

Examination Number _____

UNIVERSITY OF MISSOURI -- SCHOOL OF LAW

Professor Carl H. Esbeck

Fall Semester 2011

Civil Procedure I, 5010L -- Section 1

Directions to Part I -- Essay
(1 hour and 25 minutes)

Place your examination number in the upper right-hand corner of this examination. When finished, return these essay examination questions and submit your essay answers.

Answer only the questions asked. Do not raise or answer questions not asked.

Arrange your answers including subparts in sequential order. That is, put your answer to Question 1 first, then your answer to Question 2, and etc. If you want to skip over a question and come back to it later, leave a page or two blank and begin the next question.

You are encouraged to use your laptop to complete Part I.

If you do not use your laptop, write your answer in the bluebook provided. Use a pen with blue or black ink. Write on only one side of each page. Do not write in the left-hand margin. Do not tear pages out of the bluebook.

You may bring with you into the examination room your casebook, TWEN downloads, your 2011 federal rules supplement, and your own classroom notes (not borrowed notes).

You may also bring a course outline provided it is entirely your own work product. Copying from the outline of others or paraphrasing the work of another is not permitted. Your outline is subject to being collected at the end of the examination. This would be done only to ensure that the outline you use is entirely your own work product. It is an Honor Code violation to have any other materials with you during the examination.

* * * Part I begins on the Next Page * * *

PART I (1 hour and 25 minutes)

Question One (30 minutes): In the fall of 2008, Steven and Jennifer Frazee took up residence in Tucson, Arizona. Steven was originally from Flagstaff, Arizona, and Jennifer was from Paris, Missouri. They met as undergraduates at the University of Missouri, and they each were awarded a bachelor degree in food, nutrition, and hotel management. The prior summer they were married at Jennifer's home church in Paris, Missouri. Jennifer's father, H.L. Jensen, is still living in Paris, where he is employed as a pharmacist in the local Wal-Mart store.

Steven and Jennifer have plans to purchase an existing restaurant in Tucson and operate it themselves. Through an inheritance, Steven has \$260,000 as venture capital to purchase the business. However, the couple needs additional operating capital to get started. Accordingly, they negotiated a loan from a Tucson branch of The Bank of America, Inc., a multi-state national banking conglomerate with headquarters in Chapel Hill, North Carolina. The amount of the loan is \$80,000, and the mortgage and promissory note both say that the law of Arizona applies. In addition to taking a security interest in the restaurant property, the Bank insists that Steven and Jennifer approach Jennifer's father, H.L. Jensen, to provide a guarantee on the promissory note. Jennifer telephones her father. Mr. Jensen is reluctant to co-sign the note for \$80,000, but he ultimately agrees to do so hoping the very best for the marriage of his daughter and new son-in-law. The Tucson branch of the Bank mails the papers of guarantee to a branch in Columbia, Missouri. Officials at the Columbia branch telephone Mr. H.L. Jensen at his home in Paris, Missouri, and ask him to drive to Columbia and sign the document before a notary public at the branch. Also enclosed for Mr. Jensen's information are copies of the note and mortgage signed by Steven and Jennifer. Mr. Jensen signs the guarantee and it is mailed back to the Bank of America branch in Tucson, Arizona. The guarantee has no choice of law clause. Mr. Jensen receives no monetary consideration for the transaction, but Steven and Jennifer are overjoyed and express their considerable gratitude.

Three years go by and the restaurant falls into financial distress. Steven and Jennifer are late on their monthly payments to the Bank, payments which are made by electronic transfer to headquarters in Chapel Hill, North Carolina. The Bank decides to foreclose on the property and call the loan. It files a claim against Steven and Jennifer in the federal district court for Arizona. H.L. Jensen is joined as a co-defendant based on the loan guarantee.

H.L. Jensen only once had visited Arizona until his daughter and son-in-law moved there. Since then, Mr. Jensen has visited twice: once at Christmas 2010 and once at Easter 2011. On both occasions Mr. Jensen visited the restaurant and purchased meals, and he went by the branch of the Bank to use the ATM to get cash. He has never worked in Arizona nor conducted any pharmaceutical business there. Back when his wife was still living, the two did drive to Arizona in 2003 to visit the Grand Canyon National Park.

After being served with Summons and Complaint at the Wal-Mart store in Paris, Missouri, Mr. Jensen engaged the same lawyer in Tucson that is defending Jennifer and Steven. On Jensen's behalf, the lawyer timely files an Answer. The Answer denies liability on the guarantee and sets forth the defense that the Court lacks personal jurisdiction over Mr. Jensen. A few months later and following an exchange of information pursuant to discovery, Mr.

Jensen's lawyer files a motion for judgment on the pleadings averring that the Court lacks personal jurisdiction. An affidavit attached to the motion sworn to by Mr. Jensen sets forth the uncontested facts as related above. The Bank opposes the motion.

Arizona Code § 23-33-44, Rev. Stat. Ann. 2004, states: "The courts of this state shall have authority over persons and things to the extent permitted by the United States Constitution."

How should the Court rule on the motion? Explain.

Question Two (55 minutes): Target Stores, Ltd., has its principal place of business in California and is incorporated there. It is building a new big box store in Moberly, MO. The general contractor is Houston General, Inc., which has its principal offices in St. Louis, MO, and is incorporated in Missouri. The electrical subcontractor on the job site is Starlet Electric Co., which has its principle offices in Quincy, IL, and is incorporated in Illinois.

Late on the evening of February 19, 2008, Paul Petersen of Columbia, MO, is wandering on the job site inside the half-completed Target building. Paul comes into contact with an unshielded electrical breaker box and is severely shocked and burned. Paul is found the next morning by a watchman employed by Houston General and rushed to the hospital. Paul is revived but has serious burns, will lose his right arm, and suffers disfigurement.

Three years and six months later Paul brings a tort claim in federal district court in Missouri against Target Stores, Ltd. He requests damages in the amount of \$2.5 million. The complaint alleges negligence by the property owner in the maintenance of the property. Paul alleges that notwithstanding that he was a curiosity trespasser and the building was under construction, Target Stores, as the owner of the site, owed him the duty of due care and breached that duty. Target timely denies liability, but it also promptly impleads Houston General. Target alleges that as the general contractor, Houston General has the duty to indemnify the owner for any tort liability incurred at the site during the construction period. Houston General timely denies liability, but it also promptly impleads Starlet Electric. Houston General alleges that as the electrical subcontractor, Starlet Electric has the duty to indemnify the general contractor for any tort liability incurred as a result of Starlet's electrical work at the construction site.

Part (A): Houston General also files a claim against Starlet Electric for an electrical fire started when Paul was electrocuted. The fire damaged the partially completed building causing \$225,000 in damages that Houston had to repair. Pursuant to Rule 21, Starlet timely moves to sever the \$225,000 claim for misjoinder. How should the Court rule on the motion? Explain.

Part (B): Starlet Electric timely denies liability to the indemnity claim by Houston General and pleads the affirmative defense that Paul's claim is barred by the statute of limitations, a defense neglected by Target and Houston General. Starlet also promptly files a claim against Houston General. Starlet avers that Houston General was at fault in causing Paul's electrocution because Houston General was responsible for maintaining a fence around

the site to keep out trespassers. Starlet alleges that during Paul's electrocution several expensive tools and sensitive gages that Starlet had stored at the site were totally ruined by the accident. The loss is said to be \$21,000. Finally, Starlet brings a second claim against Houston General for nonpayment of amounts due for electrical work completed at the site but unpaid in the amount of \$63,000. Should the Court:

- (1) permit Starlet to plead the affirmative defense? Explain.
- (2) permit Starlet to plead the claim for \$21,000? Explain.
- (3) permit Starlet to plead the claim for \$63,000? Explain.

Part (C): Ameren U.E., Inc., has its principal offices in St. Louis, MO, and is incorporated in Delaware. Ameren supplied the electricity to the construction site. On the evening in which Paul was electrocuted, Starlet Electric alleges that there was a power surge caused by Ameren and that the surge was partly responsible for Paul's injuries. Starlet timely moves pursuant to Rule 12(b)(7), arguing that Houston General has failed to join Ameren and thus Houston General's claim against Starlet should be dismissed. How should the Court rule on Starlet's motion? Explain.

Part (D): Starlet Electric next files a claim directly against Paul, the injured plaintiff. Starlet alleges that on the night when Paul was electrocuted he was at the construction site stealing valuable copper electrical wiring. Paul is alleged to have taken a truck load of copper wiring Starlet had left at the site back to his garage, and then Paul had returned to steal a second load of copper wiring when he was electrocuted. Starlet seeks the remedy of replevin as to the copper wiring being stored in Paul's garage with a market value of \$84,000. Paul timely files an Answer denying the claim. Two weeks later Paul moves pursuant to Rule 12(b)(1) to dismiss Starlet's claim or in the alternative to sever it for misjoinder pursuant to Rule 21. How should the Court rule on Paul's two motions? Explain.

Part (E): Assume that, rightly or wrongly, both motions in Part (D) are denied. Anaconda Copper Wire Co. is a Delaware corporation with its principal place of business in Hurley, New Mexico. Anaconda manufactures copper wire for use as electrical conduit. Pursuant to Rule 24(a), Anaconda timely files a motion to intervene in the claim by Starlet Electric against Paul seeking to replevin the copper wiring. Anaconda alleges that Paul did indeed steal the copper wiring and that the true owner is Anaconda because Starlet has not paid Anaconda for the wire. Starlet files an affidavit telling the Court that it will pay Anaconda for the wire but that the purchase price is not yet due. Paul files an affidavit telling the Court that the copper wire in his garage he has owned for years and thus he did not steal it from the Target construction site. How should the Court rule on Anaconda's motion? Explain.

* * * END OF PART I * * *

Turn in both these examination Questions and your Answers.

After a 10 minute break, all students will begin Part II together.