on the house, Moe hired an inspector to notify him of any defects in the property. This inspection revealed several problems which the sellers agreed to take care of before title passed. As soon as he had title, Moe hired a contractor to remodel the kitchen. Two months into this work, Moe received notice that he was terminated from his employment. Moe immediately told the contractor to stop work on the house. He said he would, but said that Moe should know that just that day he had uncovered a substantial amount of asbestos in the ceiling of the kitchen and that it posed an immediate health hazard and required removal.

A few months later, Moe received in the mail, a copy of a summons and complaint from a federal court in Georgia, in which Stooze alleged unpaid mortgage debt in the amount of \$65,000.00.

1. Moe isn't sure whether he has a defense to the claim, and he wants to stall for time while he researches this question. He knows he cannot possibly defend against the lawsuit if he has to do so in Georgia. Discuss fully what response(s) Moe should make to the complaint.
2. Hoping to sell the house to pay off the debt, Moe consults a real estate broker, who tells him that with the asbestos hazard the house cannot be sold without thousands of dollars of repair work. Moe thinks that the inspector should have discovered and warned him about this problem and that the contractor, who was hired to remodel the kitchen, should have been more careful. Moe wants to join the inspector and the contractor in the suit filed by Stooze. Moe also believes that Stooze Mortgage failed to disclose the actual mortgage rate in the literature it sent to him, a violation of the Federal Truth In Lending Act and

would like to hold them accountable for that. Discuss fully what Moe would have to do to implement this strategy.

QUESTION 2

Bert, a resident of California, was injured when he bit into a bagel and came into contact with a rusty nail. Bert ran next door to the apartment of Ernie who called an ambulance. Bert files suit in California Superior Court seeking compensation for his injuries on the theories of breach of the implied warranty of merchantability as well as strict liability in tort. Bert names as defendants Sesame Bagel Company, a Delaware Corporation with its headquarters in New Jersey, who produced the bagels and Corner Market, a Nevada Corporation with 90% of its retail outlets in California, where he purchased them. The complaint seeks in excess of \$100,000.00 in damages.

1. Defendants seek to remove the case to federal district court. Bert opposes removal.

A. Is removal proper? Discuss fully.

Assume that removal is denied, and the case proceeds in Superior Court.

The defendant's learn of Ernie's identity through interrogatories and interview him, tape-recording their questions and Ernie's responses. Bert, learning from Ernie of the interview, wants to know exactly what he told the defendant's lawyers. Ernie says he'd be happy to help Bert, but he can only vaguely remember what he told them.

2. Advise Bert how he might find out exactly what Ernie said.

3. The defendants would also like to force Bert to undergo a dental examination. Discuss fully how they would go about accomplishing this.

QUESTION 3

Plaintiff purchased a building and subsequently brought suit against the seller to recover some \$80,000 spent repairing the floor. The case was originally filed in the Court of Common Pleas of Bucks County, Pennsylvania, but was removed to the United States District Court for the Eastern District of Pennsylvania on the basis of diversity jurisdiction. When the parties agreed to the sale of the property, plaintiff's attorneys prepared a written contract. The document made no reference to the existing condition of the floor or to plaintiff's specific floor strength requirements. Among the provisions was the following standardized clause: "This agreement contains the whole agreement between the Seller and Buyer and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever."

Resolution of the case hinges on a single legal issue, the fraud exception to the Parol Evidence Rule. In isolated instances, the Pennsylvania courts have held that with the presence of appropriate language in the writing, only evidence of fraud in omitting or adding certain provisions will qualify as an "exception" to the rule. More frequent, however, are decisions of the Pennsylvania courts allowing evidence to show fraud induced a party to enter into what is on its face a comprehensive, written agreement. In other words, there is "confusion or doubt" in Pennsylvania law as to whether a party asserting an exception to the parol evidence rule must plead and establish fraud in the inducement or fraud in the execution.

1. What law should the court apply, Pennsylvania law regarding the parol evidence rule or the Federal Rules of Evidence, which have been approved by the U.S. Supreme Court and Congress? Discuss fully.
2. Assume that Pennsylvania law on the parol evidence rule should apply. How should the federal district court determine which of the two diverging views on the application of the parol evidence rule should be applied? Discuss fully.

CIVIL PROCEDURE MID-TERM EXAMINATION
Model Answers
Fall 2003
Instructor: Craig Smith

MODEL ANSWER TO QUESTION 1

Whether Moe will have to appear in Georgia and defend against Stodge's lawsuit will depend upon whether the federal court has personal jurisdiction over Moe. Personal jurisdiction refers to the power of a court to require the defendant to appear before it and to render a judgment that will be binding on the defendant. Personal jurisdiction can be exercised on one of four basis, presence (*Pennoyer v. Neff*) domicile, (*Milliken v. Meyer*) consent, (*Hess v. Pawlowski*) and minimum contacts. (*International Shoe v. Washington*) Here, Moe is neither present nor a domiciliary in Georgia. Nor are there any facts to indicate that he has given his consent to be sued in Georgia. Therefore, the only basis, if any, for the Georgia court exercising personal jurisdiction would be on the basis of minimum contacts.

Due process requires that before an absentee defendant can be forced to appear and defend in a forum, he have minimum contacts with the forum state such that requiring the defendant to appear and defend does not offend traditional notions of fair play and substantial justice. A defendant's activity in the forum which is systematic and continuous will subject the defendant to personal jurisdiction in the forum. While a defendant's activity in the forum state which is sporadic and casual is not enough to subject him or her to personal jurisdiction nevertheless, a single isolated contact with the forum is sufficient if the claim sued upon arises out of that contact. Here, Moe had a single contact with Georgia, using the phone to initiate a business relationship with a Georgia corporation. This single phone contact could satisfy the requirement that to be subject to personal jurisdiction the defendant purposefully avail himself of the benefits and protections of the laws of the forum state. The minimum contacts test has been satisfied.

Additionally, the exercise of personal jurisdiction requires that the defendant receive notice of the lawsuit. The notice need only be in a form that is reasonably likely to apprise the defendant of the pendency of the action and give the defendant an opportunity to appear and defend.

(Mullane v. Central Hanover Bank) Under FRCP 4, notice can be effected by personal service, substituted service or constructive service. Personal service requires that the defendant be personally served. Substituted service requires that the defendant can be served by leaving a copy of the summons and the complaint at the defendant's usual place of abode with someone of suitable age and discretion who resides therein. Constructive service may be by publication but usually only when the other methods have been ineffective. Additionally, FRCP 4 permits service by mail when the defendant timely returns an acknowledgement of service. This last procedure would be sufficient provided Moe returned the acknowledgment. If he failed to do so the plaintiff would then have to serve him by one of the other methods.

If Moe wants to object to personal jurisdiction or the method of notice he must do so in his first responsive pleading to the complaint. That would be in either a pre-answer motion to dismiss objecting to personal jurisdiction (12(b)(2) or insufficiency of service of process (12(b)(5) or he can raise these defenses in the answer. If he fails to raise these defenses he waives them.

Stooge has chosen to sue Moe in federal court. Federal courts are courts of limited jurisdiction. That means they only have the power to hear those lawsuits which Article III of the Constitution and the Congress have authorized them to hear. Those would be cases based upon the Constitution, laws or treaties of the United States (federal question) or cases between citizens of different states where the amount in controversy exceeds \$75,000 exclusive of interest and costs (diversity). Here, the parties are citizens of different states, Moe of California and Stooge of either Georgia or Delaware. (For diversity purposes corporations are citizens of both their state of incorporation and the state where they have their principal place of business. Although, there is diversity of citizenship the amount in controversy requirement is not satisfied by a claim for \$65,000. Moe can raise this objection by a Rule 12(b)(1) motion for lack of subject matter jurisdiction. He can raise this objection at any time as subject matter jurisdiction is never waived.

Assuming the case were to go forward he could assert his claims against the contractor and home inspector by impleading them.

Modern procedural rules allow a party to join as many claims, counterclaims, cross-claims, and third party claims as he has against another party. Under the Federal Rules, the categories known as causes of action are done away with altogether. Parties may add as many claims as they wish. (See FRCP 18) The only restriction on joinder of claims in the federal courts is imposed by subject matter jurisdiction limitations. Thus in federal courts, each claim generally must have an independent basis for subject matter jurisdiction. Personal jurisdiction and venue also must be proper as to each claim.

FRCP 14, gives a defendant a limited right to implead (i.e. bring into the suit) strangers against whom he has claims related to the main action. Under the rule the defendant may bring in a person who may be liable to the defendant for all or part of any recovery the plaintiff obtains in the main claim.

FRCP 18(a) allows a defendant to add on any independent claims against a properly impleaded third-party defendant. I.e., once a defendant has asserted a claim suitable for impleader under Rule 14(a), he may join with it all of his other claims against the third-party defendant. However, there must be an independent basis for federal jurisdiction of the additional claims unless they arise out of the same transaction or occurrence as the original claim, and thus can be considered to be within the ancillary jurisdiction of the court.

MODEL ANSWER TO QUESTION 2

Removal is proper. Removal is a procedure that allows a defendant who has been sued in a state court, to transfer the case to a federal court where it originally could have been brought. In order to remove a case, the case must be one that could have originally been filed in the federal court. That means federal subject matter jurisdiction must have existed. Here, federal subject matter jurisdiction would have existed over Bert's lawsuit as it involved opposing parties who were citizens of different states and the amount in controversy exceeded \$75,000 exclusive of interests and costs. Sesame Bagel is a citizen of both Delaware and New Jersey, its state of incorporation and its principle place of business. Corner market is a Nevada corporation. Although it has 90% of its outlets in California, while that may be relevant for personal jurisdiction purposes, that does not mean it shares a common citizenship with the plaintiff Bert. As neither defendant is from California both can remove to the federal court in California encompassing the district and division of the state court where the action was filed. However, both defendants must join in the request for removal. If either one objects, the case stays in state court.

2. Anything Ernie told the defense lawyers might be covered by the work-product privilege. The privilege provides that an attorney's efforts to prepare for trial will be protected from discovery by the opposing attorneys. However, the work product privilege has two parts. There is an absolute privilege for the attorney's legal research, impressions and legal conclusions. Other preparation such as interviews with witnesses is subject to a qualified privilege. It can only be discovered on a showing of good cause: i.e., that the party seeking discovery of it has no other means of learning the information and the inability to discover it will create an undue hardship. Bert may have a problem meeting that showing however, there is a way around it. As the person who gave the statement, Ernie has a right to obtain any statement he made to the defense attorneys. Once he obtains it, there is nothing that prevents him from handing it over to Bert.

3. A party to an action can be required to undergo a physical examination when that person's physical condition is "in controversy" and good cause exists for the exam. Bert having claimed that he was injured when he bit into a bagel has placed his physical condition in controversy.

Provided the exam is not too painful or intrusive there would appear to be good cause to require him to undergo the exam.

MODEL ANSWER TO QUESTION 3

This case is being heard in federal court as a result of diversity jurisdiction. Under the *Erie* doctrine, a federal court sitting in diversity applies the substantive law of the state in which it sits, and federal procedural law. *Erie v. Tompkins* addressed the issue of what was meant by the "law" of the state and established that "law," meant not only laws enacted by the legislatures of the states (statutes) but law made by judges, that is common law or case law. Prior to *Erie*, federal judges sitting in diversity cases were free to apply federal common law. *Erie* did away with federal common law, at least as it applied to diversity cases.

Since it was decided, *Erie* has undergone an evolution. It has not always been clear what is "substantive" i.e., the laws that establish the rights and duties of the parties towards one another, and what is "procedural" i.e., how the parties go about enforcing those rights. *Guaranty Trust v. York*, marked the emergence of the "outcome determinative test." If following a state law as opposed to a federal procedure would mean that a different result or outcome would obtain, then the federal court was bound to apply the state law even though it would be ordinarily regarded as procedural. The idea was that the outcome of the case should not depend on whether the case was filed in state or federal court. The next point in the evolution of *Erie* was the case of *Byrd v. Blue Ridge*. That case held that if there was a conflict between state and federal law, the federal law should be applied if it involved a strong federal policy such as right to a jury trial. Finally, the Supreme Court settled on the present test in *Hanson v. Denckla*. Now if there is a conflict between state and federal law, the court must determine whether a true conflict exists. The court compares the two laws to see whether one is narrower in scope than the other. If one is not, that is, there is a true conflict and the court applies the federal rule or procedure as long as it is a valid exercise of the Rules Enabling Act. (No federal rule has ever been found to be in violation of the Act.) The Federal Rules of Evidence are such an enactment and if they directly addressed the Parol Evidence Rule, then they would control. However, the "Parol Evidence Rule" is a misnomer. It is not a rule of evidence but rather is a matter of the substantive law of contracts. Therefore, the federal court should apply Pennsylvania law on this point.

Determining what Pennsylvania law is may not be easy. The federal court must act as if it is another court of the state and if there is no pronouncement from Pennsylvania's highest court on this matter and the intermediate appellate courts of Pennsylvania disagree on the law then the federal court must determine how the highest court of Pennsylvania would rule on an issue which it has never considered. To do this the court would examine lower court rulings on the subject, those of the appellate courts and examine scholarly writings or treatises in an effort to predict what Pennsylvania law is on this subject.